

THE
FINDING
OF THE
MAGISTRATE F. P. POONA
IN THE
HINDOO WIDOW MARRIAGE
DEFAMATION CASE.

PRICE—8 ANNAS.

POONA.

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The following is the Finding of Dr. A. G. Fraser, Magistrate F. P., in the Widow-Marriage Defamation Case.

FINDING.

In the natural world clouds sometimes return after the rain. This criminal trial may be regarded as an instance of something analogous in the moral world. A controversial storm, which had been gathering for some time, recently burst over Poona in great violence; and after it had passed off, a dark cloud returned from it in the shape of this criminal prosecution. The complainant in this case is Narayen Bapoojee Gorey, on the part of himself and of the Hindoo Widow Marriage Association; and the accused persons are Vyankut Shastree bin Chintamon Bhut Matey and Gunesh Shastree bin Bapoojee Malwunkur. The prosecution is for defamation of character, and has arisen, as I have intimated, out of the great discussion recently held in Poona on the religious social question, whether the marriage of Hindoo widows is sanctioned or forbidden by the Shastras.

There are two antagonistic parties in the Hindoo community; a reform and an anti-reform party. Reformers may have for their object to change pristine customs and institutions in order to establish such as are adapted to new circumstances and knowledge; or they may have for their object to return to pristine customs and institutions which, under long misrule, have been changed and perverted, and made to give place to abuses. It is clear that in the former case the anti-reformers would have some reason for resisting the demands of the reformers, while in the latter case they would have no good reason for doing so; and it is equally clear that in the latter case the demands of reformers are as a right by those who are suffering wrongs. The anti-reformers in resisting the demands of the reformers in the matter of widow marriage, do so in good faith, because in the Kaliyuga such marriages are forbidden by the Shastras, and because

they believe that the Kaliyuga, in which such marriages are forbidden, is now current: that is, they resist what they believe in good faith to be the infringement of a positive injunction of their religion, applicable to the present times. Widow marriage is, under certain circumstances, forbidden likewise in the Christian religion. In the primitive Christian Church, ere the Church had so widely departed from its primitive constitution and simplicity as hardly to be recognizable as the same institution, there were widows set apart for ecclesiastical duties, who corresponded in office for their own sex in some measure to the presbyters of the other sex, who had the oversight of the Church. The first qualification for enrolment in this institution of widows, next to that of age, was that the widow should have been the wife of but one husband: that is, not married a second time. The Christian religion, indeed, goes further than this, and actually prohibits second marriage to those of the male sex who aspire after oversight in the Church. Just as the widow, who had a supervision over her own sex, must have been the wife of but one husband; so the elder, who had the supervision over the Church, must have been the husband of but one wife. In the Christian religion, however, younger widows are directed to marry, with a view to the prevention of real evils. The anti-reformers, then, in their opposition to widow marriage are acting, it should be admitted, in accordance with their religious convictions.

Reform to be useful and durable must be gradual and cautious, and it has been argued against the reformers amongst the Hindoos that they are rash, injudicious and revolutionizing. The complete refutation of this argument is found in the fact that, up to the present time, they have confined themselves almost exclusively to the matter of widow marriage; and considering the many and great evils to be prevented and wrongs to be redressed by its allowance, it is not surprising that they should have begun their work of reformation with it. They profess in regard to it to have as their chief end the latter of the two objects above mentioned, as those which reformers may have in view; while at the same time

they may not altogether exclude from their view the former of those objects: that is, while they seek the restoration of the old ways which have been perverted, they would also wish to improve those so as to adapt them to a more advanced state of society. In their efforts to re-establish the right of widow marriage, they are struggling for the restoration of what they believe, in good faith, to be the purer and simpler customs of early times, and are acting in accordance with their religious convictions. They also have the authority of the Shastras in their favour. In the 3rd Skundh of the Bhaguwunt Pooran there is the following passage which proves that that period of the Kaliyuga, in which certain things are enjoined to be observed or to be prohibited for that Yuga especially, has not yet arrived:—"Thus are carefully described the four Yugas, the Krita, the Treta, the Dvapara, and the Kali, altogether consisting of 12,000 divine years. These Yugas respectively consist of four, three, two and one thousand divine years, and also again of twice four hundred, twice three hundred, twice two hundred, and twice one hundred years, (these twice hundreds are divided into equal halves, and those periods are called Sundhya and Sandhasa. Sundhya is the beginning of a Yuga and Sandhasa is the concluding part of it.) The intervals between Sandhyas as Sandhasas are the periods in which the duties peculiar to these Yugas should be observed." In the Mahabharat is the following similar passage:—"A divine year is equivalent to three hundred and sixty human years. Thus the 1200 divine years of which Kaliyuga consists are equal to 432,000 human years. Of these the first 36,000 are the Sandhya, in which the dharmas or duties peculiar to the Kaliyuga are not to be observed." According to the Hindoo calendar only 4,970 years have already passed, and, therefore, we are in the midst of the Kali-Sandhya only, and not in the true Kali. A high authority in Hindoo lore observes:—"No one can read the Ramayana and Mahabharata without coming to the conclusion that women in India were subjected to less social restraint in former days than they are at present. True, the

ancient law-giver—Manu, speaks of women having no will of their own, and totally unfit for independence; but he described a state of society which it was the aim of an arrogant priesthood to establish, rather than that which really existed in his own time." He further observes:—"The remarriage of Hindoo widows, which is now permitted by law, is opposed to all modern Hindoo ideas about women. It is clear, however, from the story of Damayanti, who appoints a second Swayamvara, that in early times remarriage was not necessarily a violation of propriety; though, from Damayanti's wonder that the new suitor should have failed to see through her artifice, and from her vexation at being supposed capable of a second marriage, may be inferred that a second marriage was even then, under certain circumstances at least, not altogether reputable." I have referred to these authorities to show that it is due to the Hindoo reformers to believe that, in regard to the matter of widow marriage, they are struggling to restore the purer customs of those early times when remarriage was not a violation of propriety, and further to improve those customs so as to adapt them to a state of society in which nothing disreputable attaches in ordinary circumstances to a second marriage. This being the case, their demands in this respect, as I have above intimated, are made as a right by those who think that they are suffering wrongs. We cannot, therefore, regard the great struggle now prevails in the Hindoo community as a strange thing. Rights are always in this world regained by struggles. Wrong never makes a voluntary surrender: it must be met fought and conquered. It never imitates the well-bred dog, who walks quietly downstairs just as he sees preparations are making for kicking him down: it waits for the application of the foot, and is kicked twice as far as was first intended.

In these circumstances, it was agreed by parties to refer the question vexata to a commission after a full discussion. I am convinced that courts of arbitration, for which many people in these days are clamoring, in question

great magnitude, can lead only to absolute anarchy and the confusion of human rights. Private interest, prejudice, dishonesty can, under such circumstances, be exercised in a thousand modes, so that the rights of persons, or rather their exercise, will be determined in a great measure by chance. In my opinion to have referred this great question to arbitration was a great mistake. Well, it was agreed that each party should appoint five arbitrators, making up the complement of ten. The arbitrators after hearing the question fully debated were to give their opinions in writing. It is natural to suppose that each party would appoint as its arbitrators those of whose opinions it felt absolutely certain, and on whose support it had the most perfect reliance. An umpire was appointed to decide in case the arbitrators should be equally divided in opinion. With these previous arrangements, the discussion was held, and the opinions of the arbitrators given, under the presidency of the Shunkracharya. When the result was made known, it was found that six of the arbitrators had given their opinions that widow marriage was forbidden by the Shāstras, and four that it was sanctioned by them. It became known at the same time that the arbitrator whose defection from the side of the reformers had given the majority to the other side, was Vyenkut Shastree Matey. As he was the person who had first brought to the knowledge of the reform leader, Vishnool Shastree Pundit, the authority from the sacred books to show that the true Kaliyuga, in which the duties peculiar to that Yuga were to be observed, had not yet arrived, and as he was also the person in whom the reform leader, who had the attachment of the arbitrators on the reformers' side had the most unqualified confidence, Vishnool Shastree Pundit was naturally and very reasonably desirous to ascertain from him his reasons for the change of his opinion. For this purpose he sent a mutual friend, Sideshwar Shastree Joshee, to request Vyenkut Shastree Matey to appear before him; and the meeting took place on the evening of the 13th April last at the Tribhuvun Mut, the house of Gopalrao Hurry Deshmookh

in Poona, where Vishnool Shastree Pundit was stopping. There were some six or eight persons present at the meeting at the time of the interview between Vyenkut Shastree Matey and Vishnool Shastree Pundit: amongst these were Vishnool Purushram Ranade, Deputy, Collector and Magistrate of Belgaum, Sideshwar Shastree Joshee, Keshevrao Pandoorung, and the complainant Narayen Bapoojee Gorey. Vyenkut Shastree Matey was asked by Vishnool Shastree Pundit his reasons for the opinion he had given as an arbitrator. - He replied to the effect, that unjust constraint had been used towards him, that not only the Swamee but many others constantly beset him, that they urged on him the paramount duty of preserving the eternal religion, quoting the authority of the Dhurmraj to show that it was permitted to tell a falsehood for so great a purpose, and that under the influence thus exerted on him, which he could not resist, he gave his opinion against remarriage. Believing his statements to be true, one of the persons present, Narayen Bapoojee Gorey, considered that it was due to the reform party, to both parties, to the public at large, that such conduct, on his own part and on the part of others, as was described by Vyenkut Shastree Matey, and which discovered the real means by which the result of the arbitration had been arrived at, should be made known. Accordingly Narayen Bapoojee Gorey, on the following day, the 14th April, addressed a letter to a local journal, the *Dnyan Prakash*, in which he reproduced the statements he had heard from Vyenkut Shastree Matey. The next day, Chaitr Shoodh Chutoordushee or 15th April, the Shunkuracharya very properly sent a person to Vyenkut Shastree Matey to ascertain from him the truth or otherwise of the statements contained in the letter published by Narayen Bapoojee Gorey. The person sent for this purpose was Cassinath Venayek, a man, as it appears from his own deposition, of very equivocal character. This man took the written deposition of Vyenkut Shastree Matey, which is produced in evidence, and forms No. 13 of the Record. This deposition contains a simple denial by Vyenkut Shastree of having made the state-

ments ascribed to him by Narayen Bapoojee Gorey. The following day, the 16th April, there was circulated a printed proclamation, under the signature of Vyenkut Shastree Matey, not simply denying the truth of the statements ascribed to him by Narayen Bapoojee Gorey, but asserting that the Hindoo Widow-Marriage Association had published in the *Dnyan Prakash* of the 14th April, under the signature of Narayen Bapoojee Gorey, statements regarding him in every respect false, and that no one should place any confidence in those who without occasion speak or print things of their own invention. This proclamation was widely circulated and reproduced in the public journals. On the following day, there was a very large public meeting convened by the Shunkuracharya for the purpose of publicly delivering the decision of the arbitrators. Gunesh Shastree Malwunkur was appointed by the Shunkuracharya to read the printed decision. Having performed the duty thus devolved on him, he further read, without authority from the Shunkuracharya, who was President of the meeting, the letter of Narayen Bapoojee Gorey in the *Dnyan Prakash*, and the printed proclamation signed by Vyenkut Shastree Matey. After reading these documents, he added comments on the letter, and in the course of his public address said, that Narayen Bapoojee's name being Gorey (white) should rather be Kaley (black), and he explained this by adding, that Narayen Bapoojee Gorey had published what was false, and had committed a dishonest and base deed. The statements contained in the printed proclamation, signed by Vyenkut Shastree Matey, and publicly read by Gunesh Shastree Malwunkur in a large assembly, with additional imputations of his own concerning Narayen Bapoojee Gorey, were considered by the latter defamatory of himself and of the Association to which he belonged; and he accordingly, on the part of himself and of the Hindoo Widow Marriage Association instituted this criminal prosecution against Vyenkut Shastree Matey and Gunesh Shastree Malwunkur, for defamation of character.

We have now to inquire whether the words printed, and intended to be read, and the words spoken in the public assembly, on which this

prosecution for defamation of character is instituted, are defamation in the sense of Section 499 of the Indian Penal Code.

Section 499 of Penal Code defines defamation to be the making or publishing, by words either spoken or intended to be read, any imputation concerning any person (the word person including any Association of persons whether incorporated or not) intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person; and further, to harm the reputation of a person is explained by the Penal Code to mean, "directly or indirectly, in the estimation of others, lowering the moral or intellectual character of a person, or lowering the character of a person in respect of his caste or of his calling, or lowering the credit of a person."

That person and that Association must be already of a very damaged, depraved and low character, whose reputation would not be harmed by the imputation that they had published in the public journals what was in every respect false, and were unworthy of confidence for having spoken or printed as facts regarding others the merely idle inventions of their own minds. Narayen Bapoojee Gorey is a young gentleman occupying a very respectable and responsible post, for the due performance of the duties of which truth, honesty and trust are required. The Hindoo Widow-Marriage Association numbers amongst its members native gentlemen of the highest character and position in society; and moreover it is an Association of reformers, whose reputation as good men and true possesses a value to them which it is impossible to estimate too highly. To impute concerning them the publication of statements in every respect false, to impute dishonesty and baseness of action, cannot but lower their moral character in the estimation of others, cannot but lower their credit, cannot but lower their characters in respect of their callings, and also in respect of their caste; for judging from what has already been done in the way of exclusion from caste, and from the grounds for such exclusion, we cannot but conclude that Narayen Bapoojee Gorey and the

Hindoo Widow-Marriage Association are liable to excommunication in virtue of these imputations. The Court, therefore, has no doubt whatever of the defamatory character of the words libelled, if not proved to be true.

Our next inquiry is, whether the evidence before the Court proves that the statements of the printed proclamation, exhibit B, ascribing falsehood to Narayen Bapoojee Gorey and the Hindoo Widow-Marriage Association in respect of the statements contained in the letter published in the *Dnyan Prakash*, exhibit A., are true or false: that is, whether the evidence proves that Vyenkut Shastree Matey did or did not make such statement to Vishnool Shastree Pundit and others in the Tribhuvun Mut on the evening of the 13th April last, as are ascribed to him.

The evidence that such words were spoken by Vyenkut Shastree Matey, on the occasion referred to, is given by complainant, by witness No. 6, Vishnool Ranadê, Deputy Collector and Magistrate of Belgaum, by witness No. 7, Vishnool Pundit, Proprietor and Editor of the *Indu Prakash* newspaper of Bombay, by witness No. 9, Keshevroo Pandoorung, 1st Assistant Master in F. K. Mission Institution, and by witness No. 10, Sideshwar Shastree bin Bahiruv Joshee. Their evidence is unequivocal, perfectly consistent, not in the slightest degree impaired by a rigid cross-examination, and it is the evidence of witnesses entitled by their well known characters to the fullest credibility.

The defence set up for Vyenkut Shastree Matey is that of an alibi. An alibi when true is the most complete of all answers. A false alibi, however, is a favourite defence with guilty persons, and Courts are therefore very naturally suspicious of all alibis, and always subject them to rigid scrutiny. Fabricated alibis, when detected, turn the tables against those who employ them in their defence. The evidence in support of this defence is given by witnesses Nos. 15, 16, and 17. The contradictions in this evidence are glaring and numerous: to enumerate them all would be to reproduce the bulk of the evidence. They are such as are

wholly irreconcilable with the hypothesis that the witnesses were speaking the truth, and testifying to facts within their own knowledge. The contrariety in their statements affords satisfactory evidence that at least some of the three, all supposed to be present in a particular place on a particular occasion, were not there. The Court has no doubt that these witnesses have been suborned, that their evidence is throughout false, and that the defence of an alibi is a pure fabrication.

The necessary conclusion is that the statements of the letter, exhibit A, are true, and the denial of them in the printed proclamation, exhibit B, is false.

We have further to inquire whether the evidence before the Court proves that Gunesh Shastree Malwunkur read the printed proclamation, exhibit B, in the public meeting on the 17th April last, and spoke in that meeting the words concerning Narayen Bapoojee Gorey, with which he is charged.

The evidence that he publicly read the printed proclamation, exhibit B, in that meeting is given by witnesses Nos. 2, 3, 8, 11 for the prosecution, and Nos. 18, 19, 20 for the defence. Gunesh Shastree Malwunkur admits that he publicly read the printed proclamation, exhibit B, at that meeting. This part of the charge, therefore, is proved. The evidence that he spoke in that meeting the words concerning Narayen Bapoojee Gorey, with which he is charged, is given by witness No. 2, Chintamun Sukharam, Public Prosecutor in the Poona District Court; by witness No. 8, Venayek Ramchunder, Bachelor of Arts of the Bombay University, and student of law in the Government Law School, Bombay; by witnesses Nos. 3 and 11,—witness No. 3, Gunput Venkutesh, a student in the Deccan College, having made notes at the meeting of the proceedings that took place in it; and, which is the strongest testimony, by witness No. 12, the Shunkaracharya Swamee. Witnesses Nos. 2 and 8, who depose distinctly to the words used by Gunesh

Shastree Malwunkur, are entitled from their well known characters to the fullest credibility; and witness No. 12 the Juggutgooroo of the Hindoo religion, occupying the highest position in the Hindoo community, is not only entitled to the fullest credibility, but it is not to be supposed that he would wilfully perjure himself in a Court of Justice.

Gunesh Shastree Malwunkur denies that he used the words with which he is charged, with the exception of the words gorey and kaley, which he admits; and in his defence he produces three witnesses, Nos. 18, 19, 20. Witness No. 18 contradicts in his cross-examination almost every statement made in his examination in chief. He is the man of equivocal character, employed to take the deposition of Vyenkut Shastree Matey, denying the statements contained in the letter, exhibit A. Witness No. 19 gives a downright denial to the positive statements made by witness No. 18 regarding his attendance at certain meetings held in reference to the defence to be made in this trial. In cross-examination this witness was questioned about matters which lay at a distance, and the falsehood of his direct testimony was shewn by comparing it with the facts elicited. Witness No. 20 flatly contradicts himself in his cross-examination as regards his attendance at meetings held in reference to this trial. I cannot help applying to each of these three witnesses the maxim—*falsus in uno, falsus in omnibus*. The conviction forces itself upon my mind, that their untrue testimony has not arisen merely from their interest or bias in favour of their party, however strong their evidence shows that interest and bias to be; but that it has proceeded from an intention to misstate and deceive.

The Court considers, therefore, that the evidence irrefragably establishes the fact that Gunesh Shastree Malwunkur did publish, in a large public assembly, the printed proclamation, exhibit B., and did speak in that public assembly the defamatory words concerning Narayen Bapoojee Gorey, with which he is charged.

The learned counsel for the defence laid great

stress upon the argument, that the printed proclamation, exhibit, B, was merely an answer, and a calm, dignified answer to the letter, exhibit A. However truly this might be argued with reference to the written statement given by Vyenkut Shastree Matey, No. 13 of the Record, it cannot be truly argued with reference to exhibit B; for this latter, besides answering the letter, contains a sweeping and wholesale charge of falsehood against the Hindoo Widow-Marriage Association, to which not the remotest reference was made in the letter, exhibit A.

The learned counsel also laid great stress upon the singular argument, that what was said by Gunesh Shastree Malwunkur, in the public meeting, concerning Narayen Bapoojee Gorey, was said only in jest, that it was a mere joke. Even admitting that it was a joke, we have no precedent to justify a defamation on the ground that it was perpetrated in joke. "A joke's prosperity", says the great Shakespeare, "lies in the ear of the hearer": if the anti-reform portion of that large assembly had ears to hear a wholesale charge of falsehood against the opposite party, and a charge of dishonesty and baseness against one of that party, as a joke: it is quite certain that the reform portion of the assembly had not ears thus to receive it. Jokes have been properly defined as the cayenne of conversation: therefore if unseasoned defamation is an offence, defamation perpetrated in joke must be an aggravation of the offence. This singular argument thus makes against the defence.

The learned counsel also laid great stress upon the argument that there was nothing offensive in the tone and manner of Gunesh Shastree Malwunkur when he read and spoke against Narayen Bapoojee Gorey and the Hindoo Widow Marriage Association in the public assembly—that there was an entire absence of all malice. We must inquire into this question of malice. The legal import of the term differs from its acceptance in ordinary conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to a person, but denotes wrongful act done intentionally without just cause or excuse. Now as regards Vyenkut

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Shastree Matey, if he had gone no further than to give his written statement as directed by the Shunkracharya, there would have been no legal malice, because that was not a wrongful act, nor was it done without cause or excuse. In going further, and issuing a printed proclamation containing sweeping accusations of falsehood against a whole Association, he did a wrongful act intentionally, without cause or excuse. Where a man publishes a writing, which upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence. Thus it was said by Lord Tenterden, that a person who publishes what is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously intended to effect, unless he can show the contrary. No attempt has been made in this case to show that the publication was made under circumstances which justify it.

As regards Gunesh Shastree Malwunkur, he publicly read the printed proclamation, exhibit B, that is, published it, and spoke defamatory words concerning Narayen Bapoojee Gorey, in a public meeting convened for a special and entirely different purpose : he did so without any authority from the President of the meeting, and in violation of that authority ; for the Shunkracharya deposes that he directed Gunesh Shastree Malwunkur to read the written statement of Vyenkut Shastree Matey, No, 13, of the Record : instead of reading this, as directed by the Shunkracharya, he read the printed proclamation ; and his doing so was entirely out of place : that is, he did a wrongful act intentionally, without cause or excuse. In his case, moreover, the evidence before the Court proves malice not only in its legal sense ; but in its acceptance in ordinary speech, of hatred and ill-will. Witness No. 7 deposes that some two hundred and fifty persons have been excommunicated in Bombay merely for expressing their opinion that certain other persons ought not to have been excommunicated ; and that Gunesh Shastree Malwunkur was the instigator of all these excommunications. I consider it further

a proof of legal malice, that is, of a wrongful act done intentionally, without cause or excuse, when persons charged with defamation of character seek to discharge themselves from the consequences of such defamation by setting up false defences and producing false evidence ; for if the wrongful act had not been done intentionally, without cause or excuse, there would have been an honest confession of the act, and an apology offered for it.

It only remains now to state distinctly the degree of criminality of each of the accused persons.

The publication of the proclamation, exhibit B, is admitted by the defence ; and Vyenkut Shastree Matey admits that he signed it after it had been read over to him, and that he had it published. It is proved that the statements in that proclamation regarding Narayen Bapoojee and the Hindoo Widow-Marriage Association are false, and they are therefore libellous. However, Vyenkut Shastree Matey states that he did not himself write the proclamation. There is in his case great significance in this statement ; it signifies that some influence, which he could not resist, had been brought to bear upon him to extract this false statement from him. He is a man of the very advanced age of four score years. It is evident from his whole appearance that his mind and judgement have failed through age, that the imbecility of old age and of second childhood has come upon him. In this almost helpless state he has been without strength to resist the evil influences that have been brought to bear upon him. Advantage has been taken of his weakness and infirmities by designing and malicious men, and they have made him their victim. If the ravages of age have left him mind enough to realize hereafter the sad condition into which his victimizers have brought and abandoned him, it must bring down his grey hairs with sorrow to the grave. It is of the nature of an apology when he states that -it was through mistake he sanctioned the publication of anything regarding the Association. His imbecility or unsoundness of mind is so apparent that the Court does not require that it should be formally alleged.

affirmatively proved, and it seems to bring him under the general exception of Sec. 84 of Chap IV of the Penal Code.

Vyenkut Shastree Matey had some cause or excuse for publishing the proclamation, exhibit B : Gunesh Shastree Malwunker had none. It is proved that he published it in a large public assembly convened for an entirely different purpose, and that he did so without authority from the president of the assembly, and in violation of that authority ; and his eagerness thus to publish it affords grounds for the suspicion that it was he who extracted it from the aged Vyenkut Shastree : this proclamation is proved to be false, and it is defamatory. It is proved that by words spoken in that public assembly he made imputations concerning Narayen Bapoojee Gorey, intending to harm his reputation. It is proved that in publishing his defamatory proclamation concerning complainant and the Hindoo Widow-Marriage Association, and in making the imputations concerning Narayen Bapoojee Gorey harmful to his reputation, he acted from express malice, mala fide and

vindictively. It is proved, finally, that in seeking to discharge himself from the consequences of the defamation, he did not act fairly and honestly, but produced false evidence, which the Court considers an aggravation of the offence.

The Court finds that accused No. 1 Vyenkut Shastree bin Chintamun Bhut, Matey, from imbecility, the effect of very old age, comes under the general exception of Sec. 84 of Chap IV of the Penal Code, and directs that he be acquitted and discharged, and that his bail be cancelled.

The Court finds that accused No. 2 Gunesh Shastree bin Bapoojee, Malwunker, is guilty of the offence charged, namely, that he defamed Narayen Bapoojee Gorey, and the Hindoo Widow Marriage Association, by publishing and speaking concerning them false imputations, intending to harm their reputation, an offence punishable under Section 500 of the Penal Code ; and the Court directs that he be simply imprisoned for thirty-two days.

Deccan Herald Press.

10-24-11
93.

Law - India

THE
TRANSFER OF PROPERTY ACT, 1882.

WITH



INTRODUCTION, NOTES AND INDEX

BY

P. C. Sen,

Editor, Legal Companion.

SERAMPORE :

Printed and published by A. L. Kuare, at No. 28, Grand
Trunk Road.

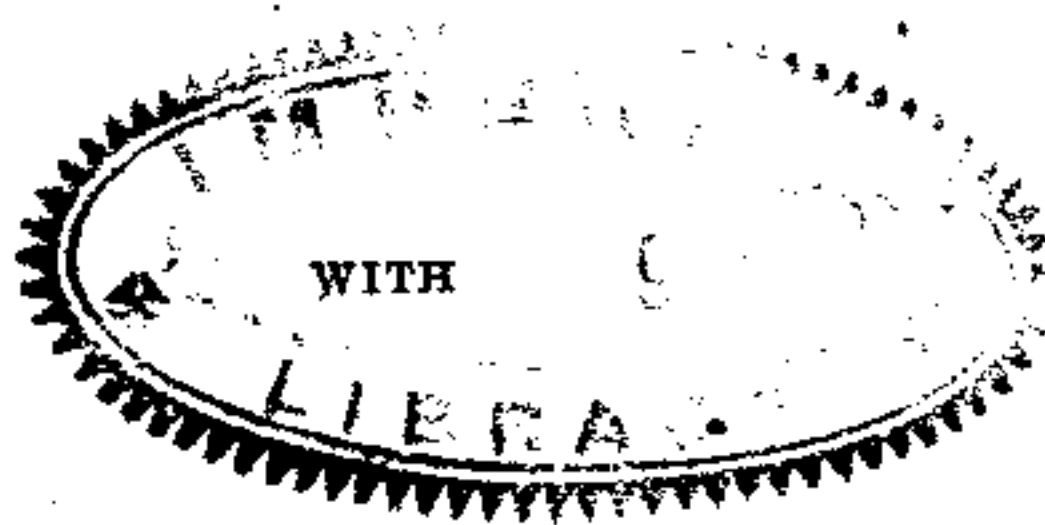
1882.

Price 8 annas.

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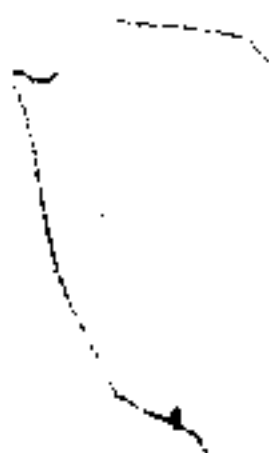
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INTRODUCTION.

THIS Act is called an Act to amend the law relating to the transfer of property by *act of parties*, because it does not affect any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction(1).

It introduces hardly any new substantive law, and does not (except in the case of the procedure relating to mortgages) displace any existing enactment. The rules, for instance, as to the relation of landlord and tenant, contained in the local Acts X of 1859, XII of 1881, XIX of 1868, XXVIII of 1868, Bengal Act VIII of 1869 and Madras Act VIII of 1865, all remain untouched. Local usages have been expressly saved(2); and all the many incidents of a mortgage or a lease, which are not inconsistent with the provisions of this Act, remain wholly unaffected.

This Act repeals, among others, Regulation I of 1798 and Regulation XVII of 1806 (the two most important Regulations of the Bengal Code regarding Mortgage, which were in force for more than three quarters of a century in Bengal and the N.-W. Provinces), and lays down the law regarding Sales(3), Mortgages(4) and Leases(5) of immoveable property, Exchanges(6), Gifts(7), and Transfers(8) of Actionable Claims.

The following are some of the changes made in the existing law by this Act:—

(1) Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in s. 44 shall be deemed to entitle him to joint possession or other common or part enjoyment of the house(9).

(1) See s. 2, cl. (d).

(2) Ss. 98, 106, & 108.

(3) Chap. III.

(4) Chap. IV.

(5) Chap. V.

(6) Chap. VI.

(7) Chap. VII.

(8) Chap. VIII.

(9) S. 44, para. 2.

(2) Sale in the case of a reversion or other intangible thing can be made only by a registered instrument(10).

(3) Sale in the case of tangible immoveable property of a value less than one hundred rupees, may be made either by a registered instrument or by delivery of the property(11).

(4) 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*(12).

(5) Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property(13).

(6) In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy(14).

(7) For the purpose of making a gift of immoveable property(15), the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

(8) For the purpose of making a gift of moveable property(16), the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

(9) No judge, pleader, mukhtár, clerk, bailiff or other officer connected with Courts of justice can buy any actionable

(10) S. 54, para. 2. (11) S. 54, para. 3. (12) S. 59, para. 1. (13) S. 59, para. 2.

(14) S. 106, para. 1. (15) S. 123, para. 1. (16) S. 123, para. 2.

claim falling under the jurisdiction of the Court in which he exercises his functions(17).

The following is an extract from the Report of the Indian Law Commission, 1879, on the Transfer of Property Bill :—

“Read with the Contract Act, this Bill covers almost the whole of the ground which could be profitably occupied by law relating to the transfer *inter vivos* of interests in property ; and for the convenience of the practitioner it could hardly be enacted in a more accessible form.

This, it appears to us, justifies the introductory chapter, which, after declaring what rights are inalienable and by what persons transfers may be made, proceeds to declare restrictions of the transfer of property called for in the interests of society. These restrictions are identical with those which are already incorporated into the law of India in the Succession Act.

In considering the necessity for these provisions, it must not be forgotten that the number of domiciled Europeans and Eurasians holding property in India has of late years greatly increased, and that the value of the property held by them in plantations of tea and coffee, in mills and machinery and in other investments, now amounts to many millions of pounds sterling. These persons and their estates are subject to the law of succession (Act X of 1865), and it would be obviously inconsistent that they should possess powers of creating estates in their property by transfers *inter vivos* which the legislature has declared they should not enjoy by testamentary disposition. Moreover, where the declared law is silent on the subject in respect of transfers *inter vivos*, the Courts may, and probably would consider themselves bound to, recognize principles stamped with the assent of the legislature as conclusive of the question that transfers *inter vivos* creating estates in violation of these principles are invalid as opposed to public policy.

The Privy Council has already ruled that estates cannot be created by Hindús in contravention of the principles which underlie the Thellusson Act, or subject to conditions which are void for repugnancy.

The rules contained in sections 10 to 35 impugn, so far as our experience goes, no law or practice of Hindús, Muhammadans or other sects recognized in India as enjoying special personal laws, unless it may be the now obsolete practice among Muhammadans of devoting property to the maintenance of the family of a particular saint. But to avoid any disturbance of rights enjoyed under personal laws, sufficient provision is made in the Bill."

The Law Commissioners, by whom the original draft of this Act was framed, observed "that their chief object was to bring the rules which regulate the transmission of property between living persons into harmony with the rules affecting its devolution upon death, and thus to furnish the necessary complement of the work which they commenced in framing the law of Succession. With this view they inserted rules that conditions in restraint of alienation should be void ; that conditions making an interest to cease on insolvency or attempted alienation should also be void ; that restrictions should be placed on the power of tying up property by transactions *inter vivos*, similar to those imposed by the Indian Succession Act, sections 100 to 104, in the case of wills. They also proposed rules as to when certain interests created by transactions *inter vivos* should be deemed vested. And they applied, *mutatis mutandis*, to transfers the rules of the Succession Act as to contingent bequests, conditional bequests and bequests with directions as to application and enjoyment."

"Mortgages were legislated for in Bengal as early as 1798, but, as the old Regulations gave a somewhat cumbrous and

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 pledged to different creditors in different mortgage-bonds, for each creditor to hold a separate sale and leave the purchasers 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 decisions 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 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.”*

The chapter on leases will be of practical use in the case of leases of buildings, gardens and mines. It will not of itself apply to agricultural leases, in other words, to the relations between zemíndár and raiyat.

With reference to the power of Hindus to create perpetuities, the Hon’ble Mr. Crosthwaite [made the following remarks while discussing the merits of the Transfer of Property Bill in the Legislative Council :—

* Extract from the speech of the Hon’ble Mr. Evans on the Transfer of Property Bill in the Governor General’s Council.

“But another class of objectors arose at the last moment, represented by his hon’ble friend Rájá Siva Prasád, for whose opinion as a learned Hindú he had great respect. This gentleman and his friends objected to the Bill, not because it infringed Hindú law, but because it did not infringe it. They wished the legislature to go behind the decisions of the Judicial Committee of the Privy Council and of the Indian Courts, and to adopt the interpretation of Hindú law which some Pandits of Benaras thought to be right. The question which they would raise was a very large one—whether Hindús had the power of creating perpetuities or not. The Privy Council (Judicial Committee) had decided that they had no such power, and the Bill in section 14 was framed accordingly.

It was impossible, if the question was to be dealt with in the Bill at all, to do otherwise than follow the rulings of the highest Appellate Court. But there appeared to be so strong a desire on the part of the Hindús, so far as the Committee could judge, that these rulings should not be affirmed by the legislature until the Hindús interested in them had been able to contest the point further, that they thought it best to save Hindú, Muhammadan and Buddhist law from the operation of Chapter II.”

THE
TRANSFER OF PROPERTY ACT, 1882.

ACT No. IV. of 1882.

*An Act to amend the law relating to the Transfer of
Property by act of Parties.*

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties ; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called “The Transfer of Property Act, 1882” :

Commencement.

It shall come into force on the first day of July, 1882 ;

Extent.

It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of Panjáb and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend this Act to the whole or any specified part of the territories under its administration.

And any Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by notification in the local offi-

cial Gazette, exempt, either retrospectively or prospectively, throughout the whole or any part of the territories administered by such Local Government, the members of any race, sect, tribe or class from all or any of the following provisions, namely, sections forty-one, fifty-four, paragraphs two and three, fifty-nine, sixty-nine, one hundred and seven and one hundred and twenty-three.

2. In the territories to which this Act extends Repeal of Acts for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(a) the provisions of any enactment not hereby expressly repealed : Saving of certain enactments, incidents, rights, liabilities, &c.

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(c) any right* or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or,

(d) save as provided by section fifty-seven, and chapter four of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction : and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindú, Muhammadan or Buddhist law.

• Interpretation-
clause.

3. In this Act, unless there is something repugnant in the subject or context,—

“immovable
property”:

“immovable property” does not include standing timber, growing crops or grass :

“instrument”:

“instrument” means a non-testamentary instrument :

“registered”:

“registered” means registered in British India under the law for the time being in force regulating the registration of documents :

“attached to
the earth”:

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

“notice”:

and a person is said to have “notice”* of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, section 229.

Enactments re-
lating to con-
tracts to be taken
as part of Act
IX. of 1872.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

* Contract Act, s. 229, as to agent ; 1 Cal. 212, and 11 B. L. R., 31 (P. C.)

CHAPTER II.

OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A).—*Transfer of Property, whether moveable or immoveable.*

5. In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and “to transfer property” is to perform such act. “Transfer of property” defined.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force: What may be transferred.

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

Persons competent to transfer.

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

Operation of transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer* of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include,† where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth ;

and, where the property is machinery attached to the earth, the moveable parts thereof ;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith ;

* 2 W. R., 125 (buildings) ; 14 W. R., 379.

† 24 W. R., 330 ; N. W. P., 1870, p. 251 ; Morley N. S., 259.

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. ~~A~~ **property** may be made without Oral transfer.
writing in every case in which a writing is not expressly required by law.

10. Where property is transferred subject* to a Condition restraining alienation.
condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindú, Muhammadan or Euddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. Where, on a transfer of property, an interest Restriction repugnant to interest created.
therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

* See L. R., 3, Chan., D. 149, 285.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Condition making interest determinable on insolvency or attempted alienation.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Transfer for benefit of unborn person.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

ILLUSTRATION.

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

Rule against perpetuity.

14. No transfer of property can operate to create an interest which is to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who

shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

15. If, on a transfer of property, an interest therein is created for the benefit of a class* of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections thirteen and fourteen, such interest fails as regards the whole class. Transfer to class some of whom come under sections 13 and 14.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails. Transfer to take effect on failure of prior transfer

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. Transfer in perpetuity for benefit of public.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction† shall be void, and the property shall be disposed of as if no accumulation had been directed. Direction for accumulation.

Exception.—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the

* *Bentick v. Duke of Portland*, 7 Chan. D. 693.

† *Donaldson v. Donaldson*, L. R. 3 Chan. Div. 743.

period during which the accumulation has been directed to be made had elapsed.

Vested interest.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

When unborn person acquires vested interest on transfer for his benefit.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

* Contingent interest.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent

interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer to members of a class who attain a particular age.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary

Transfer to such of certain persons as survive at some period not specified.

intention appears from the terms of the transfer.

ILLUSTRATION.

A transfers property to B for life, and after his death to C and D equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

Conditional transfer.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

ILLUSTRATIONS.

(a). A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b). A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The will.

(c). A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d). A transfers Rs. 500 to his niece C if she will desert her husband. The transfer is void.

Fulfilment of condition precedent.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

ILLUSTRATIONS.

(a). A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b). A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

ILLUSTRATIONS.

(a). A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and if he should neglect to do so, to C. B dies in A's life-time. The disposition in favour of C takes effect.

(b). A transfers property to his wife; but in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five and twenty-seven.

Ulterior transfer conditional on happening or not happening of specified event.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

ILLUSTRATION.

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

ILLUSTRATION.

A transfers a farm to B for her life, and, if she do not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section twelve, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

ILLUSTRATIONS.

(a). A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b). A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Such condition must not be invalid.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time being specified for performance.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Transfer conditional on performance of act, time being specified.

Election.

35. Where a person professes to transfer property which he has no* right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it ; and

Election when necessary.

in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

where the transfer is gratuitous, and the transferor has, before the election died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

ILLUSTRATION.

The farm of Sultánpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the last preceding four rules.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed

to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

ILLUSTRATION.

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election ; and if he does not comply with such requisition within a reasonable

time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment.

Apportionment of periodical payments on determination of interest of person entitled.

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of benefit of obligation on severance.

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners, in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation ; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose :

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs.

ILLUSTRATIONS.

(a). A sells to B, C and D a house situate in a village and leased to E at an annual rent of Rs. 30 and delivery of one fat sheep, B having provided half the purchase-money and C and D one quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7½ to C, and Rs. 7½ to D, and must deliver the sheep according to the joint direction of B, C and D.

(b). In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A. B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

B.—Transfer of Immoveable Property.

38. Where any person, authorized only under circumstances in their nature variable to dispose of Transfer by person authorized only under certain circumstances to transfer. immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

ILLUSTRATION.

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her mainte-

ance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable enquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Transfer where third person is entitled to maintenance.

39. Where a third person* has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous ; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

ILLUSTRATION.

A, a Hindû, transfers Sultánpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultánpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultánpur. She has no claim on the villages transferred to C.

Burden of obligation imposing restriction on use of land,

40. Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

* Wilson v. Hare, L. R. 1 Ch.; Richards v. Renell, 7 Ch. Div. 224 ; Maclean v. Mackay, L. R., 5 P. (32) ; S. A35 of 1. 1877.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, or of obligation annexed to ownership but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

ILLUSTRATION.

A contracts to sell Sultánpur to B. While the contract is still in force he sells Sultánpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

41. Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith. Transfer by ostensible owner.

42. Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a Transfer by person having authority to revoke former transfer.

revocation of the former transfer to the extent of the power.

ILLUSTRATION.

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest* which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

ILLUSTRATION.

A, a Hindú who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Transfer by one co-owner.

44. Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint posses-

* Sug. v. and P, 13th Ed, 297; 10 Legal Companion 97; I. L. R., 3 All, 805.

sion or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

45. Where immoveable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund ; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

Joint transfer
for consideration.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in

Transfer for
consideration by
persons having
distinct interests.

the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

ILLUSTRATIONS.

(a). A, owning a moiety, and B and C, each a quarter share, of mauza Sultánpur, exchange an eighth share of that mauza for a quarter share of mauza Lálpura. There being no agreement to the contrary, A is entitled to an eighth share in Lálpura, and B and C each to a sixteenth share in that mauza.

(b). A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

Transfer by co-owners of share in common property.

47. Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

ILLUSTRATION.

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultánpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half an anna share from each of the shares of B and C.

Priority of rights created by transfer.

48. Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier

transferees, be subject to the rights previously created.

49. Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Transferee's right under policy.

50. No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent bona fide paid to holder under defective title.

ILLUSTRATION.

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

51. When the transferee of immoveable property makes any improvement* on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at

Improvements made by bona fide holders under defective titles.

* 2 Bom. 225 ; 10 Legal Companion 53 ; I. L. R., 5 Bom. 450.

the then market value thereof irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Transfer of
property pend-
ing suit relating
thereto.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred* or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Fraudulent
transfer.

53. Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

* 8 B. L. R. 478; 7 Mad. 111; 11 Bom. 24, 64, 139; N. W. P., 1867, p. 301; 10 W. R. 469; 7 W. R. 225; 15 W. R. 372; 23 W. R. 382; 2 Tayl. and Bell 113; 1 O'Kin. 303, 309; 5 W. R. P. C. 63; 8 Bea. A. C. J. 61; Berry v. Gibbons, L. R. 8 Ch. 717.

Where the effect of any transfer of immoveable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. "Sale" defined.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. Sale how made.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery* of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property Contract for sale. is a contract that a sale of such property shall take place on terms settled between the parties.

* 14 B. L. R. 307, 312; N.-W. P. 1866, p. 87; 12 W. R. P. C. 6; W. R. 1864, p. 222; 5 W. R. 248; Morley N. S. 358; in the case of a reversion or other intangible thing, delivery takes place when the parties consent to the delivery.

It does not, of itself, create any interest in or charge on such property.

Rights and liabilities of buyer and seller.

55. In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

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(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same :

provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and

in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident;

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances on the property

existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto ;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller ;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof ;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount ; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

Sale of one of
two properties
subject to a com-
mon charge.

56. Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Discharge of Incumbrances on Sale.

Provision by
Court for incum-
brances, and sale
freed therefrom.

57. (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court,

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property,—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount.

to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(c) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER. IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

"Mortgage,"
"mortgagor" and
"mortgagee" de-
fined.

58. (a). A mortgage is the transfer of an interest in specific immoveable 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.

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.

Simple mort-
gage.

(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.

Mortgage by
conditional sale.

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

on condition that on default of payment of the

* English practice followed, with necessary modifications, 5 Bom. A. C. J. 109. Mortgagor need not have present ownership, N.-W. P. 1872, p. 11, sed. qu. 12. Moore's I. A. 275, 306. Colebr. Dig. B.i, c. III. t. 96.

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 authorises 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.

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. Mortgage when to be by assurance.

* Macph. 8, 12, 59 ; R. B. Ghose, 218, 219 ; 2 Moore's I. A. 487.

† Macph. 53 ; R. B. Ghose 64. This applies to defeasances.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an 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, Karáchi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

Rights and Liabilities of Mortgagor.

Right of mort-
gagor to redeem.

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 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.

* 5 B. L. R. 450 ; 6 B. L. R. 562 ; 2 Mad. 420 ; 7 Mad. 395 ; 13 B. L. R. 205 ; N.-W. P., 1868, p. 204 ; 9 Bom. 69 ; 7 B. L. R. 126 (P. C.)

† 6 Bom. A. C. J. 265 ; N.-W. P., 1869, p. 123.

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 a mortgagor.

Redemption of portion of mortgaged property.

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.

Right to redeem one of two properties separately mortgaged.

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 the redemption of the mortgage on Z alone.

* N.-W. P., 1857, p. 68; 20 W. R. 387; 22 W. R. 252; 24 W. R. 24; N.-W. P. 1870, p. 4; N.-W. P., 1872, p. 92; N.-W. P. 1873, p. 143; R. B. Ghose, 193; 15 B. L. R. 393.

† 6 Bom. A. C. J. 90; R. B. Ghose, 330, 331.

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.

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

10 Bom. 359 ; 11 Bom. 32.

† ILLUSTRATION.

A mortgages to B a field, the trees on which are the property of Government. B enters into possession of the field, and as occupant thereof buys the trees. A redeems the field. He is entitled to the trees on payment of their cost.

10 Bom. 359, 371 ; N.-W. P. 1866, p. 281.

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.

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.

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. Renewal of mortgaged lease.

65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract* with the mortgagee, Implied contracts by mortgagor.

(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

* N. W. P., 1867, 199.

† S. D. A. 1857, p. 1195 ; 1853, p. 575

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 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 such 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 of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

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.

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 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

* Macph. 109 ; R. B. Ghose, 147

† Lewin on Trusts, p. 253

‡ 2 Mad. 289 ; N.W. P. 1870, p. 311 : No foreclosure before expiration of period named. 2 Bomb. 242 : Mortgagee's right to sale, 7 Bomb. A. C. J. 146 : 9 Bomb. 12.

§ Simple mortgagee, N.W. P. 1869, p. 184 : Usufructuary, N.W. P. 1875, p. 55, Fisher 518, 575.

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 the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

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 de-

* Cases contra, Macph. 195, 196.

† 6 W. R. 283.

‡ Macph. 233 ; 25 W. R. 7.

|| 4 Moore's L. A. 464 ; Marshall 209 ; 7 S. D. A. 47 ; N.-W. P. 1860, 28 ; so in the case of a Kanam mortgage, 2 Mad. 315 ; 6 W. R. 283 ; (power to usufructuary mortgagee).

live 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.

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, is valid in the following cases (namely)—

Power of sale
when valid.

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindú, Muhammadan or Buddhist ;

(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, Karáchí 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

* 8 Bom. A. C. J. 142 ; Muhammadan Law, Macph. 2.

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 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.

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 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 a-

plies 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 Hindú, Muhammadan or Buddhist.

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 purposes 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 a luvion. For the purposes 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.

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.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

Rights of mortgagee in possession.

(a) for the due management† of the property and the collection of the rents and profits thereof;

* 11 Bomb. 32.

† Macph. 109, 113, 252; 1 Bomb. 199, 203; 5 Bomb. A. C. J. 109, 116.

(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 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 insur-

* N.-W. P., 1867, p. 187.

† 1 W. R. 133.

‡ 11 Moore's L. A. 241.

|| 2 Day, 606.

ance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

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.

Charge on proceeds of revenue sale.

74. Any second or other 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 a 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.

Right of subsequent mortgagee to pay off prior mortgage.

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 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.

* Macph. 113, 234; 1 W. R. 270; 16 W. R. 222.

Liabilities of
mortgagee in pos-
session.

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‡ 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

* A mortgagee in possession of land is bound to cultivate the best crop which it is ordinarily capable of yielding.—*Girjoji B. Sovar v. Keshavray N. P. Hinge*. 2 Bom. 222.

Act IX of 1872, s. 151; Fisher, s. 1530.

† Chan. Div. 427; N.-W. P., 1875, p. 100.

‡ A mortgagee in possession is entitled to be allowed for expenses incurred in connection with the Revenue Survey of the land mortgaged to him. *Fapusa bin Sadashiv v. Ramji bin Gopalji*. 2 Bom. 231.

Macph. 113, 119.

§ 9 W. R. 488; 4 Y. and C. Appendix, 507; Fisher, s. 1530.

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,

* Macph. 118, 119, citing 7 N.-W. P. 436.; 9 N.-W. P. 1; Act I of 1877, s. 54.

† The mortgagee need not personally attest the accounts, if he has no personal knowledge of them. Presumptions against mortgagees for non-productions of accounts must have reasonable limits, and not be mere conjectures or based on inexact data. The nature of the accounts which a mortgagor may call for from the mortgagee, explained.—*Shah Makhanlal v. Srikrishna Sing.* 2 B. L. R. (P. C.) 44.

5 W. R. 53, 271, &c.; Macph. 119.

‡ In taking the accounts as between a mortgagor and a mortgagee in possession, the interest may be set off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt. *Radha Benode Misser v. Kripamoyee Dabee.* 10 B. L. R. (P. C.) 386.

A mortgagee in possession is liable to account for profits arising from trees planted by himself on the mortgagor's land. 12 Bom. 88.

A mortgagee in possession is, in the absence of any special contract to the contrary, chargeable with a fair occupation rent, in the case of building personally occupied by him for the purpose of residence or carrying on trade or business, and in the case of land personally occupied or cultivated by him, either with a fair occupation rent or with the actual net profit realized from the use of the land. In ascertaining what those profits are, with which the mortgagee ought to be credited in reduction of his mortgage debt with interest thereon, the mortgagee ought to be credited for his expenses in obtaining produce from the land and a moderate interest on the amount of such expenses. Principles laid down on which an account should be taken from a mortgagee in possession. *Probhakur Chintamun Dikshit v. Pandurang Vinayak Dikshit.* 12 Bom. 88.

5 Bom. A. C. J. 196; N.-W. P. 1866, p. 132; N.-W. P. 1868, p. 153. When he cultivates, 7 W. R. 244; B. B. Ghose 262; 2 Moore's I. A. p. 1.

or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (e) 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) when 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.

Receipts in lieu
of interest.

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

* Macph. 159, 160.

† The necessity for an account arises, and need only arise, (1) when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the accounts, (2) when he has deposited all that he admits or alleges to be due, or (3) when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property. *Forbes v. Ameer-oonissa Begum*. 10 Moore's I, A., p. 340.

See 333; See 10 Moore's I, A., p. 340.

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.

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.

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 or allowed with notice of the subsequent mortgage. Mortgage to secure uncertain amount when maximum is expressed.

ILLUSTRATION.

A mortgages Sultánpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultánpur 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.

* N.W. P. 1868, p. 402; 2 Moore's I. A. 487; 11 W. R. 286; Hindu mortgagee in possession, 8 Bom. A. C. J. 50, 53. I. L. R., 1 All. 303.

† See sec. 115 of the Evidence Act.

‡ The mere possession of the title deeds by a second mortgagee though a purchaser for value without notice will not give him priority. There must be some act or default of the first mortgagee to have this effect. 4 Mad. 369.

Tacking abo-
lished.

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 case 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.

Marshalling and Contribution.

Marshalling se-
curities.

81. If the owner of two properties mortgages† them both to one person and then mortgages one

* 11 W. R. 310; 2 B. L. R., App. 45; 5 B. L. R., 463; 1 L. R., 4 All. 85.

† W. R. 1864, p. 374; 1 W. R. 353; 7 W. R. 483; 12 W. R. 114; Macph. 136, 205.

"Ordinarily, a subsequent purchaser of one of the estates has just as strong a claim as a mortgagee. There is, however, this difference between the position of a purchaser and that of an incumbrancer. In the case of a purchaser, if the purchase was made with knowledge of the mortgage, there is no reason why, as between the purchaser and the mortgagor, the burden should be thrown in the first instance on the mortgagor; although, as I have already endeavoured to explain, the person who is compelled to pay the whole would be entitled to bring an action for contribution. A mortgagee, however, stands upon a different footing. He has a right to enforce the payment of his debt, and whether the mortgage to him was or was not with notice of the prior incumbrance, the mortgagor cannot complain with reason of any facility which may be offered to the second mortgagee by compelling the prior mortgagee to resort, in the first instance, to the estate which is not the subject of mortgage to the puisne incumbrancer. The case, in fact, is analogous to the familiar case of a mortgagor redeeming the first mortgage. Such redemption enures to the benefit of the puisne mortgagee, and the mortgagor will not be permitted to say to him "you shall satisfy yourself only out of the equity of redemption on which alone the debt was secured." The point is a very important one, and must be carefully borne in mind." R. B. Ghose pp. 298, 299.

of the properties to another person who has not 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.

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 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.*

Contribution to mortgage-debt.

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 this section applies to a property liable under section eighty-one to the claim of the second mortgagee.†

* Fisher, 700.

† Fisher, 701.

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.†

Cessation of interest.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in 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.‡

* Beng. Reg. I of 1798, s. 2; Macph. 171.

† Do. ; Do.

‡ Macph. 159, 160.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Suits for Foreclosure, Sale or 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.*

Parties to suits for foreclosure, sale and redemption.

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-suit.

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 mort-

* 14 Moo. L. A. 101 ; 1 W. R. 176 ; 21 W. R. 428 : explained by Macph. 146 ; seton I, 442 ; See Act X of 1877, sec. 32 ; 5 Bom. O. C. J. 76 (legal representative of deceased mortgagor) ; Marshall 292 ; claimants of right of redemption, N.-W. P. 1868, p. 144 ; purchaser from mortgagor a necessary party, 3 B. L. R. (P. C.) 104.

gaged 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.

Procedure in
case of payment
of amount due.

87. If payment is made of such amount and of 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 en-
large time.

Provided that the Court may, upon good cause shewn, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

On the 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.

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 fore-closure-suit.

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 Procedure when defendant pays amount due.
Order absolute for sale.

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.

Recovery of
balance due on
mortgage.

90. When the nett 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.

Redemption.

Who may sue
for redemption.

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property:—

(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

* 3 W. R. 230; 6 W. R. 230 &c. But see 17 W. R. 272.

suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree* ordering— Decree in redemption-suit.

that an account be taken of what will be due to the defendant for the mortgage-money 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 ;

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 person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer 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.

93. If payment is made of such amount and of such subsequent costs as are mentioned in section In case of redemption, possession.

ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

In default, foreclosure or sale,

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.

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 :

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 under section ninety-two for payment to the defendant.

Costs of mortgagee subsequent to decree.

94. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a 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 of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

95. Where one of several 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 redeems.

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.

97. Such proceeds shall be brought into court and applied as follows :—

Application of proceeds.

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

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 person proving himself to be interested in the property sold, or, if there be 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 section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

Anomalous Mortgages.

Mortgage not described in section 58, clauses (b), (c), (d) and (e).

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 evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

* By an agreement reciting that A. had executed a bond in favour of B. for a certain sum of money, A., "in order to repay the bond-money in the terms in the bond contained," declared that, "until the repayment of the money covered by the bond, 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 mokurari patta, or deed of mortgage, or zur-i-peshgi ticca patta. 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." Held (Markby, J., doubting), that the instrument operated as a mortgage to A. of the lands comprised therein. No precise form is required to create a mortgage. *Raj Kumar Ramgopal Narayan Singh v. Ram Dutt Chowdry*. V. B. L. R. F. B. 264.

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 43.

Attachment of
mortgaged pro-
perty.

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 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 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Charges.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

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 de-

Extinguishment
of charges.

* Generally speaking, a purchaser of an equity of redemption with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the

clares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

Notice and Tender.

Service or tender
on or to agent.

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.

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 re-

mortgagor : he can neither set up against such subsequent incumbrances a prior mortgage of his own, nor, consequently, a mortgage which he or the mortgagor may have got in. 11 Bom. A. C. J. 41.

In 1840, A. mortgaged certain lands to B., which he had granted in patni at a rent of Rs. 145. Subsequently, in September, 1844, A. granted a fresh patni at a reduced rent of Rs. 90 ; and on the 9th October, 1844, A. mortgaged the same lands to C. In 1856, C. obtained a decree for the redemption of the mortgage to B., and he paid off the debt to B. ; but it did not appear that he took an assignment of the mortgage for the purpose of keeping it on foot as a security against incumbrances created by A. subsequently to the date of that mortgage, and prior to that of the mortgage to himself ; and in 1862, he obtained a final decree for foreclosure against A. In a suit by C. to set aside the lease of September, 1844,—held, that it was valid and binding upon him. *Semble*.—The English principle of tacking does not apply to mortgages of land in the mofussil. *Gaur Narayan Mazumdar v. Braja Nath Kandu Chowdhry*, 5 B. L. R. 463.

A prior mortgagee having purchased may still use his mortgage as a shield against the claims of subsequent mortgagees. 7 Mad. 229. See also 14 W. R. 491 ; 3 O'Kin. 184 ; *Swinfen v. Swinfen*, 29 ; *Beav.* 192 ; *Adams v. Angell*, 5 Chan. D., 631, 645.

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.

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 shall, so far as may be, apply to such application

Notice, &c., to
or by person in-
competent to con-
tract.

and to the parties thereto and to the guardian appointed thereunder.

Power to make rules.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out in itself and in the Courts of Civil Judicature, subject to its superintendence, the provisions contained in this chapter.

CHAPTER V.

OF LEASES OF IMMOVEABLE PROPERTY.

Lease defined.

105. A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Duration of certain leases in absence of written contract or local usage.

106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of

either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

108. In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, ~~as against~~ one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

A.—Rights and Liabilities of the Lessor.

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property* :

* 12 W. R. 149 ; 11 W. R. 278 ; 6 B. L. R. (App.) 44, 39 ; 15 W. R. 230 ; 9 W. R. 582 ; 3 B. L. R. Appen. 119.

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption*.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B.—Rights and Liabilities of the Lessee.

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease† :

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of

* 23 W. R. 121; 15 W. R. 230; 14 W. R. 43, 58; 1 B. L. R. 87; 11 W. R. 273.

† 8 B. L. R. 73; 5 Calc. L. R. 33.

such repairs with interest from the rent, or otherwise recover it from the lessor :

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(h) the lessee may remove*, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property in the state in which he received it :

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(j) ~~the lessee may transfer~~† absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing‡ in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or

* 8 B. L. R. 237 ; 14 B. L. R. 201, 205 ; B. L. R. F. B. Rulings, 595.

† 5 S. D. A. 205 ; 5 Mad. 120, 227 ; 7 B. L. R. 152 ; N.-W. P. 1875, p. 181 ; 12 W. R. 451 ; 16 W. R. 112 ; 15 W. R. 449 ; 6 S. D. A. 67.

‡ 8 B. L. R. 239 ; 12 B. L. R. 82.

the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee ;

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) the lessee* is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

(*m*)*the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition ; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(*o*) the lessee may use the property† and its

* 23 W. R. 34.

† 5 B. L. R. 401, 416 ; 8 B. L. R. App. 70 ; 10 B. L. R. App. 41 ; 15 W. R. 360 ; 17 W. R. 416 ; 23 W. R. 298 ; W. R. Sp. (1864) 36.

products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

(p) he must not, without the lessor's consent*, erect on the property any permanent structure, except for agricultural purposes :

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

109. If the lessor transfers the property† leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him : Rights of lessor's transferee.

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

* 8 B. L. R. 242.

† 14 W. R. 83 ; 24 W. R. 68.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

Exclusion of day on which term commences.

110. Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Duration of lease for a year.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Option to determine lease.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Determination of lease.

111. A lease of immoveable property determines¹

(a) by efflux of the time[†] limited thereby :

* 7 W. R. 283.

† 3 Moore's L. A. 261. Where the question was, whether a lease for a term continues for the specified term to the heirs of the lessee dying within the terms, or whether, in the absence of specific provisions to the contrary, it terminates with his life, it was HELD that any leasehold estate, when not expressly limited to the life of the lessee, passes to his heirs in the same way that any other property belonging to him devolves on him, and that if the heirs take the estate of the deceased lessee, they take it with all the rights and responsibilities attaching to it; and it is only in case of their refusal to accept the inheritance that the engagements entered into by the deceased cease to operate from the date of his death. 16 W. R. 147.

(b) where such time is limited conditionally on the happening of some event—by the happening of such event :

(c) where the interest* of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :

(d) in case the interests† of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(e) by express surrender ; that is to say, in case the lessee‡ yields up his interest under the lease to the lessor, by mutual agreement between them :

(f) by implied surrender :

(g) by forfeiture§ ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :

(h) on the expiration¶ of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

* Lease by Hindu widow.

† 3 O'Kin 159 ; 10 W. R. 15.

‡ N.-W. P. 1839, p. 45 ; 9 W. R. 147.

§ 16 W. R. 103 ; 25 W. R. 227. 18 W. R. 465 ; 22 W. R. 418 ; 25 W. R. 147.

¶ 23 W. R. 233, 271.

ILLUSTRATION TO CLAUSE (F).

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

Waiver of forfeiture.

112. A forfeiture under section one hundred and eleven, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent* is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

Waiver of notice to quit.

113. A notice given under section one hundred and eleven, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

ILLUSTRATIONS.

(a). A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b). A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

Relief against forfeiture for non-payment of rent.

114. Where a lease of immovable property† has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the

* 2 Bom. 73.

† N.-W. P. 1867, p. 1; 2 Bom. 70; 8 W. R. 225.

hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture ; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

115. The surrender*, express or implied, of a lease of immovable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease ; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

Effect of surrender and forfeiture on under-leases.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees or relief against the forfeiture is granted under section one hundred and fourteen.

116. If a lessee† or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his conti-

Effect of holding over.

* 10 W. R. 384 ; 13 W. R. 281 ; N. W. P. 1871, p. 63.

† 3 Bom. A. C. J. 27 ; 12 B. L. R. 263 ; N. W. P. 1870, p. 204 ; 7 W. R. 152 ; 16 W. R. 185 ; 22 W. R. 394, 548 ; 23 W. R. 271 ; 25 W. R. 234.

nuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

ILLUSTRATIONS.

(a). A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(b). A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

Exemption of leases for agricultural purposes.

117. None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law, if any, for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI.

OF EXCHANGES.

"Exchange" defined.

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

A transfer of property in completion of an exchange can be made only in manner provided for

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him. Right of party deprived of thing received in exchange.

120. Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes. Rights and liabilities of parties.

121. On an exchange of money, each party thereby warrants the genuineness of the money given by him. Exchange of money.

CHAPTER VII.

OF GIFTS.

122. "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. "Gift" defined.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. Acceptance when to be made.

If the donee dies before acceptance, the gift is void.

123. For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. Transfer how effected.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

Gift to several, of whom one does not accept.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

When gift may be suspended or revoked.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked ; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

ILLUSTRATIONS.

(a). A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b). A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully. Onerous gifts.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound. Onerous gift to disqualified person.

ILLUSTRATIONS.

(a). A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b). A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein. Universal donee.

Saving of donations *mortis causa* and Muhammadan law.

129. Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindú or Buddhist law.

CHAPTER VIII.

OF TRANSFERS OF ACTIONABLE CLAIMS.

Actionable claim.

130. A claim which the civil Courts recognise as affording grounds for relief* is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.

Transfer of debts.

131. No transfer of any debt† or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer ; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer.

ILLUSTRATION.

A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

Notice to be in writing signed.

132. Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

* See the PAPER on "CAUSES NOT ACTIONABLE" in the second volume of the Legal Companion.

† 1 Mad. 150 ; 5 W. R. 230,

133. On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer unless where the debtor resides, or the property is situate, in a foreign country and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

Debtor to give effect to transfer.

134. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

135. Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Discharge of person against whom claim is sold.

Nothing in the former part of this section applies—

(a) where the sale is made to the co-heir to, or co-proprietor of, the claim sold ;

(b) where it is made to a creditor in payment of what is due to him ;

(c) where it is made to the possessor of a property subject to the actionable claim ;

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence and is ready for judgment.

136. No judge, pleader, mukhtár, clerk, bailiff or other officer connected with Courts of justice can buy any actionable claim falling under the

Incapacity of officers connected with Courts of justice.

jurisdiction of the Court in which he exercises his functions.

Liability
transferee
debt.

of
of

137. The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

ILLUSTRATION.

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

Mortgaged debt.

138. When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.

Saving of ne-
gotiable instru-
ments.

139. Nothing in this chapter applies to negotiable instruments.

THE SCHEDULE.

(a). STATUTES.

Year and chapter.	Subject.	Extent of repeal.
27 Hen. VIII, c. 10.	Uses ...	The whole.
13 Eliz., c. 5. ...	Fraudulent conveyances ...	The whole.
27 Eliz., c. 4. ...	Fraudulent conveyances ...	The whole.
1 Wm. & Mary, c. 16. ...	Clandestine mortgages ...	The whole.

(b). ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
IX of 1842 XXXI of 1854 XI of 1855	Lease and release ... Modes of conveying land ... Mesne profits and im- provements.	The whole. Section 17. Section 1; in the title, the words "to mesne profits and" and in the pream- ble "to limit the liabi- lity for mesne profits and."
XXVII of 1866 IV of 1872	Indian Trustee Act ... Bengal Laws Act ...	Section 31. So far as it relates to Ben- gal Regulations I of 1798 and XVII of 1806.
XX of 1875	Central Provinces Laws Act.	So far as it relates to Ben- gal Regulations I of 1798 and XVII of 1806.
XVIII of 1876	Oudh Laws Act ...	So far as it relates to Ben- gal Regulation XVII of 1806.
I of 1877	Specific Relief ...	In Sections 35 and 36, the words "in writing."

(c). REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts: Interest: Mortgagees in possession.	Section 15.

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