LAW COMMISSION OF INDIA

SEVENTIETH REPORT

ON

The Transfer of Property Act, 1882

AUGUST, 1977

P. B. GAJENDRAGADKAR

CHAIRMAN
LAW COMMISSION.
Government of India.

12, TUGHLAK ROAD,
NEW DELHI—11
August 25, 1977

My dear Law Minister,

I have great pleasure in forwarding herewith the Seventieth Report of the Commission on the Transfer of Property Act, 1882.

Revision of the Act was taken by the Commission on its own, having regard to the fact that the Act is a Central Act of general application and importance which has not been the subject-matter of review for about half a century.

Since this is the last Report of the present Commission, I would like to describe briefly the procedure followed by the Commission in making all its Report after I became its Chairman in October, 1971.

The study of different Acts for revision was undertaken by the Commission either at the request of the Government or *suo motu*. When the Act was thus taken up for study and report, each one of us examined the different provisions of the Act individually and consulted relevant legal literature. This preliminary study enables us to formulate provisionally our views as to the points on which the Act in question needed to be amended.

Meanwhile, Mr. P. M. Bakshi, Member-Secretary, also studied the Act and examined critically the relevant legal literature bearing on the points which needed consideration. This literature consisted of the standard text-books on the subject and judicial decisions of the Indian High Courts and the Supreme Court of India as well as the material English, American and even Australian decisions. As a result of this preliminary comprehensive study, Mr. Bakshi prepared a draft for the consideration of the Commission and the same was circulated.

This draft was read at the meetings of the Commission and was examined carefully paragraph by paragraph. Naturally, during the course of discussion, different points emerged on several issues and as a result of the detailed and careful examination of most of the points, the Commission was able to reach unanimity. When, however, difference of opinion was of a radical nature and it was not found possible to evolve unanimity, minutes of dissent were written by those Members who differed from the majority view. But such occasions fortunately were not many.

The detailed discussion of the Report disclosed that some changes may have to be made in the draft Report and they were accordingly made by the Member-Secretary, Mr. Bakshi. Thereafter, a Questionnaire containing the broad issues involved in the study of the Report was framed whenever necessary and was circulated to the persons, bodies and institutions interested in the study of the subject.

After replies were received to the Questionnaire, they were analysed by Mr. Bakshi and in the light of the replies received and their analysis made by Mr. Bakshi, if the Commission felt that some changes were required to be made, they were made and as a result of this process, the draft was finalised.

Since this is the last Report of the Commission, I wish to put on record that during the entire period of my Chairmanship, all my colleagues have given me their fullest cooperation. It is true that in our discussion, several points of view were expressed with emphasis by different Members, but the atmosphere of the discussion was always cordial and conformed to the best traditions of academic debates. I wish to express my grateful appreciation for the cooperation which my colleagues have consistently given me in the work of the Commission.

As would be evident, in the method adopted by the Commission in making its recommendations, Mr. Bakshi has played a pivotal role in making the initial draft, and in all further discussions. He has shown remarkable legal acuemen and a profound knowledge, of the principles of law which were relevant to the debate. His industry, his devotion to his work and his intensive study of all problems have helped the Commission to a very large extent. I would like to place on record the Commission's sincere appreciation of the assistance which it received from Mr. Bakshi throughout this period.

The same procedure has been followed in making this Report. All relevant questions have been exhaustively considered and some significant recommendations have been made. In consequence, the Report has been an exhaustive document and it spreads over more than 1800 pages.

In this connection, I may be permitted to point out that during October 1971 to August, 1977, the Commission has forwarded to the Government twenty-six Reports including the present one. All the Reports have not yet been printed; but such of them as have been printed extend to 1609 printed pages and those not yet printed, including the present one, cover 5830 typed pages.

It is a matter of regret that the Reports forwarded by the Commission to the Union Government have not been implemented as the Commission hoped they would be. I ought to add that, in my covering letters to the Law Minister, I, several times, recommended that the Reports, after they were forwarded to the Government, should be immediately published and opinions of different Bar Associations of the country, including the Bar Council of India and the State Bar Councils should be called for to enable the Government to decide which of the recommendations should be accepted. It would also have been worthwhile to hold some All-India Seminars to consider recommendations of the Commission and that would have involved a real dialogue between the academics of the country. I trust the present Government will consider this aspect of the matter.

In our Report on the Civil Procedure Code, we have deliberately added the last Chapter and have observed that the discussion in that Chapter was strictly outside the terms of reference, because we thought that the discussion in the Chapter and the recommendations made in it would contribute to improve the quality of the subordinate Judiciary in the country; but, unfortunately, that part of our Report does not appear to have received due consideration from the Government. If the present Government feels that the recommendations made by the Commission in that part of the Report should be considered on the merits, I would suggest that the Government should do so an early date.

In conclusion, the Commission wishes to say in all humility that it tried its best to discharge the onerous responsibilities

placed on its shoulders during the time that it has functioned under my Chairmanship.

With warm personal regards,

Yours sincerely,
Sd/-
(P. B. Gajendragadkar)

Hon'ble Shri Shanti Bhushan,
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CHAPTER 1

INTRODUCTORY

1.1 *Reasons for taking up*—The Transfer of Property Act, 1882, with which this Report is concerned, has been taken up by the Law Commission on its own, having regard to the fact that the Act is a Central Act of general application and importance which has not been the subject-matter of revision for about half a century.

1.2 *Importance*—Although, as will be seen later, the Act does not purport to codify the whole law of property or of transfer of property, and although its application in regard to territories, persons and subjects has certain limitations, yet the fact that a law dealing with the transfer of property affects almost every citizen, renders it desirable that legislation on the subject should be reviewed from time to time. It is not only men of property who are governed by the Act or by rules of law analogous to its provisions. The provisions of the Act, or analogous rules, are of importance for almost every citizen. Every individual may not, during his life-span, have occasion to buy or sell or mortgage land or other immovable property, but almost everyone who has a shelter on his head, is either a landlord or a tenant, or a person who may become a tenant by succession. Again, while every one may not have occasion to be a transferor of immovable property almost every one is affected by the law relating to what property can or cannot be transferred. For example, the proposition that future maintenance cannot be transferred is one which has been enacted[1] by legislation or judicially recognised for the protection of those who are entitled to maintenance because, without the right to maintenance, life itself would be impossible.

1.3 *Social Aim*—A prohibition against the transfer of his right, and many other similar prohibitions, have a wider social aim to achieve; and their importance is not confined to the rich. Though they speak the language of the law and may have a flavour of the court room, their roots lie much deeper.

That, indeed, was the rationale of the legislation passed in several countries recognising a compulsory share out of the estates of decendents for those who were, in fact, economically dependent on them[2]—a movement[3] in which New Zealand seems to have been a pioneer in the Commonwealth.[4]

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1 Section 6(dd).

2 Note, "Decendents" Family Maintenance Legislation" (1955) 69 Harvard Law Rev. 277.

3 N. Z. Family Protection Act, 1908 (Part II), re-enacting the Testators Family Maintenance Act, 1908. See *Allardice* v. *Allardice,* (1911) A.C. 730.

4 Now the (New Zealand) Family Protection Act, 1955.

1.4. *Case of gifts*—Again, take a transaction that almost every one enters into—a[1] gift. How a gift can be made is laid down in the Act in a specific provision[1] which applies not only to immovable property, but to movables as well. That a gift can be made by delivery in the case of tangible movable property—we are not referring to gifts of debts etc.—is an assumption on which every citizen acts; but if a legal basis for it is to be sought, it could be sought only in the Transfer of Property Act—at least, in regard to territories, persons or matters not excluded from the operation of the Act. It is well established that if a gift is, for any reason, imperfect, the court will not approve it by construing it as a trust,—which shows the importance of the relevant provision in the Act.

1.5. In this connection, it will be of interest to refer to a Bombay case[2] in which judgment was delivered by Mulla J. It was held that the gratuity payable to retired servants of a Railway Company being in the nature of a gift, it must be completed either by a registered document or by actual payment as required by section 123 of the Transfer of Property Act. The delivery of the cheque by the Railway Company to the Mercantile Bank, though coupled with the request to send the amount to their London Office to be paid to the defendants, was not equivalent to delivery to the defendant and section 123 which requires delivery was not satisfied.

A transfer intended to operate as a gift, but invalid as such, will not constitute the donor a trustee of the property for the intended donee. In other words, an imperfect gift will not be construed as a declaration of trust.

1.6 *Law of Property a pre-requisite of social order*—Transfer of a right, of course, pre-supposes the existence of that right. Any society must, as a pre-requisite of social order, allocate rights of control over the land and goods existing in its territory. The pattern of allocation may vary, but there must be some allocation of its resources. Once "proprietorship"—ownership of the resources—is recognised, there must also be a provision for recognising subsequent dispositions of the rights as recognised in their origin. This shows the significance of a law relating to the transfer of property.

The rights may be allocated according to the norms of the particular society, but there must be some form of allocation. The transition from the natural state to civil society, according to Rousseau[3], "changes usurpation into a true right and enjoyment into proprietorship". Civilised society thus postulates the transformation of *de facto* acts into legal doctrines in the field of property. Once the rights are recognised by society—setting its seal of approval—their transfer must also be provided for. The provisions for transfer could also vary according to the norms of the particular society, but the provisions must be there.

1.7. *Transferability not an essential feature*—Of course, transferability or assignability cannot be considered to be a *Sine qua Non* or a necessary and indispensable incident of every kind of property. For example, it has

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1 Section 123.

2 *Natha Gulab & Co.* v. *W. C. Shaller,* A.I.R. 1924 Bom. 88.

3 Rousseau, Social Contract.

4 *Mrs. S. G. P. Athaide* v. *The Charity Commissioner,* (1974) 77 Bom. L.R. 486 (Vaidya J.).

been held[4] that the word "property" used in section 55(1) and 56 of the Bombay Public Trusts Act, 1950, is wide enough to include a *statutory* tenancy created under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, even though such a tenancy is not transferable.

Property—Range of

1.7A The term "property" covers a very wide range of rights. Professor Tawney[1] has pointed out that property is the most ambiguous category. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the State. Apart from these formal characteristics, he says, those multitude of rights operate indefinitely in economic character, in social effect and in moral justification. They may be conditional, like the grant of patent rights, or absolute like the ownership of ground rent. They may be permanent like a freehold land—to borrow an expression used in English law previously—or they may be terminable like copyright. They may be intimate and personal, as the ownership of clothes and books, or intangible, as shares in a gold mine.

1.8. *Concepts of property changing from time to time*—Legal concepts of what is property differ from time to time and place to place. What is property in one legal system may not be so according to another legal system. inasmuch as the law may fail to provide that the particular assertion deserves to be recognised or protected by law. This is partly due to the differences in the social order in which a legal system operates, and partly due to the state of juristic thinking in the particular country.

1.9. *Species of property*—Legal literature as well as actual instances would show that concepts of property and ownership have come up for consideration in situations that are sometimes unusal. For example, the question whether bees settling on another's land became his property has been the subject-matter of debate[2], and actually arose in England.

In Kearry v. *Pattinson*[3], title in bees settling on another's land was directly in issue. Some of the plaintiff's bees swarmed in the garden of the defendant, a neighbour, who refused the plaintiff permission to enter. When the defendant subsequently gave permission, the bees had gone. The plaintiff appealed from an adverse judgment in action for conversion based on the defendant's refusal to allow him to enter. It was held that the title in the bees persisted only so long as the plaintiff was able to pursue them without trespassing, at which time they reverted to *ferae naturae*.

The basis of this decision is that bees are *ferae naturae,* (so that only a qualified title can be obtained in them). In contrast, it may be noted that the civil law[4] provides that an owner's title is not lost[5] because his bees settle on another's land.

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1 R. H. Tawney, The Acquisitive Society (1921) Chapter 5.

2 Note "Bees settling on another's land", 52 Harvard Law Review 335.

3 *Kearry* v. *Pattinson,* (1939) 1 All Eng. Rep. 65, 834.

4 Note, 52 Harvard Law Rev. 834.

5 France : "Law of April 4, 1889; 1889 Bulletin des Lois Pt. I, 554; Cf. Code Napoleon (1804) s. 564; La. Civ. Code Ann. (Dart, 1932) art. 519.

1.10. *Wild Animals*—Incidentally, it may be stated that the mode of acquisition of ownership over wild animals in the Western legal system, alluded to above, is analogous to the ancient juristic principle of *parigraha*. That word literally means appropriation, and is explained in the Virmitrodaya[1] as signifying the appropriation of previously unappropriated property, such as, straw, water, logs of wood etc. from a forest which is open to the public as not being under the ownership of any particular individual.

In the famous text of Manu[2] dealing with the acquisition of fields, the case of wild animals is specifically mentioned.

1.11. *Change in modes of transfer*—Modes of transfer permitted by law also change from time to time. English legislation favouring case of disposition furnishes an example of the effect of changing conditions of time and place[3]. At the same time, changing social conditions may render necessary new restrictions on the freedom of disposition[4], not previously known.

English law of the medieval period was dominated by the law of feudal tenures. With the growth of equitable interests in land, the property aspect and aspect of rendering aid to the government declined. The emergence of importance of the family and the "family settlement" gave rise to the elaborate apparatus of life interest, legal and equitable interests and rules of remoteness and limitations. New claims arising from the changing economic process, and new forms of incorporeal interests seeking recognition create problems, for solving which the law must step in at some stage or another.

1.12. *Effect of practical development*—That the emergence of new commercial practices in real life may necessitate certain minor re-adjustments is strikingly illustrated by what took place in England in relation to negotiable instruments. In the Eastern world, the same process is illustrated by an interesting institution of Japanese commercial law—*Jato Tampo* (security by assignments), which was developed by the courts without any clear statutory basis[5]. This transaction permits a debtor to take possession of goods while vesting the title in the creditor, and has been described as the Japanese equivalent of "chattel mortage", conditional sale and similar security devices. There is no general provision for public registration even though registration is separately provided for many particular types of security transactions. The device referred to above permits fiexibility and, to a certain extent, secrecy. Of course, it seems to postulate that the debtor will not be able to deal with the assets to the prejudice of third parties.

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1 P. N. Sen, Hindu Jurisprudence (1918), page 55.

2 Manu, I, 44.

पृथोरयामां पृथिवीं भार्यां पूर्व विदो विदु : ।
स्थाणुच्छेंदस्य केदारमाहु : शल्यवतो मृगम ।।

3 Dicey, Law and Public Opinion in the 19th Century, pages 202, 203.

4 Simpson Stone, Law and Society, Vol. 1, pages 606-620.

5 Von Mehren, Japanese Legal Order (1963) 76 Harvard Law Review 1170, 1202, 1203.

1.13. *Personal property as security*—Since we propose to discuss, at some length, the question of transfer of future property under the appropriate sections, we may quote certain observations of a leading authority on the subject of personal property security. He has pointed out[1] that we have passed from the whole-hearted acceptance of the self-evident proposition that a man cannot transfer property which he does not own, "to a somewhat grudging acceptance of the much less evident proposition that a business enterprise should be allowed to make an irrevocable commitment, to pass the benefit to its present creditors of all its future property." He was writing of the impact of article 9 of the Uniform Commercial code, but the ovservation is, in substance, true of the device known as the floating charge. It has been observed[2-3] with reference to floating charges that although the floating charge appears in many ways to be a second-rate security, its wide use would indicate that creditors find it a useful device despite its risks.

1.14 *Instance of ownership Flats*—The emergence of what are popularly known as "ownership flats" in multi-storeyed apartments offers another interesting example of the adjustment of the law to new developments,—this time in private housing. The traditional legal concepts which assume that land is in its ownership divided only on the surface, would not obviously be appropriate for resolving legal issues arising from such flats. Such co-operative apartments involve many legal problems, foreign to the day-to-day practice of the law and necessitate changing attitudes towards ownership of property. The owner of the flat is not the owner of the land below in an undiluted form. His control over his own apartment is also restricted,—in so far as he lacks the freedom of the ordinary home-owner in deciding what services could be had in the building, what expenses can be undertaken and so on. The title to the entire land might vest in the co-operative society or company which has organised the flats, or as may be provided in the relative documents; the point to be made is that growing urbanisation renders necessary a modification of traditional legal concepts[4]. These flats also necessitate[5] the imposition of restrictions on alienation, not met with in ordinary conveyances. This is not to say that restrictions are not otherwise known. The point is that social and economic forces may give a fresh direction to the law of property.

1.15 *Law and social notions*—Of course, these forces take time to put their imprint on the law. It is obvious that in a developed society, the details of law are brought out by the lawyers and while legal details come

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1 Grant Gilmore, "The Purchase Money Priority" (1962) 76 Harvard Law Review 1333, 1334.

2 Coogan and Bark, "The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture" (1959) 69 Yale Law Journal 203, 251.

3 See also Pennington, "The Genesis of the Floating Charge" (1956) 23 Modern Law Review, 630.

4 Leiyser, "The Ownership of Flats—a Comparative Study" (1958) 7 I.C.L.Q. 31, 37.

5 Manning, "The Development of Restraints on Alienation since Grey" (1935) 48 Harvard Law Review 373.

from the common consciousness of the people in their essence, the details themselves would be worked out by the law. The law might, in this process, become complex and artificial, since it becomes a special science in the hands of the jurist. Nevertheless, the rights which it recognises and the modes of transfer to which it lends its sanction, would, speaking broadly and in the ultimate analysis, correspond with the generally accepted social notions. If they do not so correspond, it is the business of law reform to consider how far such harmony should be brought about.

1.16. *Borrowing from other system*—Since it is the common consciousness that supplies the ultimate nourishment to legal developments in this field, another interesting feature exhibits itself. When alien juristic notions are borrowed by one country from another country, they do not necessarily operate in their full force or in an unmodified form in the borrowing country. To a certain extent, an alien principle can be successfully integrated into a different system—this is what happened in India where the notion of trust, borrowed from English law, has been adopted. But this very instance shows how, in the process of borrowing, a modification was considered necessary, and the fragmentation of ownership which was an essential aspect of the English doctrine of trust, was not adopted in India. The theory of dual ownership in its full technical minutae would not have thrived in the Indian soil.

Those rules of Hindu law which are still in force—for example, that property can be dedicated to an idol without the formalities required for a transfer of property to a living person—also furnish an example of the survival of our own institutions along with legal provisions borrowed from elsewhere.

1.17. *Roman law of slaves as modified in Egypt*—Another illustration of this process is furnished by the Roman law as it travelled into Egypt. While Roman law as Administered in Italy—its home—did not allow slaves to hold property, Roman slaves living in Egypt were treated as capable of owning property[1].

Again, the standard Roman contract of sale—*emptio venditio*—was consensual, and transfer of ownership under it was separate and required physical delivery—*traditio*. But, in Egypt, the Romans accepted a different mode which was both a formal written contract (drawn up by a public official) and a conveyance[2].

1.18 *Property and recognition in society—Hindu juristic thinking*—That property and its recognition depend on social recognition was an aspect well-known to Hindu jurist. According to some Hindu jurists, the idea of property is exclusively indicated by the Sastras and onwership can be acquired only in the modes recognised[3] by them. This view is favoured by *Dhareswara, Jimutayahana* and their followers. On the other hand, *Vijnaneswara* and his followers maintain that the idea of property has its *basis on popular recognition* without any dependence on Sastras, the modes of acquisition of

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1 Alan Watson, Legal Transplants (1973), page 32.
2 Alan Watson, Legal Transplants (1973), page 33.
3. P. N. Sen, Hindu Jurisprudence (1918), page 42.

ownership being to collect and prescribe those means of acquisition recognised by popular usage that are regarded as commendable and as such worthy of being pursued. This latter view represents *the doctrine that property has its basis in popular recognition*[1].

We are not concerned with the merits of the controversy. In its essence, this controversy resolves itself into this : there are certain modes of acquiring onwership recognised by the people on all-hands; they are also the modes laid down in the Sastras as leading to the acquisition of ownership; now, the question is, which is prior ?[2] So far as the merits are concerned, one would say that public opinion and law act and react. The Sastras do not merely summarise the modes of acquisition of ownership which they find already recognised in popular usage. Nor does the popular usage merely follow and give effect to the Sastric rules laying down the conditions for the acquisition of ownership[3].

A lawyer would always feel inclined to give preference to the former view as more consonant with reason and common sense, but that is not the point sought to be made. The point is that the controversy amongst Hindu juristic presents the question in a form surprisingly modern.

1 .19. *Meaning of property under the Act*—Reverting to the Act, it is to be noted that Transfer of Property, Act does not profess to give any comprehensive idea of the concept of "property". Although the Law Commissioners of 1879 were in favour of adding definitions of "ownership" and "property"[4], those definitions[5] were never added. Section 5 of the Act, which defines what is meant by "transfer", but does not define what is meant by "property". It is clear from the sections relating to the sale of property—section 54 in particular —that the word "property" in the Act is not confined to tangible property.

It would appear that the term "property" is, in the Act, used in its most generic sense[6]. It means not only the actual physical object, but also all interest comprised therein which may be the subject of ownership. When, for example, the Act speaks of property which "can be transferred", (section 6), it does not confine itself to tangible property. The exceptions enumerated in section 6 make this amply clear. On the other hand, when we speak of general property and special property, we refer not to the subject matter of ownership but to the interest recognised by law therein.

According to Lord Langdale[7], "property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest, which the party can have." The "common of turbary", or the right of cutting turf in another person's land and "common of pasture", or the right of depasturing cattle on the land of another, are appendant incorporeal hereditaments, which are regarded in England as

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1 P. N. Sen, Hindu Jurisprudence (1918), page 42.
2 P. N. Sen, Hindu Jurisprudence (1918), Page 42.
3 P. N. Sen, Hindu Jurisprudence (1918), Page 42.
4 Gour, Transfer of Property Act, Topical Introduction to Chapter II.
5 Para. 1.20 *infra*.
6 Gour (1948), page 53, para. 68.
7 *Jones* v. *Skinner*, (1835) 5 L.J. Ch. 90.

falling into the category of real property[1]. They would be recognised in this country as rights.

1.20. *Definition in draft Bill*—In the draft Transfer of Property Bill, the following definition was proposed in regard to "ownership" and "property".

> "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. Such ownership is either absolute or qualified. The thing of which there may be ownership is called 'property'.[2]"

In an Allahabad case[3], Mahmood J. stated that section 6, in making exceptions to transferrability, must be understood to use the term "property" in its widest and most generic legal sense, for otherwise the exceptions would be wholly unnecessary.

The definition given in the then edition of Wharton's Law Lexicon—"The highest right a man can have to anything, being used for that right—as to lands or tenements, goods or chattels, which does not depend on another's courtesy", was quoted with approval by Mahmood J. in the Allahabad case[4].

1.21. *Bentham's view*—The idea of property, Bentham observed, consists in an established expectation, in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case[5]. Now, this expectation, this persuasion, added Bentham, can only be the work of law. "I cannot count upon the enjoyment of that which I regard It is this law alone which permits me to forget my natural weakness. It is as mine, except through the promise of the law which guarantees it to me. only through the protection of law that I am able to enclose a field and to give myself up to its cultivation with the sure though distant hope of harvest."

1.22. *Kinds of transfer regulated by the Act*—The Act does not now define "property" nor does it lay down any criteria for the purpose. It pre-supposes the existence of property recognised by law. It is to be noted that the Act does not profess to deal exhaustively with all kinds of transfers. Certain provisions of the Act apply to all kinds of transfers between living persons (in particular, the earlier half of Chapter 2). Some of its provisions are meant only for transfers of immovable property (Chapter 2, latter half). In so far as the Act deals with the modes of transfer, it mainly deals with—

(a) sale (of immovable property);
(b) lease and mortgage (of immovable property);
(c) exchange (of both kinds of property);
(d) gift (of immovable as well as movable property); and
(e) transfer of actionable claims—in this case, however, every mode of transfer is regulated if it is by act of parties.

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1 Will Laws, R.P. (18th Ed.) 395.
2 Clause 3 of the Bill of 1879 (following New York Code, para. 159).
3 *Mohiyuddin* v. *Kazim Hussain*, I.L.R. 13 All. 432 (F.B.)
4 *Mohiyuddin* v. *Kazim Hussain*, I.L.R. 13 All. 432.
5 Bentham Theory of Legislation (Hilderath Ed.). Chapter 8, page 111.

1.23. The Act does not specifically deal with settlements, partitions or trusts as modes of creation of interests in property. Settlements and partitions were proposed to be included in the draft Bill of 1877, clauses 49 to 53 and clause 93 to clause 98 respectively, but were later omitted as unsuitable. This does not, of course, mean that the Transfer of Property Act is entirely irrelevant to the creation of a trust, because, under the Trusts Act, the creation of a trust itself requires the transfer of property[1], unless the author is his own trustee[2]. Where there is no transfer and the author is not the trustee, a trust cannot arise. This is precisely the reason why special statutory provisions, such as section 6 of the Married Women's Property Act, 1882, were needed to deal with the situation where, though there was no transfer within the framework of the law and no trust in accordance with the statutory provisions, the legislature desired, as a matter of policy, to confer on certain persons—the wife and children of the insured—beneficial rights in regard to moneys payable under the life insurance policy[3].

1.23A. *Matters outside the Act*—There is yet another aspect which shows that the Act is not exhaustive even in regard to transfers by act of parties. Since the Act in most of its provisions is confined to transfers between living persons, it does not affect dispositions of property which do not partake of that character. In particular, it does not govern transfers to an idol otherwise than by the medium of a trust in favour of a living person. This is for the reason that section 5 of the Act, which defines—so far as is material—a transfer of property as an act by which a living person conveys property to another living person, is not attracted, since a gift to an idol is not a gift to a living person. "A juristic person is not necessarily a living person, and the fact that for some purposes the law by a fiction invests the non-animate bodies with the rights of persons would not make juristic persons living persons for all purposes"[4]. Similarly, a declaration of trust in relation to immovable property for a public religious purpose, not being governed by the Trusts Act, is also not governed by the Transfer of Property Act in regard to its provisions as to the formalities[5]. Section 123 of the Act (Gifts) has also no application to dedication of land to the public, since the section applies only where the donee is an ascertainable person by whom or on whose behalf a gift can be accepted or refused[5].

1.24. *Lines of revision*—So much by way of introduction. We need not, at this stage, anticipate all that we are going to recommend in this Report. In the American case of *Arndt* v. *Griggs*[6], the following observations were made with regard to the law of property which lucidly bring out the importance of the law of property :—

> "The well-being of every community requires that the title of real estate therein be secure, and that there be convenient and certain

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1 Section 6, Indian Trusts Act, 1882.
2 *Bai Mahakore* v. *Bai Mangla*, I.L.R. 35 Bom. 403, 407.
3 *Cleaver* v. *Middle Reserve Fund Life Association*, (1892) 1 Q.B. 147.
4 *Naraimaswamy* v. *Venkatalingam*, (1927), 53 Madras Law Journal 203, 208 (F.B.).
5 *Palliayya* v. *Ramavadhanulu*, (1903) 13 Madras Law Journal 364.
6 *Arndt* v. *Griff*, (1890) 134 U.S. 316, 321.

> methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in nature.... and is this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution or against natural justice."

This basic principle will apply whether the property is private or public. If the property belongs to the State or public authority, the title of the State or public authority has also to be made secure.

Our approach, therefore, will be to bear the importance of the law of property in mind in making our recommendations. At the present stage it will be sufficient to state that the present Act has worked with remarkable smoothness, and the careful and competent revision undertaken in 1929 solved many of the problems that had arisen up to that period. However, as our further discussion will show, some problems still remain. Some of the provisions of the Act have created difficult problems in interpretation—for example, section 5. Some of them have been found to be obscure—e.g. section 6. Some have revealed lacuna or incompleteness—e.g. section 10. Some, while appearing to be clear in themselves are found, when read with others, to disclose internal inconsistency in the Act which requires attention—e.g. sections 5, 6 and 43, when read together. The sociological or commercial importance of some of the provisions—e.g. section 120 to 123 and the last Chapter—is now far greater than in 1882. It will therefore, be our concern to remove defects in all these provisions.

CHAPTER 2

HISTORY

2.1. *Policy of codification.*—The Transfer of Property Act was prepared in pursuance of the policy of the Government to prepare a self-contained Civil Code for India. The Commission appointed for the purpose prepared the draft of the Succession Act, which according to their recommendation was to be enacted as the first chapter of the Civil Code. When the draft was submitted for the approval of the Secretary of State, it was returned with instructions that that Act should be enacted without reference to the projected Civil Code. It was so enacted and became Act 5 of 1865. The draft of the Transfer of Property Act which the Third Law Commission prepared was submitted with the following note : "It is probable that several of these rules will eventually find a different place whenever a final distribution and rearrangement of the whole law shall have been effected; but some blending of subjects is unavoidable in a work which the Government has, for sufficient reasons, instructed us to submit to it in portions, as each portion is completed.[1]" The Government had agreed to scientifically arrange at a later stage the various chapters of the Civil Code thus produced. But as this was never done, the Select Committee had to make the present Act, as far as possible, self-contained. Hence the reference in section 4 to the Contract and the Registration Acts. Referring to that section, the Law Commissioners wrote : "We would declare that all chapters and sections of the Bill which relate to contracts should be taken as part of the Contract Act, 1872."

2.2. *Previous law.*—Prior to the passing of the Act, the state of law relating to transfers was in a chaotic state.[2] One of the earliest Madras cases illustrates this chaos.[3] The law on the subject was, for the most part, fragmentary, The enactments mentioned in the Schedule to the Act, now superseded and repealed,[4] covered only a part of the field.

2.3. *Situation in* 1850.—The background in which the Act was enacted could be best illustrated by taking up first the question of applicability of English law. The situation which presented itself during the fifties of the nineteenth century as regards the law applicable to those parts of the country which were under British rule was not a very happy one. On the one hand, it was not clear how far the English law applied, even in the Presidency Towns. In the celebrated case of *Mayor of Lyons* v. *East India*[5] Company, Lord Brougham expressed the opinion that the Indian inhabitants were governed by their own laws and that English law applied only to British subjects and other foreigners who sought the protection of the factories, but even in their case good many parts of English law which from the nature were unsuited to the conditions of the colonies could not be taken to have been so introduced. It was on this reasoning that he held that the Mortmain Act and the statutes which incapacitated aliens from holding land, did not apply to Calcutta.

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1 3rd Law Commission (1879) 6th Report.
2 Gour, Comment on Section 1.
3 *Thumuswamy* v. *Hossain Rowthen,* I.L.R. 1 Mad. 1 (P.C.) See para. 2.3 infra
4 Section 2.
5 *Mayor of Lyons* v. *East India Company* (1837) 1 Moore Indian Appeals 135.

2.4. So far as the mofussil courts were concerned, Bengal Regulation III of 1793—subsequently re-enacted in the Bengal Civil Courts Act, 1887, Bombay Regulation IV of 1827, section 26, and similar provisions in Civil courts Acts directed, in substance, that where no specific rule existed, the court shall decide according to justice, equity and good conscience. Although this direction was generally construed as authorising the courts to apply rules of English law, that position was subject to the important qualification that the rules of English law must be found appropriate to Indian circumstances.[1] This qualification became of importance in the field of law of property. How far the English law would apply became a subject of debate in almost every instance. In a case of 1874, for example,[2] the question whether the rule against perpetuities applied to charitable trusts was considered at length by the Privy Council. The appeal was from the Settlement of Penang, but the observations made by Sir Montague Smith apply also to the territories in India then under the British rule. The observations were as follows :—

> "Whilst English Statutes relating to superstitious uses and to mortmain ought not to be imported into the law of colony, the rule against perpetuities was to be considered to be part of it. This rule which certainly has been recognised as existing in the law of England independently of any Statute, is founded upon considerations of public policy, which seem to be applicable to the conditions of such a place as Penang as to England, viz. to prevent the mischief of making property inalienable unless for objects which are in some way useful or beneficial to the community. It would obviously be injurious to the interests of the island if convenient for the purposes of trade or for the enlargement of town or a port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The law of England has, however, made an exception also on grounds of public policy in favour of gifts for purposes useful and beneficial to the public and which in a wide sense of the term are called charitable uses and this exception may properly be assumed to have passed with the rule into the law of the colony."

2.5 In a case decided in 1879—this time on appeal from Calcutta[3]—the Privy Council made these general observation which are relevant to the subject—"If the principle invoked depends on any technical rule of English law, it would, of course, be inapplicable to a case determinable like this on broad principles of equity and good conscience. It is only applicable because it is agreeable to general equity and good conscience. And again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although these decisions are undoubtedly valuable in so far as they recognize the general equity of the principle and show how it has been applied by the courts of this country". Thus, in each case it became obligatory to consider how far the English rule was appropriate for the physical, social and historical conditions in India.

2.6 *Necessity for codified law.*—It was in this background that it was considered necessary to have a codified law on the subject. The

1 *Warden Seth Sam* v. *Luckpathy Royjee Lallah,* (1862) 9 Moors Indian Appeals 303.
2 *Prap Chash Neo* v. *Ong Cheng Neo* (1874) Law Reports 6 P.C. 381, 394.
3 *Raja Kishendatta Ram* v. *Raja Mumtaz Ali Khan* (1879) I.L.R. 5 Cal. 198, 210.

Act was first drafted as far back as 1868-1870. Macaulay had, in 1833, written "that no country ever stood so much in need of a Code of law as India, and I believe also that never was a country in which the want might be so easily supplied." The British Parliament accepted this view and at one time intended to draft an Indian Code, for which several efforts were made, but ultimately given up. The Transfer of Property Act itself passed through numerous hands, and was revised by several Commissions, with the result that its final draft remained in suspense for twelve years from 1870.

2.7 The Act was passed in 1882. In the same period were enacted the Negotiable Instruments Act (in 1881), and the Acts on Trusts and Basements (in 1882). History of the drafting of the Act is represented by the following stages—

(a) *The Third Law Commission.*—This Commission drafted the First Bill on the subject.

(b) *Despatch of* 1877.—A body of substantive civil law had long been in course of formation for India. In 1877, whitely Stokes, who had for long been the Legislative Secretary, became the Law Member in succession to Lord Hobhouse. The Government's despatch of 1877 contained Whitely Stockes's programme of work and plan of operations.[1] It laid stress on reduction to a clear, compact and scientific form, of the uncodified branches of the substantive law. This, it was said, was preferable to ascertaining the law "only from English text-books written solely with reference to the system of English law, and from a crowd of decisions, often obscure and sometimes contradictory, to be found in the English and Indian law reports." The Government, therefore, proposed the codification, besides others, of the following branches of substantive law—Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments, and Transfer of Immovable Property, in the order mentioned. This despatch was the genesis of further work on the subject.

(c) *Work subsequent to the despatch.*—The Secretary of State accepted these proposals of the Government of India. Dr. Whitley Stokes was appointed to remodel the Bills relating to the Transfer of Property and Negotiable Instruments and to prepare Bills on other subjects. The work took about two years.[2]

(d) *Fourth Law Commission.*—On the 11th February, 1879, through a notification issued by the Governor-General-in-Council a Commission was appointed to enquire into and consider the provisions of the draft Bills mentioned above and to report thereon, and to make such suggestions as to the codification of the substantive law of British India as might seem desirable. The members of the Commission which came to be known as the Fourth law Commission—were :

Whitley Stokes, Sir Charles Turner, Chief Justice of the Madras High Court, and Raymond West, a Judge of the Bombay High Court. For our purposes it is enough to state that the Fourth Law Commission

1 Ilbert, Government of India, page 357.
2 Stokes, The Anglo-Indian Codes, Vol. I, para. xix.

recommended that the law relating to the subject dealt with by the Transfer of Property Bill should be codified, and the Bill already drawn for the purpose by the Commission should be passed into law.

2.8 *Objective of Civil Code.*—The intention was that when the body of substantive civil law enaced for India is re-arranged in a more compact and convenient form than that of a series of fragmentary portions from time to time passed by the Legislature, the chapters on sale, Mortgage, Lease and Exchange (contained in the present Act), will probably be placed in close connection with the rules contained in the Contract Act. But, till then, they may fitly be left in a law containing what the contract Act does not contain, namely, general rules regulating the transmission of property between living persons.

2.9 *Amendments.*— It may be convenient to mention briefly the important amendments that have taken place since the Act was enacted. The first important amending Act was Act 6 of 1904, which amended sections 1, 59, 69, 107 and 117. The Code of Civil Procedure, 1908 (5 of 1908) repealed sections 85 to 90, 92, to 94, 96 and 97 and amended section 100. The amendments were mainly consequential on the inclusion, in the Code, of certain provisions as to mortgages. Act 11 of 1915 amended sections 59 and 69. In 1920, 1925, 1926 and 1927, the Act was amended in certain points of detail.

The most important amendment was, however, made by Act 20 of 1929, which was passed to implement the recommendations made by a special Committee. The special Committee consisted of distinguished lawyers and forwarded its report in 1927.

The Act of 1929 made extensive amendments. It amended sections 1, 2, 3, 4, 5, 6, 11, 15, 39, 40, 43, 52, 55, 59, 60, 62, 63, 64, 67, 69, 71, 72, 76, 82, 83, 84, 98, 100, 102, 103, 106, 107, 108, 111, 128, 129 and 130. It revised sections 16, 17, 18, 53, 56, 61, 68, 73, 81, 91, 95, 96, 101 and 119.

It also inserted new section—53-A(59-A, 60-A, 60-B, 63-A, 65-A, 67-A, 69-A, 92, 93, 94 and 114-A. It also omitted sections 74, 75 and 80.

2.10 Principally, the Amendment Act was concerned with the doctrine, of notice, the doctrine of part-performance, sale of immovable property, the law relating to mortgages and actionable claims. If it is not pedantic to say so, one would like to state that many of the amendments effected in 1929 brought the statute law nearer to some of the important doctrines of equity. The fusion of law and equity that took place in England in the latter half of the nineteenth century has a striking parallel in the amendment Act of 1929. The device adopted was different; the very doctrines were being given legislative recognition. But the result was to bring the statutory law in harmony with the dictates of equity. We shall later deal in detail with the amendments effected by this Act.

Act 4 of 1938 and Act 6 of 1944 effected certain amendments concerning policies of insurance—an instance of the impact of increasing commercialisation. The other amendments as well as the adaptations made by various Adaptation Orders need not be mentioned in the present rapid survey.

2.11 *Equity.*—Incidentally, the above resume of the important amendments would show how intimate is the connection between the law of property and equity jurisprudence. Hardly any important section of the Act can be understood in its true sense without a background of the relevant principle of equity.

Another feature that stands out on a study of the amendents is the over-whelmingly large number of amendments that touched the provisions relating to mortgages in the amending Acts of 1904, 1908, 1915 and 1929. This is understandable, because about one-third of the sections in the Act are concerned with mortgages. Apart from this purely numerical aspect, it should be mentioned that vital amendments were made in the fasciculus of sections which constitute the basic provisions on mortgages sections 59 to 63.

2.12 *Gist of amendments made in* 1929.—It is desirable now to give in detail the gist of important amendments made in 1929. The Act made important amendments in the doctrine of notice. In particular, it extended the category of constructive notice. It also removed the exception regarding Hindus, in section 2, Taking note of the revision of the law of registration that had taken place, it provided that the registration of documents by which a transaction relating to immovable property is effected, is deemed to be notice.

As regards the property that can be transferred, the amendment inserted a prohibition against the transfer of the right to maintenance, in whatsoever manner arising or secured or determined. This amendment was rendered necessary by the pre existing conflict of decisions on the subject. In regard to gifts to a class (sections 13 and 14), a welcome change was made by abolition of the English Common law rule in *Leake* v. *Robinson*[1], and by adopting a suggestion made by Wilson J. in an earlier Calcutta case. In substance, the new provision enacted that where a gift to a class fails, the failure is not to be in respect of the whole class, but only so far as the gift relates to those persons who fall within sections 13 and 14, i.e., those members who in regard to whom the gift becomes invalid.

2.13 The law regarding the validity of clauses directing accumulation was also sought to be modified. The doctrine of it *lis pendeu* (section 52) was the subject matter of an amendment which removed certain difficulties arising from the case law[2]. The law relating to fraudulent transfers (section 53) was modified by revising the section on the lines of sections 172 and 173 of the Law of Property Act, 1925. A certain amount of neatness was introduced by splitting up the section so as to deal separately with transfers with and without consideration.

2.14 One of the most important amendments made by the Act was by way of statutory recognition of the well-known doctrine of part-performance. There had been an acute conflict of decisions on the subject.

2.14A Sale of immovable property or of any interest in it was now to be made only by a registered instrument, irrespective of the value of the property. This amendment represents a movement in the direction

1 *Leake* v. *Robinson* (1817) 35 English Report 2979.
2 *Ram Lal* v. *Kanya Lal*, (1886) I.L.R. 12 Cal. 663.

of formalisation of the procedure for transfer—a contrast with the amendment pertaining to the doctrine of part performance (section 53A) which was, in substance, aimed at reducing the importance of formalities.

2.15 A pretty large number of amendments made in 1929 related to the law of mortgages. The class of mortgage known as mortgage by conditional sale had been a source of trouble to the courts, as it was often very difficult to decide whether the transaction was a sale (with condition of repurchase) or merely a mortgage by conditional sale. It was provided that no transaction can be a mortgage by conditional sale unless the whole arrangement (sale and the usual conditions) was embodied in one single document. The governing test was still the intention of the parties, since the new statutory proviso was of a negative character. It did not provide that wherever there is only one document evidencing the sale and the condition, the transaction is to be deemed only a mortgage by conditional sale irrespective of the intention of the parties. We are mentioning this since there arose a controversy on the subject even after the amendment. The definition of usufructuary mortgage was amended in order to get over a Madras ruling dealing with the case[1] where possession has not actually been given. The principal remedy of the mortgagee in such a case would be to demand possession, failing which he could demand the mortgage money—this was separately provided by amending section 68.

2.16 A new definition of "anomalous mortgage" was also added in section 58(g). Rights of mortgagees under such mortgages were to be governed by revised section 98—principally by the contract as evidenced in the mortgage deed, and, so far as such contract does not extend, by local usage.

2.17 The policy of compulsory registration was sought to be implemented by providing, in section 59, second paragraph, that even where the principal money secured is less than one hundred rupees, the mortgage must be effected by a registered and attested instrument or (except in the case of a simple mortgage) by delivery of the property. The question whether attestation should continue to be insisted upon in the case of mortgages does not seem to have been discussed.

2.18 The prohibition of consolidation of mortgages—section 61—underwent a far-reaching change. The right to redeem separately or simultaneously two or more mortgages executed by a mortgagor in favour of the same mortgagee (in the absence of a contract to the contrary) was strengthened. Consolidation at the instance of the mortgagee was not to be allowed, even when the same property was mortgaged more than once.

A new section—Section 63-A—was inserted to deal with improvements to a mortgaged property. Curiously, the case where an improvement is effected by the mortgagee *with the consent of the mortgagor*—express or implied—is not expressly covered in section 63A(2). This could have been achieved by adding, after the words "public authority", the words "or with the consent express or implied of the mortgagor".

2.19 A new section—Section 65A—permitted the mortgagor, while in possession to grant a lease which would be binding on the mortgagee. Certain conditions were imposed as to the kind of leases which the mortgagor can grant. The condition in section 65A (2)(e) as to the duration of the lease (maximum three years) may not be practicable, though

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[1] *Subammah* v. *Narayya* (1917) LL.R. 41 Mad. 259.

of course, these conditions can be varied under section 65A(3). But, then a specific provision in the mortgage deed and careful conveyancing would be required.

By amending section 67 (right to foreclosure and sale), certain restrictions were imposed as to the right of fore-closure in certain kinds of mortgages.

2.20 A new Section—Section 67A—was added to compel a mortgagee who holds more than one mortgage executed by the same mortgagor to bring a suit on all his mortgages in certain cases. The object was to prevent a sale of mortgaged property in execution of a decree for sale in respect of one mortgage, reserving the rights of the same person as mortgagee under other mortgages in his favour, whether prior or subsequent.

As regards the right of the mortgagee to bring a suit for the mortgage money under section 68, certain changes were made, of which the most important was the addition of sub section (2), to compel the mortgagee to exhaust all his available remedies against the mortgaged property before obtaining a money decree unless he abandoned the security.

The mortgagee's power of sale without intervention of the court was also clarified. The amendment allowed the same powers of private sale in the case of English mortgages, whether the mortgage deed conferred a power or not. An amendment was also made to allow the appointment of a receiver in cases where the right to exercise the power of private sale had arisen. This was on the analogy of the English law. These matters were dealt with in sections 69 and 69-A.

2.21 Certain amendments were made concerning marshalling and subrogation. The main rules of the law of subrogation were recognised in the new section.[1]

2.22 As regards charges governed by section 100, it was made clear that the charge-holder has the same rights, as far as the case may be, as a simple mortgage. It was also provided that the charge as such cannot be enforced against property in the hands of a transferee for consideration without notice. Incidentally, the last mentioned amendment is an instance of the influence of equitable doctrines.

2.23 In regard to leases, service of notice to quit by post was provided for, (Section 106). Registration of all leases, from year to year or for any term exceeding one year or reserving a yearly rent was made compulsory. The instrument of lease must be executed by both the parties. In so far as registration was made compulsory of a lease for a term exceeding on year say, even two years—certain practical difficulties may arise. Also, the amendment requiring *both the parties* to sign the lease seems to be contrary to the then existing usage,[2] perhaps even to the current practice is to the contrary.

These, in brief, are the important amendment of 1929.

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1 Sections 91-92.

2 For the old law, see *Syed Alam Sahib* v. *Ananthnayam* (1910) I.L.R. 35 Mad. 95.

CHAPTER 3

SOURCES AND SCHEME OF PROVISIONS

3.1 *Introductory*—Before proceeding to consider the Act section by section, it will be useful to deal briefly with the sources of its provisions and with its general scheme.

3.2 *Previous statute law*—There was not much of statute law in India on the subject of transfer of property, and, in drafting the present Act, the framers do not seem to have drawn much on the pre-existing Central Acts. The Act cannot, therefore, be described as a mere re-enactment of pre-existing statutory provisions. It drew upon English rules. While English terminology and conveyancing practice have left their mark on many of the general provisions—particularly, Chapter 2—and on the specific provisions relating, for example, to mortgages, it is not to be overlooked that the Act has, in the content of many of its provisions, deliberately departed from the English law.

For example, in England, at the time when the Act was drafted, loss arising from destruction by fire of leased immovable property was to be borne by the lessee, while in India, under section 108, it is not so. Similarly, in England, at the time when the Act was enacted, an alien could not hold immovable property except in certain cases. This was also the position in ancient Rome[1]. But it was not the law in India even before the Act[2], and is not the law under section 7. That section, so far as is material, provides that every person competent to contract and entitled to transferable property is competent to transfer such property. It may be stated that an adult alient is competent to contract.

3.2A *English law followed only to a limited extent*—It is apparent from the above that it is only to a limited extent that the Act is based upon the English law of real property[3]. It would, therefore, be correct to say that the general scheme adopted in the Act in regard to the pre-existing law is to lay down settled rules where there was a conflict, to add certain rules where there was obscurity, and to abrogate rules which were found to be unjust or inappropriate, and to regulate the transfer of property in its general principles and, to a limited extent, in its modes of transfer.

3.3 *Equity*—It would be of interest to note that equity supplied the source of material for some of the rules, and was also the guiding spirit in many others. This has both a positive and a negative aspect. It would not be improper to mention that when certain provisions of the Act based on corresponding rules of equity recognise the overriding rights of a bone fide purchaser for value without notice, the ultimate rationale is that an equitable right cannot be a *jus in rem* in an undiluted sense[4]. It

1 Hunter, Introduction to Roman Law, Chapter on Law of Property.
2 *Mayor of Lyons* v. *East India Company*, 1 Moores' Indian Appeals 175.
3 *Taijo Bibi* v. *Bhagwan Prasad*, I.L.R. 16 All. 295.
4 Maitland, quoted by H. G. Hanbury, "Field of Modern Equity" (April 1929) Law Quarterly Review.

is the very key-note of equitable jurisdiction that equity acts *in personam*. Hence, equity will not act against a person who is innocent and has given value.

3.4 It was pointed out by Matland[1] that equity has added to our legal system, together with a number of detached doctrines, "one novel and fertile institution, namely, the trust, and three novel and fertile institutions, namely, specific performance, injunction and judicial administration of estates". Indian statute law has made full use of all these creations of equity. The topics just now mentioned did not find a place in the Act (as originally enacted), but it may be noted that part-performance is a part of its provisions after the amendment of 1929.

3.5 *Sale of wife*—That there were certain antiquated practices which were, fortunately, not given legislative sanction in express terms is worth illustrating. In England, as late as the 18th century, the wife was treated as a chattel. The following extract from a short article[2] by Mr. Courtney Kenny published in the Law Quarterly Review makes interesting reading. After recording some early instances including an aristocratic instance as old as the reign of Edward I, of the transfer of a wife, the writer tells us—

"The great majority of those who took part in wife-selling seem to have had no doubt that what they did was lawful, and even conferred legal rights and exemptions. They were far from realising that their transaction was an utter nullity; still less that it was an actual crime and made them indictable for a conspiracy to bring about an adultery.

> "Lord Mansfield could recall (3 Burross 1438) 'a cause in the Court of Chancery wherein it appeared that a man had formerly' (formally) 'assigned his wife over to another man. And Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners.
>
> "From the beginning of the last quarter of the eighteenth century until nearly the end of the nineteenth one, journalists frequently recorded instances of wife-selling. The last that I have noticed was in 1887 at Sheffield. That town and also Manchester and the metropolitan market of Smithfield and a market of the same name at Birmingham—appear to have been conspicuous for the practice. Had it not penetrated into Wessex too, Hardy would scarcely have ventured to make it the starting point of his 'Mayor of Casterbridge'.
>
> "In no instance of which I have read does the wife appear to have exhibited any reluctance to be alienated. Nor is this surprising; for she might well think that by any average Englishman she would likely to be better treated than by a husband who had so conspicuously shown his disregard for her.
>
> "The prices paid differed very markedly from a pint of beer to a handful of guineas. For there would be corresponding differences in the attractiveness of the ladies themselves; and also in the zeal of their purchasers, for the buyer might be merely a casual stranger or, on the other hand, an attached paramour.

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1 Maitland, quoted by H. G. Hanbury, "Field of Modern Equity" (April 1929) Law Quarterly Review.

2 Kenny "Wife Selling in England" (October 1929) L.Q.R. 57 M.L.J. 182, 183.

"Customary solemnity required that the husband should lead the wife into the market by a halter—usually of rope but sometimes of ribbon—and that the purchaser should take his halter and lead her away by it.—Cf. The Times of March 30, 1796, and July 18, 1797.

"But the strongest proof of the high current estimate of the efficacy of these transactions is the trouble sometimes taken to create formal evidence of them. A striking instance of this is preserved in the British Museum (Additional Mas. 32,084). It is *a bill of sale of a wife, couched* in such full technical form as to suggest that it may have followed some accustomed precedent."

3.6 The Act, though the first of its kind introduced in India, does not entirely create new rights, or impose new obligations. It does not professedly do more than "define and amend" the law relating to the transfer of property by act of the parties. It is not, therefore, exhaustive. However, it is self-contaied,[1—3] in so far as it goes. The Act relates to the transfer of property *inter vivos,* as the Indian Succession Act relates to the devolution of property after death. In the words of the framers, "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".[4]

3.7 *Scheme*—This, then, is a general description of the sources of the provisions of the Act. The scheme of the Act may be briefly described at this stage. After certain preliminary matters dealt with in the first few sections, the Act proceeds to indicate a few general principles relating to the transfer of property by act of parties. These are first dealt with in relation to transfers of all property, whether movable or immovable, and the sections concerned contain important provisions, enacted as matters of legal policy, in regard to what property may be transferred, who are the persons competent to transfer, the mode of transfer, the operation of a transfer and similar matters (sections 5 to 9). The actual content of the transfer is sought to be governed by detailed provision in sections 10 to 34; these principally deal with the conditions on which interests of various classes may be created.

It is in this context that the difficult but unavoidable subject of contingent and vested interests comes up for consideration. While simple and absolute transfers do not create many legal problems, conditional transfer raises the question how far the condition is valid, what happens if the condition is fulfilled and what happens if the condition is not fulfilled. A discussion of the nature and effect of the conditions is a necessary concomitant of the two kinds of interests—vested and contingent—contemplated by the Act, to which reference has been already made above. Since the draftsmen of conveyances are not always precise or exhaustive in their description or anticipation of the possible events, it is desirable that the legislature should give a clear indication as to what happens when a transfer is conditional on the performance of an act but the time for perfor-

1 *Choteshav. Mt. Maklum bi,* A.I.R. 1928 Nag. 223.
2 *Ghasi Ram* v. *Kundan Bai,* A.I.R. 1940 Nag. 163.
3 *Corporation of Cal.* v. *Arun Chandra,* A.I.R. 1934 Cal. 862.
4 Report '1879'.

mance is not specified, or the time is specified but the performance is prevented by fraud. All these matters take up sections 10 to 34. The influence of English legal concepts is clearly seen in the structure and terminology of these sections. Many of the illustrations are drawn from reported English cases. Some of them echo arguments addressed at the bar in Chancery.

3.8 These sections have their counterparts in the Succession Act. Occasionally, implementation of the terms of a transfer creates difficulties where a person professes to transfer property which he has no right to transfer and, at the same time, confers a benefit on the owner of the property. This situation is dealt with in the interesting doctrine of "election" (section 35), which concerns the obligation imposed upon a party—originally by the courts of equity—to choose between two inconsistant or alternative rights[1]. After this provision of considerable theoretical interest involving ethical issues, the Act goes on to enact two sections of a more prosaic character, dealing with apportionment of periodical payments and apportionment of the benefit of an obligation on severance—sections 36 and 37.

3.9 These general principles are intended to apply to all kinds of transfers between living persons by act of parties. In regard to transfers of immovable property, certain principles required to be dealt with in detail. These provisions, contained in section 38 to 53A, and confined to transfers of immovable property, do not, of course, indicate that if a similar problem arose in regard to a transfer of movable property, the legislative approach would have been necessarily different. The need for making detailed provisions as to transfers of immovable property arose not because of any radically different approach as a matter of policy, but because certain kinds of problems either arise more frequently from transfers of immovable property or assume greater practical importance because of the value which immovable property generally possesses. It may also be observed that while the general principles as to transfer of property apply whether the land is agricultural or not, and while the Act (in sections 106 and 107) expressly or impliedly recognises the special position of agricultural tenancies, yet sections 38 to 53A were enacted as part of a scheme that was intended to apply, in general, to agricultural land as well as to other immovable property. Having regard to the tremendous importance of agricultural land in the economy of the country, detailed and elaborate provisions to deal with situations frequently recurring or possessing practical importance seem to have been considered necessary. Perhaps, the sections may not retain their present importance in the coming century.

3.10 After enunciating general principles governing transfer of property, the Act (in sections 54 to 57) deals more particularly with sales of immovable property; in sections 58 to 104 with mortgages of immovable property and charge; and in sections 105 to 117 with leases of immovable property. Sections 118 to 121, not confined to immovable property, deal with exchange. The logic of dealing first with sales needs to comment. Sale represents a transfer of all the rights absolutely. A mortgage, even where expressed in the form of a transfer of ownership, operates only as a security. A lease does not transfer all the interest of the transferor.

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1 *Bapathamma* v. *Shankaranarayan*, A.I.R. 1965 S.C. 241.

Next are dealt with transfers without consideration made voluntarily, that is to say, gifts,—in sections 122 to 129. A peculiar species of non-tangible property, which is described in the Act by the name of actionable claims, comes up for consideration in sections 130 to 137.

3.11 *Differentia*—At this stage it may be useful to mention some of the important concepts which form the basis of distinction in the scheme of the Act. These differentia could be usefully emphasised, since on them depends the answer to the question whether a particular provision applies to a particular transfer or not.

First, we may take up the kind of transfer. In general—the only exception seems to be the case of a charge—the Act is not concerned with the transfer by operation of law or with a transfer operative on death. It is confined to transfer by acts of parties between living persons, as distinct from transfer by operation of law and transfers operative on death.

3.12 *Transfers with or without consideration*—Assuming that the transfer is by an act of parties between living persons, then, for the purposes of certain sections, it still remains important to consider whether the transfer is without consideration or whether it is with consideration. This is particularly so in the case of the transfers mentioned in the sections contained in the latter-half of Chapter 2, dealing with certain general principles applicable to transfers of immovable property. Either the rights of the transferee or the rights of third persons or the rights of a subsequent transferee are, in many cases, made to depend on the presence or absence of consideration.

In this category, for example,[1] fall section 35 (election), section 38 (Transfer by persons authorised only under certain circumstances to transfer), section 39 (Transfer where a third person is entitled to maintenance), section 40 (Burden of obligation imposing restriction on use of land or of obligation annexed to ownership but not amounting to interest or easement), section 41 (Transfer by ostensible owner), section 42 (Transfer by person having authority to revoke former transfer), section 43 (Transfer by unauthorised person who subsequently acquires interest in property transferred), section 45 (Joint transfer for consideration), section 46 (Transfer for consideration by persons having distinct interest), section 49 (Transferee's right under policy), section 53 (Fraudulent transfer) and section 53A (Part-performance). And, of course, the absence of consideration is one of the essential ingredients of gift as defined in section 122.

3.13 *Meaning of expressions "consideration" and "price"*—Since the expression "consideration" is not defined in the Act, though used in several sections, one may presume that it will have the same meaning as in the Indian Contract Act, 1872. Section 4 of the Transfer of Property Act, 1882 in fact, provides that the chapters and sections of the Act "which relate to contracts" shall be taken as part of the Indian Contract Act, 1872. If not on a literal interpretation of this section, at least by analogy, one can refer to the definition in the Indian Contract Act.

The expression "price" used in the definition of sale in section 54—a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised—is also not defined in the Act, and here again

1 The list is not exhaustive.

we may presume that the meaning given to that expression in the Sale of Goods Act can be drawn upon. It may incidentally be noted that section 4 of the Transfer of Property Act, under which the Indian Contract Act, 1872 is attracted, was enacted at a time when the topic of sale of goods also formed a part of the Indian Contract Act.

3.14 *Tangible and intangible—Immovable and movable*—Apart from the distinction[1] based on consideration, in the scheme of the Act, the distinction between tangible and other property is important with reference to sale under section 54. The distinction between immovable and movable property is important for the purposes of several sections of the Act, including the latter half of Chapter 2, which is confined to immovable property, and including the sections dealing with specific modes of transfer such as sale, lease, gift and exchange, where the fact that property is movable property either renders the relevant provision inapplicable, or leads to the application of a rule different from that applicable to immovable property.

3.15 *Hindu and Mohamedan rule*—The expression "tangible" reminds one of certain texts of Hindu law. A mortgage of future property is, perhaps, strictly speaking, contrary to Hindu law[2], as being a mortgage of that which was not "visible" or in existence[3], and it was so thrown out by Westropp, J., in a Bombay case.[3]

According to Colebrooke, in 2 Strange's Hindu Law, 467, 469, a mortgage (bandhaka) is defined to be "or real, substantial, visible (drisha) property, under which the mortgagor remains in possession till the stipulated time arives[4]".

It will be noted that the Act does not maintain the distinction between real and personal property on the technical lines of English law. As to the distinction between tangible and intangible property, it may be that this distinction was suggested by the Roman law classification between *Res Corporales* and *Res incorporales*. In Roman law, the former category comprises lands, clothes, money and all things which can be touched. The latter category included servitudes, contractual rights and things which cannot be touched and exist only as legal conceptions[5].

3.16 *Immovable and movable property*—As to the distinction between immovable property and movable property, it is to be noted that in England this distinction has not much importance so far as the law of property is concerned. The distinction was, however of considerable significance, in Roman law. In that legal system, things were classified as immovables and movables (*res immobiles* and *mobiles*). A similar division exists in modern times in most continental systems of law[6], though there is no uniformity. Immovables in Roman law comprise land and things attached to the land, while movables comprise all other forms of property which do not have essentially a permanent location. Immovable property could not, in Roman

1 Para 3.13.

2 Drishtadi, Drishtabandhak, Wilson's Glossary, 148; cited in *Kedari* v. *Atmaram*, 3 B.H.C.R. (A.C.) 11, 17.

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

4 *Venkatav* v. *Parvati*, 1 M.H.C.R. 460 (464 note).

5 Vaines, Personal Property, page 14.

6 Clarence Smith, "Classification by site" (1963) 26 Modern Law Review 16.

Law, be stolen—a distinction which had great practical importance. In Indian law also, under section 378 of the Indian Penal Code, theft can be committed only in respect of movable property. Again, in Roman law, special rules apply as to the period of acquisition of title by long possession in the case of immovable property.

The distinction has considerable importance in the field of conflict of laws, even as administered in England. We shall revert to this aspect later.

CHAPTER 4

PRELIMINARY MATTERS : SCOPE AND APPLICATION

SECTION 1

4.1. The short title of the Act, as given in section 1, is the Transfer of Property Act. It will be seen from the various sections that the Act does not deal with all property, or, indeed, with any but the topics comprised therein. Nor does it deal with all kinds of transfer, limited as it is only to transfers *inter vivos,* nor in dealing with such transfers does it more than "amend certain parts of the law". In short, the Act merely professes to crystallize some leading principles of the law of Transfer. These are to be supplemented by other laws and by final recourse to the principle of "justice, equity and good conscience[1]".

4.2. The Act, for example, is not exhaustive even on the law of mortgages[2]. Thus, an award can create a mortgage. In a case not covered by the Act, the Court is entitled to apply rules of equity, justice and good conscience which are not inconsistent with the Act. Thus, the holder of a statutory charge is entitled to a decree for sale, even though the charge arises by an act of the legislature and not by "transfer" as defined in section 5. This was the position even when section 100 did not cover statutory charges.

4.3. The preamble to the Act makes it clear that the law codified is by no means exhaustive, and that the Act does not purport to consolidate, but only defines and amends certain parts of the law[3] relating to transfers by act of parties. The expression "by act of parties" is used to distinguish transfer by operation of law, e.g., in case of insolvency, forfeiture or sale in execution of a decree[4]. Even as to transfers by act of parties, it does not profess to be exhaustive[5].

For instance, it does not deal with pledges of tangible movable property and transfer of Government promissory notes[6]. In such cases, the matter is governed partly by statutory law and partly by the rules of justice, equity and good conscience. The Courts will have to act upon the principle of justice, equity and good conscience, in enforcing the contracts in accordance with their tenor[7] where there is no statutory provision.

4.4. *Extent*—Section 1 provides that the Act extends to the whole of India except the territories which, immediately before the 1st November, 1956, were comprised in Part B States or in the States of Bombay, Punjab and Delhi. Thus, the initial extent of the Act was very limited.

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1 Gour.

2 *Hotchand* v. *Krishanchand,* A.I.R. 1924 Sind 23, 24.

3 *Jotindra* v. *Rangpoor Tobacco Co.,* A.I.R. 1974 Cal. 990.

4 *Golak Nath* v. *Mathura Nath,* I.L.R. 20 Cal. 273, 278; *Krishnan* v. *Perachan,* I.L.R 15 Mad 383.

5 *Kalyan Das* v. *Jan Bibi,* A.I.R. 1929 All. 12.

6 *Subbaraya* v. *Kuppuswamy,* (1909) 1 I.C. 535, 538; *Kishori Lal* v. *Krishna Kamini,* (1910) 5 I.C. 500, 502; *Bunsee Dass* v. *Gena Lal,* 14 C.L.J. 530, 536.

7 *Subbaraya* v. *Kuppuswamy,* (1909)1 I.C. 535, 538.

But the same section enacts that this Act or any part thereof may, by notification in the Official Gazette, be extended to the whole or any part of the said territories by the State Government concerned. Notifications have been issued from time to time in exercise of this power by several State Governments. We need not go into details of such notifications, it being unnecessary for the present purpose.

4.5. *Exemption*—Section 1 further provides that any State Government may, from time to time, by notification in the Official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such State Government from all or any of the following provisions, namely :

Sections 54, paragraphs 2 and 3, 59, 107 and 123.

The sections listed relate to the formalities requisite for effecting a sale, mortgage, lease and gifts respectively.

4.6. *Territories excluded from Registration Act*—Finally, the last paragraph of section 1 provides that notwithstanding anything in the foregoing part of this section, section 54, paragraphs 2 and 3 and sections 59, 107 and 123 shall not extend or be extended to district or tract of country for the time being excluded from the operation of the Indian Registration Act (1908), under the power conferred by the first section of that Act or otherwise.

4.7. *Other sections relating to exemption*—There are other sections in the Act which have the effect of exempting or extending the operation of certain provisions. For example, section 69 empowers the State Government to specify the classes of persons whose participation in an English mortgage excludes the operation of certain provisions mentioned therein. Section 57(e) further empowers the State Government to extend the jurisdiction of courts for the purposes of that section. Section 104 empowers the High Court to make rules to carry out the provisions of this Act relating to mortgages or charges on immovable property. That the legislature can empower State Governments to remove a district from the jurisdiction of the High Court or extend the operation of the law to any district is now authoritatively ruled by the Privy Council[1]. Section 2(d) also enacts that "nothing in the second chapter of this Act shall be deemed to affect any rule of Muhammadan Law".

In relation to gifts governed by Muhammadan law, a similar provision is contained in the Chapter on gifts—section 129.

4.8. *Power to extend*—Regarding the power of the State Government to extend the provisions of certain sections to any area within their jurisdiction, it has been held that this power does not entail the abrogation of the general scheme of the Act, to which they might be subject. For instance, under the general provisions of section 129 all rules of Muhammadan Law relating to gifts remain unaffected by any of the provisions of Chapter 7,—which includes section 123. Consequently, when the Government of Burma extended the provisions of that section to the district of Pegu, it could not, by such extension, rescind the general exception in favour of

1. *Emperor* v. *Burah*, L.L.R. 4 Cal. 180 (P.C.).

Muhammadan gifts which would still be complete if accompanied by mere delivery without being compulsorily registrable under that section[1].

4.9. We shall deal later with the position regarding Government Grants and Rent Acts[2].

1 *Mami* v. *Kallander*, I.L.R. 5 Rang. 5 (P.C.).
2 Chapter 4, *infra*.

CHAPTER 5

SCOPE AND APPLICATION AND RULE OF DAMDUPAT

SECTION 2 AND PROPOSED SECTION 2A

5.1. *Section* 2(*a*)—The first part of section 2 deals with enactments mentioned in the schedule which are repealed. It does not have much practical importance. In the second part of the section, there is a saving not only in respect of certain enactments, but also in respect of certain incidents, rights and liabilities. Under clause (a), the provisions of any enactment not hereby expressly repealed are saved.

5.2. *Section* 2(*b*)—Under clause (b), the section saves 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. In practice, this clause assumes the greatest importance. In the very nature of things, its scope cannot be exhaustively indicated. However, by way of illustration, it may be stated that the right to partition of property is definitely saved by this clause. In addition, terms which can be imposed by a partition, being the terms of a "constitution of property", would also be saved by this clause.

In its comment on this clause, the Select Committee observed[1] :—

> "We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option which the Bill, as introduced, expressly preserved, there must be many other incidents of native contracts with which it is desirable not to interfere."

5.3. *Section* 2(*c*)—Clause (c) of section 2 saves rights and liabilities arising out of legal relations constituted before the Act came into force and reliefs in respect of any such rights or liabilities. This may have been considered necessary either because section 6 of the General Clauses Act, 1868, which was in force at the relevant time, was not considered comprehensive enough, or because the Transfer of Property Act was taken as affecting or abrogating not merely statutory rights but also others, for which the General Clauses Act could not have proved sufficient, the case not being one of "repeal" in regard to the sources of such rights.

5.4. *Rights under rules of Hindu Law*—In this connection, it may be of interest to note that the Hindu and Muslim law had a fairly well developed system of rules regulating the creation of mortgages, liens and pledges. Any rights which would have been created under such mortgages and pledges that were executed prior to the Act were not intended to be affected. Since there were certain points of difference between the present Act and Hindu and Muslim law as it was administered prior to the Act, such a saving was obviously necessary. In Hindu law, for example, a mortgagor who had once mortgaged the property could not mortgage it to another, since such a conduct was regarded as criminal and worthy of punishment. Muslim law did not so penalise the mortgagor, but the purchaser after the mortgage could be compelled to redeem the property.

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1 Report of the Select Committee (1878), paragraph 3.

5.5. Prior to the Regulations of 1798, in Bengal and the United Provinces, and for a long time subsequently in the other provinces, the law administered was according to the personal laws of the Hindus and Muslims. These laws recognised no distinction between mortgages of land and pledges of movable property[1]. In both, the pledge might be for a period specified or not, and either usufructuary or simple possession was considered essential to its validity[2], but it was by no means the invariable rule. When no date was fixed by the parties for redemption, the mortgagor could redeem it at any distance of time from the mortgagee, who acquired no title as against him by prescription or possession, however long. Under the Muslim law, taking of interest was forbidden, but the property pledged was always presumed to be, in value, equivalent to the debt due[3].

5.6. *Features of Hindu & Muslim mortgages*—The salient features of the Hindu and Mohamedan mortgages have been thus described[4] by Turner C.J. :—

> "The form of Hindu mortgage under the names of Katkabala, Muddatakriyam, and Gahanlahan obtains commonly throughout British India, though its incidents may vary. It is generally, though not universally, accompanied by the delivery of possession to the mortgagee with permission to enjoy the usufruct either in lieu or part-payment of the interest. Although there is no precise form of words necessary to constitute such a mortgage, it ordinarily differs from the bye-ul-wufa of the Mahomedans in this, that, in the Hindu form there is a preliminary mortgage with a condition for future sale, while in the Mahomedan form there is at once no absolute sale with a counter-agreement for re-sale which may be contained in the original sale-deed, or in a separate contemporaneous instrument. The origin and nature of this form of mortgage among "the Mohamedans is explained in Baillie's Mahomedan Law of Sale[5].
>
> "It was introduced or adopted in order to defeat the precept of the Mahomedan Law prohibiting usury. The lender, by stipulating for the usufruct, or for the payment of a price on the re-sale higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the law."

The abrogation of all these rules by the Act was not a case of repeal of an "enactment". Hence the need for a widely-worded savings.

5.7. *Section 2(d)*—This takes us to section 2, clause (d), which saves transfers by operation of law or transfers by or in execution of a decree or order of a court of competent jurisdiction,—except as provided by section 57 and chapter 4. Section 57 relates to sale by a Court. Chapter 4 relates to mortgages and charges. The intention is that mortgages and charges, even if created by operation of law, would be governed by the Act.

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1 Cole, Dig., Vol. I, Ch. 3 Tit. 'Pledge';
Manu, Ch. VII, SS. 143-145;
Macnaghten's Mohamedan Law, page 74, all cited by Gour.

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

3 Macnagthen's Mahomedan Law, page 74.

4 *Ramasami* v. *Samiyappanayakan*, I.L.R. 4 Mad. 179, 183.

5 Baillie's Mahomedan Law of Sale, page 303.

5.8. *Section 2, last paragraph*—The last paragraph of section 2 provides that nothing in the second chapter of the Act shall be deemed to affect any rule of Mohamedan Law. There was also a saving for Hindus and Budhists, which has not been repealed. The saving regarding Hindus, it is stated, was inserted at the instance of Maharaja Jyotiandra Mohan Tagore[1].

5.9. *Governments grants*—This disposes of the savings expressly provided for. Let us now turn to a few other matters. It is to be noted that though there is no express savings in the Act as regards grants made by the Government, such grants are subject to a special law, namely, the Government Grants Act, 1895, which—to state the position in broad terms empowers the Government to make grants of property and to impose conditions which may not be otherwise valid under the Transfer of Property Act. In other words, in making such a grant, the Government has a wider discretion than an ordinary citizen and can burden the grant with conditions on the non-fulfilment of which the grant may be forfeited.

5.10. *Gist of section* 3, *Act of* 1895—By the Government Grants Act, 1895, section 3, grants and gifts by or on behalf of the Government are subject to special rules. The Bill was originally framed as an amendment of the Transfer of Property Act. But since its object was to also over-ride limitations supposed to be imposed otherwise than by that Act, it was considered desirable to introduce it as a separate self-contained Bill. Section 3, in particular, provides that all provisions, restrictions, conditions and limitations whatever contained in any such grant or transfer (grants and gifts made by or on behalf of the Government), shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the legislature to the contrary notwithstanding. The Act was expressly made retrospective.

The effect of the Act—to give a few important illustrations—is to empower the Government to create estates unknown to the Hindu law[2] or the Muslim law[3].

5.10A. *Construction of* 1895 *Act*—General rules of construction will, of course, apply. Thus, the question whether a grant is permanent or personal must, in a great measure, depend upon its terms. But it would appear that in the construction of terms of a Government grant, recourse can be had to the surrounding circumstances and the object for which the grant was made[4].

5.11. A restriction or limitation, if clearly intended to be for a special purpose, would nevertheless be enforceable by the Government, though it could not be availed of by a third party.

5.12. So, where the grant was resumable if required for government purposes, and the Government had reserved ownership therein, the Court held[5] that the propriety of resumption could not be questioned, as it fell within the terms of the grant. By a sanad of 1862, the Government granted to one A in consideration of his personal military services, a village revenue—free "to remain in the family of the grantee—on his demise subject to assessment,"

1 Gour, Commentary on section 2.
2 *Sheo Singh* v. *Raghubansh Kunwar*, I.L.R. 23 All. 634, 653.
3 *Hapi Mohd.* v. *Egambara*, (1907) 2 Mad. Law Times 55.
4 *Krishna Rao* v. *Rangarao*, 4 Bom. H. C. Reports App. Cases 1, 24.
5 *Sapurlo* v. *Secretary of State*, I.L.R. 36 Bom. 438.

and the question turned upon what was intended to be conveyed by term "family", and the Court held that it must be taken to be employed in its restricted sense, as meaning "the wife and children" of the grantee, and not in the more extended sense of a household comprising all the blood relations of the man[1].

5.13. It would appear that in England Crown[2] grants must be in writing. There is no such restriction in India, since no form is prescribed by the Government Grants Act, 1895. The Transfer of Property Act, does not apply to Government grants—which is the reason why in a Calcutta case[3] it was held that a grant can be made even by a letter from the Agent to the Governor General to the grantee.

5.14. So, again, in the absence of any procedure prescribed by law for the resumption of government grants, it is manifestly proper and convenient that a notice should be given, even though it be not strictly necessary[4].

5.15. *Equitable principles and Government Grants.*—This does not mean that equitable principles generally governing the transfer of property—even those codified in the Transfer of Property Act—would not apply to such grants. When there is nothing in the Government Grants Act or in the grant made thereunder to the contrary, such principles can appropriately be applied. Thus, where a man spends money on the improvement of land granted by the Government under an expectation of an interest therein created or encouraged by the grantors, he would be no worse off than if his grantors had not been the Government. Moreover, as regards situations governed by statute, sometimes particular Act itself may provide that it applies to the Government[5].

5.16. *Rent Acts*—Another important modification of the rights which would otherwise flow under the Act should be noticed at this stage. With the emergency of the problem of scarcity of accommodation, it became necessary after the first world war to pass legislation for the control of rents and eviction of tenants. While such legislation does not, in terms, repeal the Transfer of Property Act, the effect of the material provisions is to impose restrictions on the right of the landlord in respect of a tenancy governed by the Act, both as regards the quantum of the rent and as regards eviction of the tenant. Consequently, the legislature also considered it necessary to make detailed provisions as to the enforcement of the statutory rights so created in favour of the tenant and other matters.

5.17. The direct impact of such legislation is to modify the provisions of the Transfer of Property Act relating to leases. But, since what has come to be known as a "statutory tenancy" comes into being under the Act for the control of rents and eviction, the question how far such statutory tenancy is itself property would naturally arise[6]. In this sense, the juristic importance of such legislation transcends the narrow sphere of leases and could embrace the whole of the law of property.

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1 *Jaimal Singh* v. *Gurmukh Singh,* (1910) P.R. No. 20.

2 Coke, 3 Inst. 71, cited by Gour.

3 *Hassan Ali* v. *Chutterput.* (1892) I.L.R. 23 Cal. 742.

4 *Thomas* v. *Sherwood,* L.R. 9 P.C. 142, 148.

5 *Municipal Corporation* v. *Secretary of State,* I.L.R. 29 Bom. 588. *Secretary of State* v. *Dattatraya,* I.L.R. 26 Bom. 271.

6 See Chapter 1, *supra.*

While the Transfer of Property Act is the general law, the Rent Control Act is a special and local enactment overriding the provisions of the general law so far as it is in conflict therewith. A lease may be terminated under section 106 read with section 111 of the Transfer of Property Act, but the lessee is still not liable to ejectment unless the conditions laid down in the Rent Control Act are satisfied.

5.17A. *Damdupat*—There remains to be discussed yet another matter pertaining to the scope of the Act. It relates to a matter arising out of Hindu law. It is not very clear whether the rule of Hindu law prohibiting a creditor from recovering, at one and the same time, as interest, an amount more than the principal—the rule popularly known as Damdupat—is still operative in respect of mortgages. The matter is not governed by the Civil Procedure Code in a direct manner, since that Code does not deal with the substantive law of interest for the period prior to the institution of the suit. The Interest Act, 1839 also gives no specific guidance on the subject. It is, therefore, a matter of investigation whether any such rule exists.

5.18. Section 4 of the Transfer of Property Act provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Indian Contract Act. From this section, it would appear that the rule would not apply to mortgages. In its essence, a mortgage debt, or for that matter, any debt, is a pecuniary obligation arising under a contract, express or implied,—leaving aside debts arising by operation of law. Under the Hindu law of contract, the rule did apply to debts under mortgages and pledges and other loans.

5.19. *Damdupat—Rationale*—In a Bombay case[1], West J. had occasion to consider the rationale of the rule. The precise question related to its applicability to proceedings in execution. West J. held that there is no authority for limiting the amount recoverable in execution of a decree by any such rule. The following observations explain the rationale of the rule :—

> "As regards purely private transactions, the law for the protection of the weaker party controls his freedom of contract in the way to which we have referred, or, at least, refuses to enforce the debtor's engagement by means of a duty imposed on the Courts of exercising their powers of coercion to give effect to what it presumes to be an extortionate or unduly rigorous bargain. But the same reason, it is obvious, does not *apply to the execution of a decree of a Civil Court.* In making such a decree the Judge is not liable, as the debtor is supposed to be, to undue pressure on the part of the creditor."

5.20. On the question with which we are immediately concerned, the High Court of Bombay has taken the view that the rule applies as much to secured debts as to non-secured debts. Thus, in a Bombay case[2], while holding that the rule applies in all cases as between the Hindu debtors and creditors in respect of simple debts as also *in respect of mortgage debts,* it was also held that it does not apply where the mortgagee has been placed in possession and is accountable for profits received by him as against the interest due. But, where those profits are, by the terms of the mortgage, received for *only a portion of the mortgage debt,* the general rule of damdupat will govern the mortgage accounts.

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1 *Balkrishna* v. *Gopal,* (1875) I.L.R. 1 Bom. 72, 73.

2 *Sundarabai* v. *Jayavant Bhikaji Nadgowda,* (1899) I.L.R. 24 Bom. 114, 119 (Parsons & Ranade, JJ.).

5.21. In a Calcutta case[1], it was held that the rule applies until the matter travels from the region of contract to that of decree. On this point, an earlier judgment of Woodroffe J.[2] was followed.

In Madras[3], it has been held that the rule does not apply to mortgages governed by the Transfer of Property Act. The judgment does not discuss the position taken in Bombay. There seems to be some disparity between the Bombay view and the Madras view.

5.22. *Recommendation to abrogate the rule of Damdupat in relation to mortgages governed by the Act*—Having regard to the fact that the true position is not evident from the Transfer of Property Act, it is, in our view, desirable to make a specific provision. It could be to the effect that the Act shall not affect the operation of the rule of Hindu law known as Damdupat in regard to areas and persons to which or to whom that rule applies.

Or, in the alternative, the reverse provision should be made, namely, *the rule of Hindu law known as the rule of Damdupat shall not apply to mortgages to which the Act applies.* We prefer the latter alternative, for the sake of uniformity, and also having regard to the fact that cases where, as a matter of policy, interest should be restricted are, in modern times, amply taken care of by legislation for the relief of indebtedness or the Usurious Loans Act or the Money-lenders Act. We recommend that a suitable amendment implementing this approach should be incorporated as section 2A, somewhat on the following lines :—

"2A. The rule of Hindu law known as the rule of Damdupat shall not apply to mortgages of immovable property to which this Act applies."

As to money-lenders, we give below an illustrative list :—

	Act or Regulation No.	Year
1. Money Lenders Act (Assam)	4	1934
2. Money-Lenders Act (Bihar)	3	1938
3. Money-Lenders Act (Bombay)	31	1947
4. Money Lenders Act (Kerala)	35	1958
5. Money Lenders Act (Madhya Pradesh)	13	1934
6. Money Lenders Act (Madras)	26	1957
7. Mones Lenders Act (Mysore)	12	1939
8. Money Lenders Act (Orissa)	3	1939

1 *Nanda Lal Roy* v. *Dhirendra Nath,* (1913) I.L.R. 40 Cal. 710, I.L.R. 24 Bom. 114, 119 (Parsons & Ranade, JJ.).

2 *In the matter of Hari Lal Mullick* (1906) I.L.R. 33 Calcutta 1269, 1276.

3 ***Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu,* (1903) I.L.R. 26 Mad. 662.**

CHAPTER 6

DEFINITION OF IMMOVABLE PROPERTY

SECTION 3

6.1. *Introductory*—Section 3 contains a definition of the terms "immovable property", "instrument", "attested", "registered", "attached to the earth", "actionable claim" and "notice". The definitions should have been arranged in alphabetical order, which is not the case at present.

6.2. *Immovable property*—Section 3 begins with the meaning of "immovable property". It does not define "immovable property", but only interprets and limits it by excluding from the definition occurring in the General Clauses Act, certain things, namely, "standing timber, growing crops or grass" which would otherwise be included in the category[1].

6.3. *Real property*—The term "immovable property" does not occur in English internal law, where the distinction is between real property and personal property. This distinction is not synonymous with immovable and movable property. It is based upon no juristic conception of property, but is associated with an early form of action called *actio realis*[1]. The terms "real" and "personal" were originally applied to actions in which a decree for restitution might or might not issue against the thing in suit (*in rem*).

A successful party in a real action obtained the King's writ commanding the Sheriff to put him in possession of the identical holding in respect of which the action had been brought, whilst personal actions were brought to enforce an obligation imposed on a man personally to *make* satisfaction for a breach of contract or a wrong, in short, to pay damages[2]. And, since specific recovery could only be obtained in respect of immovable property, the other suits being only relieved in damages, the distinction between real property and personal property began to be made according to the appropriate reliefs granted in each case. Now, as freeholds were the only things specifically recoverable at common law, the term "realty" came to be used as denoting the freehold.

Thus, a lease for years, however long, was not regarded as real property at all; and even now it is classed as a chattel real. But in India, a reversioner who has a lease in a property, for however long a period it may be, has an interest which arises out of land and so it is immovable property[3].

6.3A. *Scientific position*—The law, unlike engineering, deals with rights, and not with things[4]. In making a classification of property into movable and immovable, the legal system really classifies *rights* for the particular purpose in hand. It may be noted that the law of one of the early European principalities—the Custom of Artois—considered even houses to be movable, on the ground that an enemy might pull them down[5]. It is also to be noted

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1. Gour.
2 Williams, Real Property (18th Ed.), pages 24, 25.
3 *Matilal Raga* v. *Ishwar Radha Damodar,* A.I.R. 1936 Cal. 727, 736.
4 Cook, Logical and Legal basis of Conflict of Laws, page 301.
5 Clarence Smith, "Classification by Site on Conflict of Laws" (1963) 26 Modern Law Review, pages 16, 22.

that even now, on another man's land, the house is regarded as moveable property[1].

6.4. *Subject-matter of ownership classified as movable or immovable not as realty or personalty*—The categories of movable and immovable property could, thus, possibly differ from country to country. Thus, a semi-permanent pavillion is classified as movable property in several American States[2].

As a matter of internal law, even common law jurisdictions cannot agree whether some kinds of property are movable or immovable[3]. For example, take the case of the right of a mortgagee. England[4] and *Ontaio*[5] consider it to be immovable. New Zealand[6] and Australia[7] regard it as movable.

It will be of interest to note that even as late as 1834, the question arose whether an equitable mortgage of land in Antiqua included the slaves on the land as "affixed to the free-hold" by a local Act of 1692 or whether slaves were personalty within the reputed ownership of the mortgagor and were available to the unsecured creditor[8]. Again, it seems obvious at first sight that a building erected for the purposes of an exhibition, which cannot be removed without losing its identity, must be in the same category as normal buildings, yet in some of the American State[9] and in Germany[10] its owner is deemed to hold an interest in a movable.

6.5. Tangible physical objects may be classified[11] as either 'land' or 'chattels', and as such, 'immovable' or 'movable'. Like all classificatory terms, these develop ambiguities in use, and whether some physical object is to be regarded as part of the 'land' or as a 'chattel' must always be decided in the light of the purpose of the classification. The problem is not merely one of physics : the classification is being made by lawyers for legal purposes,—that is, in order to reach useful decisions in particular types of cases. One type of case is concerned with the law of 'fixtures' (between land and chattels).

The decision involves[12] in doubtful cases a problem somewhat like that of deciding whether when one sells an automobile, the tyres which, of course are easily detachable, are a 'part' of the automobile. Much depends upon the customary use of terms : in the 1500's it seems that window glass in a house was regarded as not part of the house, and so not part of the 'land'.

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1 Clarence Smith. "Classification by Site on Conflict of Laws" (1963) 26 Modern Law Rev. 16, 22.

2 Cook, Logical & Legal Basis of Conflict of Laws, page 306.

3 Cheshire, Private International Law (1970) page 269.

4 *Re Hoyles* (1911) 1 Ch. 179.

5 *Re Ritchie,* (1942) 3 D.L.R. 330 (Ontario).

6 *Re Q'Neill* (1922) N.Z.L.R. 468.

7 *Haque* v. *Haque* (No. 2) (1965), 114 C.L.R.

8 *Ex pare Rucker,* (1834) 1 Mont & Ayr 480 referred to by Clarance Smith, "Classified by site in the conflict of laws' (1963) 26 (Modern law review 16, footnote 2.

9 Cook, Logical basis of Conflict of Laws, page 306 at seq.

10 Wolff, Private International Law, p. 502.

11 Cook "Immovable Property and the Law of Situs", 52 Harvard Law Rev. 1246, 1251.

12 Bingham, "Some Suggestions Concerning the Law of Fixtures" (1907) 7 Col. L. Rev. 1.

Later, as the use of window glasses in houses became customary, the meaning of the word 'house' came to include the glass in the windows. No one of course doubts that when bricks, shingles, and nails for example, have been used in building an ordinary dwelling house, they have become part of the 'land', even though they may easily be physically detached. At the other extreme, we all recognise that cattle horses, threshing machines, etc., are 'chattels' or 'movables' and are not to be regarded as 'improvements' to the 'land'. Between these two classes lies a third which includes objects which are not so easily classified. That is to say, the members of this class are not, according to prevailing usage, always regarded as part of the 'land', and yet may be, and often are, thought of as so used in connection with the 'land' that they are treated as part of it for many purposes. In spite of this, they are, to quote Professor Bingham[1], "not actually merged into the land or some 'improvement' on it in such a way as to prohibit regarding them as separate objects of property." Under this group Bingham puts the key to a house.

6.6. *Definition in General Clauses Act and other Acts*—So much by way of introduction. Let us now compare a few Indian precedents. "Immovable property" is thus defined in the General Clauses Act—

> "Immoveable property shall include land, benefits to arise out of land, and things attached to the earth[2]."

This applies to the Transfer of Property Act also. The expression has been, however, used in varying senses in the different Acts of the Legislature. In the Indian Trustees Act[3], for example, it was defined thus : "Immovable property shall extend to and include messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein." In the Registration Act[4], "Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise "out of land and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass." Similar definitions occur in other Acts, where, however, the term has been given more or less different meanings. Thus, within the meaning of the Limitation Act[5], standing crops are immovable property; growing crops and trees are held not to be moveable property[6] within the meaning also of the Small Causes Courts Act[7], and they are likewise treated as immovable property within the meaning of the Civil Procedure Code and the Provincial Small Causes Courts Act, 1887[8]. All these are, however, expressly declared to be moveable property by this clause[9].

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1 Bingham, "Some suggestions concerning the law of fixtures" (1907) 7 Columbia Law Rev. 1.

2 S. 3(25), General clauses Act, 1897. The same definitino occurs in section 2, Act I of 1868.

2a Section 3(26) and section 4, General Clauses Act, 1897.

3 Section 2, Act 28 of 1866, Trustees Act, 1866 (28 of 1866) Repeal.

4 Act 16 of 1908, section 2(6).

5 *Pandah Gazi* v. *Jennuddi*, I.L.R. 4 Cal. 665;
Nattu Miah v. *Nandrani*, 8 B.L.R. 509;
Tafail Ahmad v. *Banee Madhub Mukerjee*, 24 W.R. 394.

6 *Gopal Chandra* v. *Ramjan*, 5 B.L.R. 194;
In re Hormasji Irani, I.L.R. 13 Bom. 87.

7 Act 11 of 1865.

8 *Madaya* v. *Venkata*, I.L.R. 11 Mad. 193;
Cheda Lal v. *Mulchand*, I.L.R. 14 All. 30.

9 *Raj Chandra Bose* v. *Dharmo Chandra Bose*, 8 B.L.R. 510.

6.7. *Calcutta case—Letters Patent*—In a calcutta case[1], the combined effect of the two Acts was considered for the purpose of the Letters Patent. According to the General Clauses Act, "immovable property" includes lands, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth, and "movable property" means property of every description except immovable property.

As land or immovable property has not been defined in the Letters Patent, one has, in order to find out whether there has been a transfer of an interest in immovable property, to refer to the Transfer of Property Act. If the definition of "immovable property" in the Transfer of Property Act had been self-sufficient, no other piece of legislation need have been examined. Looking at section 4 of the General Clauses Act, one finds that the definition of "immovable property" in section 3 of that Act will apply to the Transfer of Property Act, which is a Central Act made after 3-1-1868, unless there is anything repugnant in the subject or context.

The following observations then follow in the judgment :—

> "*The effect therefore is that by virtue of the combined operation of section* 2 *of the Transfer of Property Act and sections* 3 *and* 4 *of the General Clauses Act,* 2 *"immovable property" includes land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth, but does not include standing timber, growing crops or grass*[2]. So far as the expression "attached to the earth" is concerned, it occurs only in two sections of the Transfer of Property Act, namely, sections 8 and 108, clause (h). But as a result of the above amalgamation the meaning of the expression "attached to the earth" given in section 3 of the Transfer of Property Act is attracted to all immovable property referred to in the said Act. "Immovable property", therefore, for the purpose of the Transfer of Property Act includes things attached to the earth or things permanently fastened to anything attached to the earth within the meaning of the expression "attached to the earth" given in the Transfer of Property Act. "So interpreted, the definition of immovable property for the purpose of the Transfer of Property Act becomes almost the same as that given in the Registration Act except that the incidents such as "hereditary allowances, rights to ways, lights, ferries, fisheries" expressly mentioned in the Registration Act are absent in the Transfer of Property Act. But these incidents are probably also brought in by virtue of section 8 of the Transfer of Property Act."

6.8. *Incorporeal rights*—"Immovable property" as defined is not confined to tangible property. It may be generally premised that the term includes all that would be real property according to English Law, and possibly more[3]; toda giras hak[4], being a right to receive an annual payment which attaches to the inamdar into whose hands the village may pass, is an "interest

1 *Jnan Chand v. Jugal Kishore,* A.I.R. 1960 Cal. 331, 334, 335 (G.K. Mitter J.).

2 The portion relating to combined effect is underlined for emphasis.

3 *Futtehsangji* v. *Desai.* 13 B.L.R. 254 (P.C.); *overruling Fattehsangji* v. *Desai,* 4 B.H.C.R. 189.

4 "A right of levying a cash composition in lieu of other claims, or of plunder, "*The Collector* v. *Pestonjee,* (1855) B.S.D.A. 291; *Sumbhoolall* v. The Collector, 8 M.I.A. 1, cited in Gour.

inimmovable property", and would fall into that category. Similarly, haq-i-chaharum or liability to pay customary dues is an incident attaching to land and may be enforced against the vendee, unless it is limited to a right available only as against the vendor[2]. Varshasans or annual allowances, charged on immovable property, are also included within the definition of immovable property[3].

6.9. *Hindu law*—Certain rights are classified as immovable property in Hindu law. A right to officiate as priest at the funeral ceremonies of Hindus is in the nature of immovable property[4-5]. But an allowance, payable periodically, which is not incidental to a hereditary office, is not, unless it is a charge on such property. A hereditary office is regarded as by itself immovable property[6-7], and so is a right to worship an idol[8]. A claim to maintenance is a familiar example of this species of property[9]. A nibanoha or corody involves generally the idea of a connection with immovable property and ranks with it[10]. The chance of acquiring a right to light and air is both incapable of valuation and is wholly outside the term[11].

6.9A. *Share*—A share in a registered company is by law declared to be moveable property[12]. And so, under the Hindu law, Government Promissory Notes are classed as movable property[13].

6.10. *Standing timber*—The Act excludes standing timber from immovable property. The definition is professedly not one of general application, but is limited only to this Act, from which it follows that the term "standing timber" is not to be classed as movable property for all purposes. It is so regarded under the Provincial Small Causes Courts Act[14-15] and the Indian Registration Act[16], but it is treated as immovable property for the pur-

1 *Dhandai Bibi* v. *Abdur Rehman,* I.L.R. 23 All. 20 210; following *Heera Ram* v. *Raja Narain Singh* Agra, (F.B.) 63.

2 *Futtehsangji* v. *Desai,* 13 B.L.R. 254 (P.C.); overruling *Fatteshangji* v. *Desai,* 4 B.H.C.R. 189.

3 *Keshav* v. *Vinayak,* I.L.R. 23 Bom. 25.

4-5 *Krishnabhat* v. *Napabhat,* 6 B.H.C.R. 137 *Balvantrav* v. *Pushotam,* 9 B.H.C.R. 99; *The Collector of Thana* v. *Krishnanath,* 5 B. 322; *Appanna* v. *Nagia,* I.L.R. 6 Bom. 542; *Futteshsangji,* v. *Desai,* 13 B.L.R. 254, (P.C.) *Raghoo* v. *Kassy,* I.L.R. 10 Cal. 73; *Sukhlal* v. *Bishambhar,* I.L.R. 39 All. 196.

6 *The Government of Bombay* v. *Goswami,* 9 B.H.C.R. 222, 225; following *Bharatsangji* v. *Navanidharaya,* 1 B.H.C.R. 186; *Fattesangji* v. *Desai,* 4 B.H.C.R. 189; *Raiji* v. *Desai,* 4 B.H.C.R. 56.

7 *Government of Bombay* x. *Desai,* 9 B.H.C.R. 228; (P.C.); *Vishnu* v. *Yeshwantrao* (1895) B.P.J. 453.

8 *Eshan Chander* v. *Manmohini* I.L.R. 4 Cal. 683; following in *Jetikar* v. *Mukunda Bastia,* I.L.R. 39 Cal. 227, 230.

9 *Vishnu Ganesh Joshi* v. *Yeshvantrao,* I.L.R. 21, Bom. 387.

10 *Government of Bombay* v. *Gosvami,* 9 B.H.C.R. 222, 226; *Krishnaji* v. *Gajanan,* 11 Bom. L.R. 352; *The Government of Bombay* v. *Kalianrai,* 14 M.I.A. 551.

11 *Sultan Nawaz Jung* v. *Rustamji,* I.L.R. 20 Bom. 704; *Munappa* v. *Subramania,* I.L.R. 18 Mad. 437.

12 Companies Act.

13 *Doorga* v. *Pooreen,* 5 W.R. 141.

14 Gour.

15 *Umed Ram* v. *Daulat Ram,* I.L.R. 5 All. 564, 566 (F.B.).

16 *Ram Ghulam* v. *Manohar Das,* (1887) A.W.N. 50, *Mangal Sen* v. *Naoli,* O.I.C 478.

pose of the Limitation Act[1] and the Code of Civil Procedure, and would be so regarded under the General Clauses Act[2-3].

6.11. *Growing crops*—Under the English law, where the owner of the soil sells what is growing on land, whether natural produce or fructus industriales, (the fruit of human industry), on the terms that he is to sever them from the land and deliver them to the purchaser, the latter acquires no interest in the soil[4]. The section in our Act would yield the same result.

But the Indian law makes no distinction between what are known as "emblements" in English law, i.e., crops which are the annual results of agricultural labour, and other crops, i.e., grass and clover which do not repay within the year the labour by which they are produced[5]. Consequently, "growing crops" would, in India, include not only the seeds or products of the harvest in corn, but also all vegetable growths, whether in the form of fruit, leaf, bark or roots, which have no existence apart from their produce, as distinguished from trees and shrubs which have a recognised existence apart from any produce which they may bear. As such, pan creepers would be included in the term, though the creepers are uprooted not annually but at the end of the third year[6].

6.12. *Fixtures*—Since the expression "attached to the earth" is an important element of the concept of immovable property, it may be considered in some detail. The position as to fixtures has been discussed at some length in a Madras case[7]. It was pointed out that 'immovable property is defined at least in three Indian enactments,—the General Clauses Act, the Registration Act and the Transfer of Property Act. The first two are not of much assistance, for they merely say that 'immovable property includes things attached to the earth or permanently fastened to anything attached to earth. They give no guidance as to what is meant by 'attached' or 'permanently fastened'. The Transfer of Property Act, by section 3, describes what is meant by 'attached to the earth', namely, (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. Broadly speaking, the degree, manner, extent and strength of attachment of the chattel to the earth or building, are the main features to be regarded. The attachment should be such as to partake of the character of the attachment of the trees or shrubs rooted to the earth, or walls or buildings inbedded in that sense, the further test is whether, such an attachment is for the permanent beneficial enjoyment of the immovable property to which it is attached. Even here, although there may be an attachment to the earth, as contemplated by the first two aspects in the description of 'attached', still, if the attachment is a necessary requisite and that is the manner by which the movable property is or can be enjoyed or worked, it may be open to question whether because of its fixture, though

1 (a) *Sakharam* v. *Vishram*, I.L.R. 19 Bom. 207; (b) *Madayya* v. *Venkata*, I.L.R. 11 Mad. 198; (c) *Jaimal Singh* v. *Ladha*, (1884) P.R. No. 112.

2 Section 3(25). General Clauses Act, 1897.

3 (a) *Jaimal Singh* v. *Ladha*, (1884) P.R. No. 112; (b) *Abdullah* v. *Ashraf Ali*, 7 C.L.J. 152, 166.

4 *Washbourne* v. *Burrows* (1847) 10 L.J. Ex. 266; 1 Exch. 107, cited in Gour.

5 Gour.

6 *Atmaram* v. *Doma*, 11 C.P.L.R. 87, cited by Gour.

7 *Perumal* v. *Ramaswami*, A.I.R. 1969 Mad. 346.

permanently, in the qualified sense, it can *ipso facto or ipso jure* be regarded as immoveable property[1].

6.13. *Incidental Fixtures*—Besides the erections imbedded in the earth, the clause would not exclude other fixtures such as machinery and the building accessory thereto, being erected to cover and protect it[2]. With regard to buildings and trade-fixtures, the general rule is that in respect of whatever has been annexed to the land, for the purpose of its better enjoyment, the intention must clearly be presumed to be to annex the erection to the property in the land, but the nature of the annexation may be such as to show that the intention was to annex it only temporarily, in which case, it may be detached and removed from the corpus[3]. The question, again, is a question of intention[4], but the degree and nature of the annexation is an important element for consideration; for, where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land. Of course, no such presumption is possible where the value of the fixture is far in excess of the land upon which it was erected, or where by custom or contract a different intention is indicated.

6.13A. *Comparison with English law*—The English law as to fixtures is based on the maxis *quicquid plantatur solo, solo credit*[5-6] as to trees, and *quicquid inædificatur solo, solo credit*[6] as to buildings, and the application of these maxims is varied by a mass of exceptions in favour of a tenant and in a favour of trade fixtures. The term fixture has no precise meaning in English Law, and is not found in *Termes de la Ley*[7] but it is generally applied to something annexed to the freehold.

The classification in the Act as immoveable property of things attached to the earth bears some analogy to the English Law of fixtures, but the maxims on which the English law is founded do not generally apply in India.

Long before the Transfer of Property Act was enacted Para Manisk's case[8](s) settled that it was the common law of India that buildings and other improvements do not by the mere accident of their attachment to the soil become the property of the owner of the soil. The general rule laid

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1 Gour.

2 See per Lord Fitzgerald in *Wako* v. *Hall,* 8 App. Cas. 195, 216; o.a. from *Wake* v. *Hall,* 7 Q.B.D. 295.

3 *Per Lord Blackburn in Wake* v. *Hall,* 8 App. Cas. 195, 204 o.a. from *Wake* v. *Hall,* 7 Q.B.D. 295.

4 *Lancaster* v. *Eve,* L.R. 3 ex. 257, 260. The intention may be rebutted by circumstances pointing to the contrary—ib., page 260. *Subramaniam Chettiar* v. *Chidambaram Servai,* A.I.R. 1950 Mad. 527.

5 I.e., whatever is planted in the soil falls into, or becomes part of the soil.

6 I.e., whatever is built in the soil falls into, or becomes part of the soil. Another reading substitutes fixtures (is fixed to) for inaedifictor (is built in).

7 Per Campbell, C. J. *Wiltshear* v. *Cottrell,* (1853) 1 El. & Bl. 674, 682.

8 *Thakoor Chunder* v. *Ramdhone* (1866) 6 W. R. 228; Beng. L. R. Supp. Vol. 595; Approved and *followed in Narayan Das Khettry* v. *Jatindranath* (1927) 54 Cal. 669,54 I. A. 218, 102, I. C. 198. A.I.R. 1927 P.C. 135: A.I.R. 1933 Oudh 468; A.I.R. 1967 Kerala—22.

down by a Full Bench of the Calcutta High Court in that case was as follows :—

> "We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any bona fide title or claim of title, he is entitled either to remove the materials restoring the land to the state in which it was before the improvement was made, or to obtain compensation or the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken done by the builder during the continuance of any state he may possess."

6.13B. The Mohomedan Law is the same,[1]

Our Legislature has departed from the English Law of fixtures in section 2 of the Mesne Profits and Improvements Act 11 of 1855, corresponding to section 51 of this Act[2] and again in section 108(h) of this Act dealing with the lessee's right to remove fixtures.[3] The Act inclines rather to the law recognised by Hindu and Mahomedan Jurisprudence.[4]

6.14. *Considerations applied by English Courts in regard to fixtures*— As is clear from the above, different considerations have been applied by English Courts in deciding whether given things amounted to fixtures, in the sense in which he term is understood in the law relating to real property.[5] Nevertheless, reference may be made to two of the English cases. In *Leigh* v. *Taylor*,[6] the House of Lords held that valuable tapestries affixed by a tenant for life to the walls of a house for the purpose of ornament and the better enjoyment of them, were not fixtures and therefore did not pass with the freehold to the remainder-man. The House of Lords was of the view that the tapestries formed part of the *personal estate* of the tenant for life. The speech of Lord Halsbury shows that questions like this cannot always be answered, in the nature of things with arithmetical accuracy, but certain discernible tests, as aids in deciding the question, are well-established, as, for instance, if something is made part of the house, it must necessarily go to the heir, because the house goes to the heir and it is part of the house. So, where something is attached in some form to the walls of a house, nevertheless, having regard to the nature of the thing itself, and the purpose of its being placed there, it is not intended to form part of the reality, but is only a mode of enjoyment of the thing while the person is temporarily there, and is there for the purpose of his or her enjoyment, Though these observations were in the context of fixtures, and we are conscious that English law relating to fixtures cannot be applied without qualifications and in their entirety to conditions in this country, the observations of Lord Halsbury certainly are of weight and point to the correct approach to questions of this kind.

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1 *Secretary of the State* v. *Charlesworth Pilling & Co.*, (1902) Bom. 1; I. A. 121

2 *Ismail Kani Rowthan* v. *Hazarali Sahib*, (1903) 27 Mad. 211.

3 *Chaturbhuj* v. *Bonnett*. (1905) 29 Bom. 323.
Beni Ram v. *Kundal Lal*, (189) 21 All. 496.
Sitabai v. *Sambhu*. (1914) 38 Bom. 716; 28 I.C. 796.

4 *Hafiz Shaikh* v. *Rashik Lal Ghose* (1910) 37 Cal. 815; 6 L.C. 796.

5 *Perumal* v. *Ramaswami*, A.I.R. 1969 Mad. 346, 349.

6 *Leigh* v. *Taylor*, (1902) A.C. 187.

The House of Lord, again, had to consider in *Reynolds* v. *Ashby & Son,*[1] whether machinery attached to freehold was a fixture. There the machines affixed to concrete beds in the floor of the factory by bolts and nuts, could have been removed without injury to the building or the beds. In this case too Lord Halsbury was one of the Law Lords who decided it, but with this difference, here the House considered that as the machines were part of a factory, which was the subject-matter of a lease, the attachment of the machines to the earth in that manner should be regarded as a fixture.

6.15. *English conflict of laws and movable property*—We have mentioned above that the distinction between immovable and movable property is not important in England in internal law. But even in England, the distinction becomes material when a question of conflict of laws arises. When English courts have to determine rights between domeciled Englishmen and persons domiciled in other countries which do not adopt the English division into real and personal property, the division into immovable and movable property becomes relevant because, in such case,[2] out of international comity and in order to arrive at a common basis on which to determine questions between the inhabitants of two countries living under different systems of jurisprudence, English courts recognise and act on a division otherwise unknown to English law into movable and immovable property.

It is for this reason that a lease hold interest in English land, though classified as personal property for the purposes of English internal law, is regarded as immovable property for the purposes of private international law in England.[3-4]

6.16. *Immovables some-times regarded as movable*:—Rights over immovable are determined by the *lex situs.* Rights over movables are not necessarily governed by that law, If, therefore, the subject-matter of ownership is regarded as an immovable by one system of law but as a movable by another, to which law is the decision left? This question must also arise. The answer given by English law and by most foreign legal systems is the *lex situs.* If the *lex situs* attributes the quality of movability or of immovability to the object in question, the English court which is seised of the matter must also proceed on that basis.[5]

6.17. The first task of the[6] court in conflict of laws case, when required to decide some question of a proprietary or possesory nature, is to decided whether the *res litigiese* is a movable or an immovable. Upon this preliminary decision depends the legal system that will be applicable to the case. Rights over immovables are determined by the *lex situs* : rights over movables are not necessarily governed by that law, as already stated. The classic situation is the transfer of property by succession, land going

1 *Reynolds* v. *Ashby & Son* (1904) A.C. 466.
2 Re Hoyles (1911) 1 Chancery 179, 185 (Farwell L.J.).
3 *Greke* v. *Lord Carbery* (1873) L. R. 16 Equity 461.
4 *Duncan* v. *Lawson* (1889) 41 Ch. D. 394.
5 *Johnstone* v. *Baker* (1817) 4 Mad. 474, note Re *Hoyles* (1910) 2 Ch. 333, 341, (1911) 1 Cr. 179.
6 Cheshite Private International Law (1970) p. 269.

to the heirs selected by the law of the site while goods go according to the law of the domicile of the deceased[1].

6.18. In one article[2] pertaining to the conflict of laws, it is stated that immovable right means any right of ownership, occupation or drawing profit from any site, the site being taken as one with all things regarded by the law of that site as annexed to it for the purpose in hand, and it has been added that this expression probably means also any right which is creature of positive law and is so classified (classified as an immovable right) by its creator. Movable right could then mean other right.

6.19. *Recommendation*—Reverting to the Act, we may state that the definition of "immovable property" in the Act, merely provides that it does not include standing timber, grown crops or grass. This definition is obviously not self-contained, and must be read with the definition in the General Clauses Act, 1897, which[3], by virtue of section 3(26) of that Act read with section 4, applies to the Transfer of Property Act. In our opinion, it would be convenient if the definition is made self-contained, by combining[4] what is enacted in the General Clauses Act with what is enacted in the Transfer of Property Act—at least to the extent to which the two can stand together.

6.20. *Recommendation*—This does not, of course, mean that such a combination will avoid all disputes for the future. But the citizen will, at least, be able to locate from one place the scope of the expression. It will also lend some utility to the elaborate definition of the expression "attached to the earth" given in the Transfer of Property Act. At present, the importance of the expression "attached to the earth" is not readily perceived, since the fact that the expression occurs in the definition of 'immovable property' in the General Clauses Act—Which also applies to the Transfer of Property Act—does not appear in the forefront. It will, therefore, be an improvement if the definition of 'immovable property' is made self-contained as suggested above. We recommend accordingly.

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1 Clarence Smit, "Classification by Site in Conflict of Laws" (1963) 26 Modern Law Review 16.

2 Clarence Smit, "Classification by Site in Conflict of Laws" (1963) 26 Modern Law Review 16, 23.

3 See para 6.6, *supra*.

4 Compare para 6.7, *supra*.

CHAPTER 7

DEFINITIONS PERTAINING TO INSTRUMENTS

SECTION 3

7.1. *Introductory*—Three definitions concerned with instruments may now be dealt with. These definitions are needed because several sections require "instruments" for carrying out certain modes of transfer, and some of them require that the instrument should be attested or registered. Having inserted these requirements, the legislature considered it necessary that the essentials thereof should be indicated.

7.2. *Instrument*—"Instruments is defined as meaning a non-testamentary instrument. It hardly needs any comments or change. It reinforces the position flowing from section 2 to the effect that the Act does not apply to transfers operative on death. The definition may be left as it is.

7.3. *Attested—Analysis*—The definition of "attested" can be broken up into several parts :

(a) There must be attestation—an ingredient whose importance is often not realised;

(b) The attestation must be by two or more "witnesses"—again, an ingredient which seems to have raised problems in regard to seribee, registration officers and the like;

(c) Each of the two witnesses must have seen the executant sign or affix his mark to the instrument or must have seen some other person sign the instrument in the presence and by the direction of the executant or must have received from the executant a personal acknowledgment of his signature or mark or of his signature by such other person;

We shall have a few comments on "personal acknowledgment".

(d) Each of the two or more attesting witnesses must have signed the instrument in the presence of the executant;

(e) It shall not be necessary that more than one of such witnesses shall have been present at the same time;

(f) No particular form of attestation shall be necessary.

7.4. *Complexity*—The definition of "attested" may appear to be a complicated one; but this complexity is primarily due to the fact that a number of situations had to be dealt with, and several points that had arison in the case law prior to the insertion of the definition had to be clarified. The most important clarification is that to the effect that for the purposes of the validity of attestation it is not necessary that both the attesting witnesses must be present at the same time. It is, of course, requisite that each of them must have either witnessed the execution or received an acknowledgment of execution from the executant of the instrument.

It may be noted that the definition of "attested" was added at the instance of Dr. Hari Singh Gour[1]. The specific provision in the definition of "attested", to the effect that the two witnesses need not have simultaneously witnessed the execution, was inserted in view of the fact that the previous position led to a lot of perjury, and was seen to be unrealistic. Moreover, in view of the requirement of registration which is now compulsory for all gifts and most mortgages, the additional precaution that both witnesses must have witnessed the execution simultaneously was considered unnecessary.

7.5. *Common law and history of the definition*—At common law, an attesting witness must be *present at the execution*[2]. In the Indian Succession Act, attestation included an attestation of an admission of execution. Since the Transfer of Property Act contained no such definition, controversy arose on the subject, till that Privy Council gave the expression a restricted meaning[3].

This position was allowed by the Legislature to continue for the future, though a Validating Act was passed in 1917 to validate past instruments which had been attested on admission of execution. In 1926, a specific definition was inserted, overriding the Privy Council ruling. In 1927, it was clarified that the amendment of 1926 was retrospective.

Post—1927 decisions do not reveal any serious controversy that can be appropriately remedied by an amendment. But a look at the important points that have been discussed in the judicial decisions would be worthwhile.

7.6. *Animus to attest*—Although not so expressly stated in the definition, it is an important ingredient of the concept of attestation that there must be an animus to attest[4]. This is implicit in the word "attest". This ingredient is often lost sight of so that unfortunately controversies arise whether a *scribe* can be an attesting witness, or whether the registering officer's signature can be regarded as an attestation, or whether an identifying witness can also be regarded as an attesting witness. In general, the answer would be affirmative only if the animus to attest is proved.

7.7. Since intention to attest is a question of fact, the answer to be given in a particular case as to whether the test mentioned above is or is not satisfied must, in general, depend on the facts of the case. Many of the apparently conflicting decisions on the subject can be reconciled on this ground.

Once the matter is seen in this light, there does not seem to be much scope for improving the form or content of the definition on the question of animus.

7.8. *Personal acknowledgment*—The portion of the definition relating to personal acknowledgment requires some discussion. It should be noted that personal acknowledgment need not be in a particular form.

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1 Legislative Assembly Debates, 3rd February, 1925, pages 716, 717.

2 *Freshfield* v. *Reed*, (1842) 9 M & W 404, followed in *Seal* v. *Claridge*, (1861) 7 Q.B.D. 516, 519.

3 Shamu Potter v. Abdul Kader, (1912) I.L.R. 35 Mad. 697 (P.C.).

4. *Abdul Jabhar* v. *Venkata Sastri*, A.I.R. 1969 S.C. 1147; (1969) 2 S.C.R. 513, affirming *Venkata Sastri*, A.I.R. 1962 Mad. 11.

and it need not be express. An acknowledgment of signature may well be inferred from the conduct of the executant at the time when the deed is attested by the witnesses. In fact, many cases of attestation by admission would be of this nature, since it is hardly likely that the executant of a will, mortgage, gift,—or for that matter, any other document,—would go through the ceremonial or perform the ritual of solemnly announcing to those present as attesting witnesses *in so many words* that he has signed the instrument. Of course, we recommend no amendment on this point.

It may be noted that according to the English rulings, it is not necessary that the acknowledgment should be expressed or should have been made verbally by the executant. In several cases where the executant was present and the attesting witnesses signed the document in his presence on being assured that he had executed the will, it was held that there had been sufficient acknowledgment. In *Inglesant* v. *Inglesant*[1], the deceased had signed her will in the presence of one witness; on the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so and the second witness also subscribed the will. The deceased was in the room, but said no word during the proceeding. The will was lying on the table open and had a heading in large characters that that was the last will and testament, etc. It was held that the deceased "acknowledged" her signature in the presence of two witnesses. So far as the attestation of a will is concerned, it is, in India, governed by the Succession Act, which uses the expression "personal acknowledgment" which occurs in Section 3 of the Transfer of Property Act also. In the English Wills Act (1 Vict. Ch. 26, S. 9), the section is similar, except that the word "personal" does not occur therein.

7.9. As regards the form of attestation, it is now well established that it can be by affixing marks.[2-3]

7.10. The definition of "registered" merely refers to the law for the registration of documents—the Indian Registration Act, 1908. The definition assumes importance not only for the purposes of those sections which require registration for the validity of certain modes of transfer, but also for the section relating to part performance—section 53A—which cures the absence of, or defects in, registration, subject to the conditions mentioned therein.

1 A.I.R. 1935 Mad. 176 (2).

2 *Bishwanath* v. *Babu Ram* A.I.R. 1957 Patna 485, following *Maiku Lal* v. *Sannu*, A.I.R. 1936 All. 576 (F.B.3.)

CHAPTER 8

DEFINITION OF "ACTIONABLE CLAIM"

SECTION 3

8.1. *Analysis*—The definition of "actionable claim" comprises several items which may be broadly enumerated as (i) debt and (ii) a beneficial interest in movable property which is not in the actual or constructive possession of the claimant. Of course, in both the cases, the definition is framed in terms of a "claim" and in both the cases, the claim must be one recognised by the Civil Courts as affording grounds for relief,. There are other requirements which we shall keep aside for the presence.

8.2. In the case of a debt, the further condition is that the debt must not be secured by a mortgage of immovable property or by a hypothecation or pledge of movable property. In both the cases, it is immaterial whether the debt or interest is existent or accruing or conditional or contingent.

8.3. *Essence*—The essence of an actionable claim is the concept of action coupled with the element of incorporeal personal property. Previously the definition was as follows :

> "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."

This definition led to certain conflicts of decisions and obscurity, chief amongst which were questions pertaining to secured debts, questions relating to mere right to sue and questions relating to cases where the cause of action had accrued before the assignment of the actionable claim. Although it it often assumed that all the difficulties have been removed by the amended definition which was transferred to section 3 and re-modelled in 1900, certain questions do still survive. In particular, the position regarding benefits under contract is not evident from the definition as it now stands. We discuss this aspect in some detail below[2]. Statements[3] that "all claims under contract are excluded except claims to the payment of a liquidated sum of money or debt or price" may require qualification in certain respects.

8.3A. *English concept*—It would be noted that in English law all personal property may be either in possession or in action. The former is called chose in possession, while the latter is called chose in action. Things of which the owner has the present possession and enjoyment and which he can deliver over to another are choses in possession. Things of which he has no actual possession or enjoyment to which he has only a right enforceable by suit are designated choses in action[4]. The latter includes, in England a debt, the benefit of a contract or damages for a wrong.

8.4. About the transferability of damages, the Indian law is different, but it is clear that in England, the benefit of contract is included in a chose

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1 Mulla (1973), pages 804 and 805.

2 See Infra.

3 Mulla (1973), page 805.

4 *Colonial Bank* v. *Whinney*, 30 Chancery Division 261, 285 (cited by Gour).

in action. Whatever be the position as regards shares and patents, copyright and trade marks in England—a matter into which we need not go—it has never been doubted that the phrase "chose in action" includes many things whether a contract or not and contracts of every nature except contract for the sale of goods[1-3].

8.5. *English law*—A brief but helpful statement of the English law is given as follows in a work on Mercantile law[4] :—

> "Rights under a contract are called choses in action which is a legal expression used to denote all personal rights in property which can only be claimed or enforced by an action at law e.g. contract debts, shares in companies and negotiable instruments. They may be contrasted with choses in possession which are things capable of actual physical assignment, e.g. a watch, a piece of furniture and so on.
>
> The common law does not recognise assignments of choses in action, but equity does and so does statute."

8.6. As common law[5] choses in action could only be assigned with the assent of the debtor, or in accordance with the law merchant.[6] So, unless the contract were one of a negotiable character, the rights given by it could not be assigned; to transfer these rights; a new contract of a trilateral nature, "a novation" was required, i.e. the creditor A agreed to release the debtor B from his liability to A in return for B agreeing to pay the debt to C. C could only enforce B's promise if he gave consideration for it.

The common law rule was altered by the Judicature Act, 1873, section 25(6), which was repealed and re-enacted by section 136 of the Law of Property Act, 1925. These Acts provided that a debt or other legal chose in action may be assigned so as to entitle the assignee to sue in his own name without joining the assignor as a party if :

(i) the assignment is absolute, and not by way of charge;

(ii) the assignment is in writing;

(iii) notice in writing of the assignment has been given to the person bound—the notice must actually reach the person bound[7].

8.7. *English law as to benefits of contract*—Thus, in English law, a chose in action includes, inter alia, benefits of contract[8]. Under the Transfer of Property Act, it would appear that the right to claim the benefit of a contract is a beneficial interest in movable property not in possession[9]. That the benefit of a contract is assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under

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1 Slphinston, "Ghose in action", 9 L.Q.R. 311.

2 Sweet, "Ghose in Action" 10 L.Q.R. 303, 317.

3 T. C. Williams, "Ghose in Action". 10 L.Q.R. 143.

4 Smith & Koenan, Mercantile Law (1965), page 57.

5 Stevens, Mercantile Law (1969), page 69.

6 See remarks of Martin, B., in *Liversidge* v. *Brosdbent,* (1859), 4 H & M 603, 610.

7 *Holt* v. *Hoatherfield Trust, Ltd.,* (1942) 2 K.B. I; (1942); 1 All F.R. 404.

8 Mulla (1973), page 804. Also para 8.4 *supra.*

9 *Jaffer Mehar Ali* v. *Budge Budge Jute Mills Co.,* (1906) I.L.R. 33 Cal. 702, affirmed in (1907) I.L.R. 34 Cal. 289.

an agreement between the parties is also now fairly well settled[1]. Of course, this assignment of *rights under a contract* is quite distinct from assignment of a claim for compensation which one party has against the other *for breach of contract.* The latter is a mere claim for damages which cannot be assigned in law; the former is a benefit under an agreement, which is capable of assignment. This much is clear from the discussion in the judgment of the Supreme Court in *Khardah Company Ltd.* v. *Raymon & Co. Ltd.*[2].

8.8. The discussion in the Supreme Court judgment cited above[3] was, in a sense, obiter, because in that case there was a statutory prohibition against assignment of the benefit of the contract. The contract in issue was for the purchase of foreign jute. Since the goods had to be imported under a non-transferrable licence, and since the licence contained an express condition requiring the utilisation of the imported raw material only *by the Bill* in question, an assignment was regarded as prohibited. But the discussion is fairly exhaustive, with respect, illuminating. The assignment of the benefit of a contract was a subject specifically discussed, the court observing that ordinarily, there is nothing personal about a contract for the sale of goods. It even referred to an English case[4] holding that an arbitration clause does not take away the right of a party to assign the benefit if it is otherwise assignable.

8.9. Apart from the cases already cited, it may be mentioned that in a Privy Council case[5], it seems to have been assumed that the benefit of a contract of repurchase or resale of property could be assigned. In the Calcutta case of *Champarun Sugar Co.* v. *Haridas*[6], the question at issue was whether the right to purchase shares or option to do so could be attached, but the discussion is exhaustive and the court specifically held that such a right is a beneficial interest for movable property and is an actionable claim where the movable property is not in possession and that it was assignable and transferable.

In the Bombay case of *Vishweshwar* v. *Durgappa*[7], the question was whether the option to purchase property is assignable. Beaumont C.J. observed :

"There can be no doubt that both under the common law and under section 23(b), Specified Relief Act, an option to repurchase property is prima facie assignable though it may be so worded as to show that it was to be personal to the guarantee and not assignable. Under section 23(b), Specific Relief Act, 1877, it is provided that a specific performance of a contract may be obtained by the representative-in-interest of the principal, or any party thereto; provided that, where the learning, skill, solvency of any personal quality of such party is a material ingredient in the contract, or where the

1 *Khardah Company Ltd.* v. *Raymon & Co. Ltd.*, A.I.R. 1962 S.C. 1810; (1963) 3 S.C.R. 183, 202.

2 *Khardah Company Ltd.* v. *Raymon Co. Ltd.*, A.I.R. 1962 S.C. 1810, 1817, 1819; (1963) 3 S.C.R. 183, 202, covering A.I.R. 1960 Cal. 86.

3 *Khardah Company Ltd.* v. *Raymon & Co. Ltd.*, A.I.R. 1962 S.C. 1810, 1817, para 19; (1963) 3 S.C.R. 183, 202.

4 *Shaylor* v. *Woolf*, (1964) 2 All E.R. 54.

5 *Sakaleguna* v. *Munnuswamy*, A.I.R. 1928 P.C. 174, 175, on appeal from A.I.R. 1926 Mad. 699.

6 *Champarun Sugar Co.* v. *Haridas* A.I.R. 1966 Cal. 134, 136, 137 (D. M. Sinha & A. C. Sen JJ.).

7 *Vishweshwar* v. *Durgappa*, A.I.R. 1940 Bom. 339.

contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed."

8.10. *Contract Act*—The Indian Contract Act has no section dealing generally with the assignability of contracts. A contract which, under section 40, is such that the promiser must perform it in person is not assignable by virtue of section 40—the section which deals with the burden of the contract. Judicial decisions have applied the same principle to the benefit of the contract[1]. But there is no specific provision in that regard. Insertion of it would be useful.

The utility of the proposed clarification[2] would be seen when one takes the case of contracts for the return of specific goods. The interest of the buyer of goods in a contract for future delivery, would be property within the meaning of the Transfer of Property Act and an actionable claim. It was so held in a Bombay case[3]. The following observations of Jenkins C.J. are pertinent :

> "What was transferred was, in my opinion, property, and under section 6 of the Transfer of Property Act property of any kind may be transferred except as therein provided. None of the specified exception would have included what Shariffbhoy (buyer) purported to transfer and I further hold that the subject of the transfer was an actionable claim, and so Chapter VIII of the Transfer of Property Act applies. That this view of the Transfer of Property Act does not involve any material change in the law as previously understood in Bombay is apparent from what was said by Westropp C.J. in *Dayabhai Dipchand* v. *Bullabhram Davaram*."

It may be noted that the decision was rendered after the extension of the Transfer of Property Act, to the then existing province of Bombay by a notification of 1st January, 1893.

8.11. *Position under the Contract Act*—We are not, at the moment, concerned with the modes of assignment of the benefit of a contract[4]. But the broad and general proposition that a benefit of a contract is a species of an actionable claim should, in our opinion, find a place in the definition of that expression in the Transfer of Property Act, to make it more expressive and self-contained.

8.12. Such an amendment would not, of course, mean that contractual or statutory restrictions on assignment, or non-assignability arising by reason of the nature of the subject-matter, would thereby be rendered nugatory[5]. What actionable claims can be assigned is a matter which is dealt with not by the definition but mainly by the provisions of section 6 and, though indirectly, by section 130 and succeeding sections. This is true even of those items of property which are undoubtedly actionable claims under the present definition. For example, the salary of an employee[5] and also his pension is an actionable claim. But this proposition is subject to section 6(g) prohibiting the transfer of certain pensions—a prohibition which does not apply

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1 *Toomey* v. *Ramanahi*, (1889) I.L.R., 17 Cal. 115, 121.

2 See para 6.13, *infra*.

3 *Hans Raj* v. *Nathu*, (1907) 9 Bom. Law Reporter 838.

4 *Ibrahim* v. *Union of India*, A.I.R. 1966 Guj. 6, 13, paras 7 and 8.

5 Section 6.

to pensions payable by a foreign State remitted to pensioner in India.[1]. Then, an insurance policy creates an actionable claim, but there are special provisions relating to its assignment—for example, in the Marine Insurance Act[2-3].

8.13. *Recommendation*—On the above reasoning, we recommend that in the definition of "actionable claim", after the words "not in the possession, either actual or constructive, of the claimant", the words *"including the benefit of a contract otherwise than one relating to immovable property"* should be added. After this amendment, the last portion of the definition which reads—"whether such debt or beneficial interest be existent, accruing, conditional or contingent" will still apply to the benefit of a contract; as also the restrictions indicated by the words "which the civil courts recognise as affording grounds for relief".

8.14. *Mere right to sue*—A question often arises whether a particular claim is an actionable claim or a mere right to sue which cannot be transferred by reason of section 6(e). Much depends on the manner in which the instrument of assignment is drafted. In a Nagpur case[4], these were the facts—

On the 25th of March 1920, the defendant Mst. Nakhela executed a document in favour of one Raoji, which had been described as a chitti, in which it was recited that she had borrowed a cart, bullocks, a silk dupata and a sari, the total value of which things was Rs. 200, to use in the marriage of her son. In the chitti, Mst. Makhela promised to return the article when done with, when she would be entitled to get back her chitti. On the 2nd of June, 1921, according to the case of the plaintiffs, Raoji executed in their favour a sale deed by which he transferred to the plaintiffs Kokaya and Durga the chitti with all the rights thereunder. The following are extracts from the deed of sale :

> "You are at liberty to recover the *amount of these articles from* Nakhela, either "privately or through the Civil Court. It also stipulated that if you do not recover this amount from Nakhela, I shall be liable to pay it to you."

It was held that this was a transfer of a mere right to sue—a personal claim which could not be transferred. A claim for damages for breach of Contract, after breach, is not an actionable claim. The actual decision, with respect, is correct on the language of the instruments. But the following discussion of the law, as found in the judgment, seems to be wider than is the correct position :—

> "For the applicant it is contended that all that Raoji could recover *was either the original articles lent or damages* for breach of contract to return them and I have no doubt that this contention is a correct one. *So far as Raoji's right to recover the goods lent is concerned, that is a personal claim and there is ample authority for holding that such a personal claim is a right which cannot be transferred.* It is also clear that, failing the recovery of the original goods, what was recoverable was money in the form of damages "and that this money was not a debt.

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1 ***Bishamber Nath*** **v.** ***Imdad Ali,*** **(1891) I.L.R. 18 Cal. 216** (P.C.).
2 Sections 17, 52, and 79 of the Marine Insurance Act, 1963.
3 *Union of India* v. *Alliance Insurance Company,* A.I.R. 1964, Cal. 31.
4 *Mt. Nakhela* **v.** *Kokava.* A.I.R. 1923 Nag. 67(2).

No doubt, the value of the article was specified in the chitti but the chitti would only be the evidence of the value of the articles and there is no promise in the chitti to pay Rs. 200. It would be open to the defendent to prove that the goods were in reality worth less than Rs. 200. What was transferred therefore by Raoji to the plaintiff was a mere right to sue for damages and there is ample authority for holding that such a transfer is against the provisions of section 6 of the Transfer of Property Act."

8.14A. We may comment that if the right to recover the goods is transferred, it would be transfer of a claim to beneficial interest in movable property not in possesssion, actual or constructive.

8.15. *Debt*—We have discussed at length the latter part of the definition of actionable claim in view of the fact that the statutory provision does not mention it specifically. This does not mean that the earlier half of the defintion relating to "debt" is not important. In practice, questions do arise with reference to this part of the definition also, namely, whether a particular demand is within this part. The answer must depend largely on what may be understood to be comprehended by "debt", since a claim to a debt is an actionable claim. "Debt" in its primary sense, means a liquidated monetary obligation which is usually recoverable by a suit. There is a series of rulings to that effect in India[1-2].

This also seems to be the English law, where the aspect of certainty (liquidated amount), the aspect of money and the aspect of recoverability in law, have been emphasised in the judicial decisions. In English law, it is an essential feature of an action for debt that it should be for a liquidated or certain sum of money. "In general", says Blackstone[3], "whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other (as in the case of a bond for payment of money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth), a debt is then said to exist between these parties; while, on the other hand, if the demand be of an uncertain amount, as when an action is brought against a bailee for injury done through his negligence to an article committed to his care, it is described not as a debt, but as a claim for damages."

1 *Moti Lal* v. *Radhey Lal*, I.L.R. 55 All. 814.
2 *Ram Charan Das* v. *Naseeran*, A.I.R. 1935 All. 342.
3 Blackstone, cited by Cour.

CHAPTER 9

DEFINITION OF NOTICE

SECTION 3

9.1. *Introductory*—The last of the definitions contained in section 3 is concerned with notice. A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

This is the gist of the main part of the definition. But the Explanations are equally important, or perhaps more important than the main part.

9.2. *Scheme*—In the scheme of the clause, notice falls into three separate sub-divisions—(a) actual notice—this is called, in the English law, express notice; (b) constructive or "implied" notice, when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known; (c) imputed notice, when notice is acquired by an agent. The last mentioned category is sometimes described as a species of constructive notice, but deserves special treatment.

9.3. *Some important sections*—In order that the importance of the definition of 'notice' may be appreciated. It would be useful to refer to a few important sections wherein the expression occurs. Under section 39, where a third person has a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property and such property is transferred, the right to receive such maintenance or provision may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous. But the right cannot be enforced against a transferee for consideration and without notice of the right, nor against such property in his hands. Again, under section 40, when one person has, for the more beneficial enjoyment of his own immovable property, a right to restrain the enjoyment in a particular manner of the immovable property of another person or where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, such right or obligation may be enforced against a transferee with notice, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands. A familiar example is the case where there is a contract for the sale of immovable property and the prospective vendor, in breach of the contract, sells the property to a third person who has a notice of the contract. The prospective purchaser may enforce the contract against a transferee with notice to the same extent as he could have enforced against the prospective vendor. Then, under section 43, where there is a transfer of immovable property by an unauthorised person who subsequently acquires an interest in the property which he professes to transfer and the transfer is for consideration, such transfer shall, at the option of the transferee, operate on such subsequently acquired interest while the contract of transfer subsists, but this shall not impair the rights of transferees in good faith for consideration without notice of the existence of the said option.

All these provisions illustrate the importance attached to notice or its absence. We need not give an exhaustive list. Many of the provisions, as we have pointed out in the first chapter, are derived from rules of equity.

9.4. *Principle of notice*—The doctrine of notice as affecting priorities is founded upon the rule which discountenances laches and frauds of all kinds.[1] As such, its principle is widely applicable, and stated generally, it is an exception to the general maxim *qui prior est tempore, potior est jure* (He who is first in point of time is more powerful in law). Correctly understood, however, it is rather an explanation than an exception to it, for the true meaning of the maxim is that, as between persons having only equitable interests, if such equities are in all other respects equal, then only would the rule apply.[2]

9.5. *History*—The definition of the word 'notice' in the Act correctly codifies the law which existed prior to the passing of the Act so far as notice *to the principal* is concerned.[3] Thus, it was held in a case decided in 1881[4] that when a person is proved to have had knowledge of certain facts, or to have been in a position, the reasonable consequences of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law fixes him with having himself had notice of that particular fact.

9.6. It is to be noted that the definition of 'notice' was adopted by the Law Commissioners of 1879[5] from Bill which led to the Indian Trusts Act, 1882, section 3. In the Act as subsequently passed, however, the words "or search" were added after the words "from an enquiry", at the instance of the Select Committee,[6] in order to make the definition[7] apply expressly to a case where a person wilfully abstains from a search in a register, which he ought to have made.

This raised the question whether registration should, of itself, be deemed to be legal notice. On this point, the High Courts of Bombay and Allahabad had been, for some time, at variance with those of Calcutta and Madras, where registration was held to be no notice—a view afterwards confirmed by the Privy Council.[8]

The law was altered in 1929. The Amending Act has not accepted the ruling of the Privy Council, on the ground that it inevitably led to such prejury and litigation. In America[9], registration of conveyance is held to operate as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property.[10] "The reasoning, upon which this doctrine is founded, is the obvious policy of the Registry Acts, the duty

1 Gour

2 *Rice* v. *Rice*, 2 Drew. 73;
Cordon v. *James*, 30 Ch. D. 249;
National Provincial Bank v. *Jackson*, 33 Ch. D. 1;
Farrand v. *The Yorkshire Bank*, 40 Ch. D. 182.

3 *Churaman* v. *Balli*, I.L.R. 9 All. 591.

4. *Doorga Narain* v. *Boney Madhub*, (1881) I.L.R. 7 Cal. 199.

5 Report, dated 15th Nov. 1879, section 29.

6 Third Report, dated 11th March, 1881, section 3.

7 Gour.

8 *Tilakdhari* v. *Khedan Lal*, (1921) I.L.R. 48 Cal. 82 (P.C.).

9 Notes on clauses.

10. Gour.

of the party purchasing under such circumstances to search for prior encumbrances, the means of which search are within his power, and the danger of letting in parol proof of notice or want of notice of the actual existence of the conveyance."[1]

9.7. *First Explanation*—Actual notice does not raise problems. Constructive notice requires to be discussed at length. According to the first Explanation, where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest, in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908, from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated.

This Explanation, however, applies only if three conditions mentioned in the Proviso thereto are fulfilled, namely,—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908, and the rules made thereunder,

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

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

If these conditions are satisfied, registration is given the effect of notice by a construction of law.

It is aptly described in the text books as constructive notice.

9.8. In England, under section 197 of the Law of Property Act, 1925, registration is notice in the two counties of Middle sex and Yorkshire where the system of local deed Registries prevails, and, under section 198, in the case of instruments which are registered under the Land Charges Act, 1925, it is provided that registration shall be deemed to constitute actual notice of such instrument to all persons and for all purposes connected with the land affected.

9.9. *Second Explanation*—The solemnity of legal transactions has been given recognition in the First Explanation. The reality of *de facto* enjoyment is next dealt with in the Second Explanation which is concerned with actual possession as a source of constructive notice. Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of the person who is for the time being in actual possession thereof.

1 Story's Equity, section 534, pages 510, 511, cited in Notes on clauses (not traceable in 3rd Eng. Edition).

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9.10. *Third Explanation*—The third Explanation deals with agency as a source of notice. This category of notice is usually described as imputed notice. A person shall be deemed to have had notice of any fact if his agent *acquires notice* thereof whilst acting on his behalf in the course of business to which that fact is material. This is, however, subject to a qualification contained in the proviso. Under the proviso, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to, or otherwise cognizant of, the fraud.

9.11. *Whether constructive notice attributable to principal*—Does the notice of the agent, that could be fictionally attributed to the principal under the third Explanation, have to be actual notice, or it is enough if it is constructive notice? The use of the word "acquires" would, at first sight, seem to support the first view, since "acquisition", in ordinary language, implies something positive and actual, or at least some effort. However, it should be noted that there is at least one judicial decision taking the opposite view.[1] This also seems to be the English concept of notice.[2] It would, thus, appear that when the constructive notice of an agent is imputed to the principal, there is a double fiction.

9.12. In other words, the principal is liable not only on the actual notice received by the agent, but also on the basis of constructive notice received by the agent. Of course, in every case, the important condition must be satisfied, namely, that the agent was acting on behalf of the principal in the course of business to which the fact is material and that there was no fraudulent concealment on the part of the agent.

9.13. *Limits*—The discussion so far has dealt with width of the definition of notice as read with the Explanations. The limits of the definition must also be noted. There may be such wilful negligence in abstaining from inquiry into facts which would convey actual notice, as may property be held to have the consequences of notice actually obtained. But if there is no actual notice, and no wilful or fraudulent turning away from an inquiry into, and consequent knowledge, of facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied.[3]

9.14. The above discussion calls for no amendment of the definition.

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1 *Renukabai* v. *Bheoson*, A.I.R. 1931 Nag. 132.
2 Snett, Equiry (1966), page 60, para 3(a).
3 *Doorga Narain* v. *Baney Madhub* I.L.R. 7 Cal. 199; following *Agra Bank* v. *Barry*, L.R. 7 H.L. 135; and *Ramcoomar* v. *McQueen*, 11 B.L.R. 53. See, also *Khushalchand* v. *Trimbak*, 48. Bom. L.R. 586.

CHAPTER 10

RELATIONSHIP WITH CONTRACTS ACT AND REGISTRATION ACT

SECTION 4

10.1. We have already stated[1] that the Transfer of Property Bill was originally conceived as a part of a wider project forming part of a draft Civil Code. That plan did not materialise. But the unity of the project finds some reflection in section 4.

Section 4 provides that the Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

Further, it provides that section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

The first part of the section does not merely mean that transfers by act of parties are subject to the general principles of the law of Contracts. That did not require an express provision. Its practical importance could be more concretely indicated by stating that definitions and explanations in the Contract Act can be invoked for construing the Transfer of Property Act.

We have no further comments on section 4.

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1 Chapter 1.

CHAPTER 11

DEFINITION OF TRANSFER OF PROPERTY

SECTION 5

11.1. *"Transfer of Property" defined Introductory*—Section 5 defines the expression "transfer of property" as meaning an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons. It also defines the expression "to transfer property" as meaning to perform such act.

The section further clarifies that 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals. This clarification was inserted in 1929.

11.2. *Analysis—Living person*—Let us analyse the section. The first important ingredient is that there must be a living person. This is explained in the second part of the section which expands its scope. But apart from that, it may be noted that the section,—and therefore the Act in general—does not apply to the conveyance of property to an entity which is recognised by law as having a personality in law but which does not have life. It is for this reason that a gift to God Almighty does not fall within the frame-work of the Act.[1]

For the same reason, a transfer of property to an idol is not a transfer[2] within the meaning of section 5. Those judicial decisions,[2]-[3] therefore, which take the view that a living person includes a juristic person, do not, with respect, appear to be correct. The very fact that in 1929 a paragraph had to be added to define a living person as including a company or association or body of individuals whether incorporated or not, would seem to show that artificial legal persons do not otherwise fall within section 5.

Of course, the position in regard to idols or other juristic persons may be different if the mode of conveyance is so adopted that the transferor executes the instrument in favour of *living persons designated as trustees.*[3] Such a transfer must satisfy the requirements of the Act.

11.3. *Conveyance*—The next important ingredient of section 5 is that indicated by the word "conveys". This expression is not defined in the Act, but it postulates on act by which a change of proprietory right is sought to be effected. Where there is no transmutation of a proprietory interest, but only a re-distribution thereof, there is no act "conveying" property within the meaning of this section. It is fo rthis reason that a family arrangement is not a transfer[4]. Again, it is for the same reason that an arrangement by way of dissolution of partnership is not, speaking

1 a. A.I.R. 1946 Audh 256.
2 a. A.I.R. 1926 Nag. 469.
3 (1975) 16 Guj. Law Rep. 289.
4 A.I.R. 1966 S.C. 432.

ordinarily, a transfer,[1] though the case could be different where, after the dissolution, *a specific conveyance of property is* the device adopted. For the same reason, the contribution of immovable property by a partner as his share of partnership does not require a written document or registration.[2]

11.4 It has been held[3] that an arrangement by which, on the dissolution of a partnership, certain partners are paid off and, in return, give up or assign their interests in the assets of the partnership by way of debts, which were due to the firm is a "transfer of property" as defined by section 5. This, with respect, must be taken as confined to actionable claims (section 130).

11.5. *Transferee*—The third important ingredient of section 5 is indicated by the words which relate to the transferee. The transferee must be (i) one or more *other* living person, or (ii) the transferor himself, or (iii) the transferor himself and one or more other living persons. In the case (ii) mentioned above, the transferor, when he becomes the transferee, does so as a trustee.

11.6. *Property*—'Property', of course, is a wide term, Thus, it includes an interest of the lessor. The interest of a lessor is a reversion, a future estate capable of being reduced to possession on the termination of the existing lease, and can be validly transferred[4] under section 5, while the lease is subsisting.

11.7. *Property in existence*—The subject matter should be property in existence. Where the section uses the words 'conveys property', in present or in future (to one or more other living persons), one should read the words 'in present or in future' with the word 'convey', and not with the word 'property'. In other words, in the contemplation of the section, the property must exist before the transfer can be effected.[5-6]

11.8. *Effect of transfer of future property*—This does not, of course, mean that it is illegal to transfer property to be acquired in future. Such a transfer is not prohibited by the Act in general terms, and all that can be said with reference to such a transfer is that it does not fall within the terms of this section. It may not be effective as an immediate transfer, but this is quite a different thing from saying that it is totally devoid of any legal effect. Section 5 does not cover it, but such an instrument relating to property to be acquired in future may yet have certain legal consequences. It could, for example, bring into being contractual liabilities or rights similar to those recognised in England as equitable rights—same principles apply to property not in existence. This aspect of the matter

1 *Cf.* A.I.R. 1970 Mad. 111.
2 A.I.R. 1963 Pat. 221;
A.I.R. 1965 Pat. 144.
3 A.I.R. 1939 Sind 288.
4 A.I.R. 1957 Andhra Pradesh 619.
5 *Jugal Kishore Saraf* v. *Raw Cotton Co.*, A.I.R. 1955 S.C. 376 (1955) 1 S.C.R. 1369, 1413.
6 *Chief Controlling Revenue Authority* v. *Sudarsanam Picture* A.I.R. 1968 Mad. 319 (F. B.).
7 *Moti Ram* v. *Khyali Ram, A.I.R.* 1967 All. 484.
8 A.I.R. 1955 Pat. 402.

is often overlooked by reason of the juxtaposition of the words in section 5, but the correct positions seems to as above.

While section 5 cannot be invoked to validate a transfer of future property, such transfer can create certain rights depending on the nature of the property, the relations between the parties and various other circumstances relevant to the application of doctrines originating in equity. For example, the principle of section 43,—if not the literal text thereof,—could be invoked for giving effect to the instrument purporting to incorporate such a transfer.[1]

11.9. In an Allahabad case,[2] section 18 of the Specific Relief Act, 1877—now section 13, 1963 Act— was also discussed. The old section 18 and the new section 13 are based on the well-known rule of estoppel, sometimes referred to as feeding the grant by estoppel. The effect of section 13, so far as is material, is to confer on the transferee, from a person having no title, certain rights if the transferor acquires any interest subsequently.

The Calcutta High Court in the case of *Prem Sukh Gulgulia* v. *Habib Ullah,*[3] held that transfers of non-existent or, as it is conveniently called, after-acquired property, provided they are not of the nature contemplated in section 6(a)—transfer of a mere chance—are perfectly valid. The transfer would be regarded in court of justice as a contract to transfer after the vendor had acquired title, and would fasten upon the property as soon as the vendor acquired it. A contract of sale of property which is not of the vendor's at the time of the contract, but which the vendor thinks of acquiring by purchase later on, is not bad in law.

11.10. *Sale of Goods Act*—It may also be noted that section 6 of the Sale of Goods Act has a detailed provision[4] as to transfer of goods not in existence—

> "6. (1) The goods which form the subject of a contract of sale may be either existing goods, owned[5] or possessed by the seller, or future goods.
>
> (2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
>
> "(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates an agreement to sell the goods."

11.11. *Recommendations for amendment*—The only amendment that we recommend in section 5 is transportation of the words "in present or in future" after the word "convey"[6] and before the word "property".

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1 A.I.R. 1960 Cal. 609.
2 *Ehsanul Haq.* v. *Mohd. Umar,* A.I.R. 1973 All. 425, 426 (S. Malik, J.).
3 *Prem Sukh Gulgulia* v. *Habib Ullah,* A.I.R. 1945 Cal. 355.
4 Section 6, Sale of Goods Act, 1930.
5 E. G. shares.
6 Para 11.7 *supra.*

CHAPTER 12

PROPERTY WHICH CANNOT BE TRANSFERRED

SECTION 6

12.1. *Section* 6—*Introductory*—Several items which cannot be transferred have been enumerated in section 6, after laying down the abstract general proposition that property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force. Transferability is, then, the general rule, and the right to property includes the right to transfer that property to another person.[1-2] We need not concern ourselves with restrictions on the transfer of property which arise by reason of—

(a) Hindu law;
(b) Muslim law;
(c) Special or local laws;
(d) Custom.

12.2. *Rationale*—Concentrating on those prohibitions which are expressly provided in section 6, one may note that these prohibitions owe their rationale either to the nature of the property, or to certain considerations of policy, or to the need for enforcing the provisions of other legislative enactments. Sometimes, more than one of those considerations operate together. The prohibition in clause (d) against the transfer of an interest in property restricted in its enjoyment to the owner personally is based on the nature of the interest. The prohibition in clause (c) relating to the transfer of an easement apart from the dominant heritage, is also similarly explained, namely, by reason of the nature of the right.

The prohibition in clause (f) relating to the transfer of a public office or the salary of a public officer is obviously based on considerations of public policy easily apparent, and the prohibitions in clauses (dd) and (g) are also based on similar considerations. Clause (h), in sub-clause (2) and sub-clause (3), is intended to re-inforce prohibitions flowing from other statutory provisions. Clauses (h) and (i) are based on mixed considerations.

12.3. *Section* 6(*a*)—Under section 6(a), "the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of kinsman or any other mere possibility of a like nature" cannot be transferred.

The words "of a like nature" in this clause should of course, be contrued, as *ejusdem generis* with the two kinds of "chance" mentioned in the clause.[3] However, that does not lead to a very precise position. For example, does it mean that only a possibility *dependent on death* is excluded? Reported[4-5] cases do not take such a very narrow view.

1-2 Mulla.
2 *Lala Baidnath* v. *Chandrapaul*, A.I.R. 1924 All. 793.
3 A.I.R. 1919 Mad. 718.
4 A.I.R. 1938 Mad. 881.
5 I.L.R. 43 Cal. 28.

12.4. *Meaning of "chance"*—What is meant by these "chances" or "possibilities"? Lord Westbury referred, in *Davis* v. *Angel,*[1] to the distinction between an interest that has arisen and is represented, and an interest that has not arisen and that never may arise, but with regard to which there is a remote possibility that the event which has not occurred and upon which it is made to hand may hereafter occur. The latter is not an interest; it is not a right; it is nothing more than a bare expectation of a future right. The expectation of a future interest, or rather, of a future event which may give an interest, is not a thing which would justify a court of equity in "entertaining a suit at the instance of a party having that and nothing more."

12.5. *Comparison with Code of Civil Procedure*—Thus, a bare expectation of a future right is contrasted with an interest. It would be of interest to compare and contrast the language of the corresponding provision[2] in be Code of Civil Procedure—section (60)m. What is excluded from liability to attachment under the Code is "an expectancy of succession by survivorship or other merely contingent or possible right or interest". The earlier half of this clause in the Code is better expressed than section 6(a) of the Transfer of Property Act. The latter half is wider than section 6(a),—an aspect to which we shall revert later.

12.6. *Muslim law*—There is a corresponding rule in Muslim law. Sir Roland Wilson, in his 'Anglo Mohammadan Law"[3] states the position thus :

> "For the sake of those readers who are familiar with joint ownership of father and son according to the most widely prevalent school of Hindu Law, it is perhaps desirable "to state explicitly that in Muhammaden, as in Roman and English Law, *nemo est heres viventis* a living person has no heir. An heir apparent or presumptive has no such reversionary interest as would enable him to object to any sale or gift made by the owner in possession; see *Abdul Wahid,* (1885) 12 Ind. App. 91 (P.C.) and (1885) I.L.R. 11 Cal. 597 which was followed in Hasan Ali, (1889) I.L.R. 11 All. 456.
>
> "The converse is also true; a renunciation by an expectant heir in the lifetime of his ancestor is not valid, or enforceable against him after the vesting of the inheritance."

There is, however, no prohibition as such in Muslim law against a renunciation for consideration of the claim to succeed. Such renunciation may at least operate as an estoppel.

12.7. *Possibility coupled with interest*—Reverting to section 6(a), we should note that a mere possibility must be distinguished from a *possibility coupled with interest.* A contingent interest[4] can be transferred,[5-6] though

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1 *Davis* v. *Angel,* (1862) 4 De. G.F. & J. 524 8 Jur. (n.s.) 1024; 6 L.T. 880; 10 W.R. 722.

2 Section 60(m), Code of Civil Procedure, 1908.

3 Wilson Anglo Muhammadan Law page 280, para 208, cited in *Gulam Abbas* v. *Hafiz Kayyam Ali,* A.I.R. 1973 S.C. 556, 554 (para 7).

4 Section 19.

5 A.I.R. 1967 Guj. 16 (contingent interest).

6 A.I.R. 1930 P.C. 17 (contingent interest)

it cannot be attached. This position has come to be established after considerable litigation in the Courts. The principal section of the Act relating to contingent interests is section 19. A contingent interest depends on the happening or non-happening of an event which is not certain. The law is that until the event happens, or is rendered impossible, as the case may be, the interest does not vest. But it is still an interest. In this sense, it is not a 'mere' possibility.

12.8. *Need for amendment regarding contingent interest*—In order to maintain the distinction between a bare possibility and a contingent interest, it appears to be desirable to make it clear in section 6(a) that a contingent interest can be transferred. Such an amendment is needed in view of the fact that the present wording might lead to a misconception, and also since the matter seems to have come up before the Courts for determination.[1]

12.9. *Need for clarification regarding "chance"*—Apart from this clarification regarding contingent interests, it is also, as a matter of drafting, desirable to amend section 6(a) in so far as it deals with 'chance'. The present wording in section 6(a) is not very appropriate. The earlier half of section 60(m), Code of Civil Procedure, is better expressed as already stated.[2] The term 'heir apparent"[3]—itself not very happy in the Indian context—is restricted, and gives the wrong impression that an heir presumptive[4] can transfer his *Spes successionis*—which is not the intention.

It is true that the non-transferability of the interest of an heir presumptive is deducible from the general prohibition as to "mere possibility". But that is true of the interest of the heir apparent also. This part of section 6(a) is certainly capable of improvement and advantage can be taken of the more appropriate wording in the earlier part of section 60 (1)(m), Code of Civil Procedure, 1908.

12.10 *Recommendation to revise section* 6(*a*)—We, therefore, recommend that section 6(a) should be revised as under :

> "(a) *an expectancy of succession by survivorship or any other mere possibility of a like nature.*
>
> *Explanation.—A contingent interest in property is not a mere possibility within the meaning of this clause.*"

12.11 *Section* 6(*b*)—This takes us to section 6(b) which provides that 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. This clause has in mind right of lessor as against the leassee for breach of an express condition which provides that on its breach the lessor may re-enter. The "condition subsequent" referred to in section 6(b) is defined in section 31 as a condition which divests an estate that has already vested. Where the reversion of the lease is itself assigned, the assignee certainly is entitled to enforcement of the condition; but the mere right of re-entry cannot be assigned. Being an

1 See case-law as to contingent interests, para 12.7, *supra.*
2 Para 12.5, *supra.*
3 The person first in line of succession.
4 The person second in line of succession.

incident of the land, it may not be severed from the land for the benefit of another person unconcerned with the reversion.[1] This is the principle.

12.12 It has been pointed out[2] that the principle is succeptible of extension to other cases. For instance, in a hire-purchase transaction of a movable property, the right to take *possession by force* of the property which is the subject matter of the hire-purchase-for example, a refrigerator or a motor-vehicle or furniture—is analogous to the right of re-entry. Or rather, it is an extra udicial rjemedy which cannot be transferred.

To quote what has usually been stated in regard to easement, the right is a parasitical one.[3-5]

12.13 *No change*—The points discussed above do not call for any amendment of section 6(b).

12.14. *Section* 6(*c*)—Under section 6(c), an easement cannot be transferred apart from the dominant heirtage. The expressions employed in this clause must be understood in the light of the definitions given in the Indian Easements Act, 1882. Since an easement appended to a dominant heritage is, by its very nature, intended for the enjoyment of the dominant heritage, it is exiomatic that it cannot be divorced from the dominant heritage. Conversely, where the dominant heritage is transferred, the easement is, *ipso factor*, transferred without a specific provision for transfer of the easement. This is expressly provided[6] in the Act. Section 6(c) merely expresses the rule that there cannot be an easement in gross.[7-8]

The clause needs no change.

12.15. *Section* 6(*d*)—Then, under section 6(d), an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. The example usually given is that of the right of the head of a Hindu religious institution such as a Math. Offices connected with such institutions are, in general, restricted in their enjoyment to the 'owner' personally—the word 'owner' is used in a wide sense as indicating the person entitled to the interest.

There is also axiomatic. If enjoyment of property is restricted by law to the owner personally, it is obvious that it cannot be parted with. All these exceptions became necessary because section 6 opens with the abstract general rule that property 'of any kind' may be transferred and that general rule had to be qualified.

The precise question that usually falls to be considered under this clause is whether the particular interest in question is restricted personally to a particular person. This question cannot be answered without a study of that field of law which regulates the creation of the interest. It

1 Gour.
2 Gour.
3 *Ammutool* v. *Jamach Singh*, 24 Weekly Reports 345 Calcutta.
4 Gale, Easement, 6th Edition, pages 65 and 492.
5 Also see section 19, Easements Act, 1882.
6 Section 8, second paragraph, Transfer of Property Act.
7 A.I.R. 1919 Nag. 62.
8 A.I.R. 1917 Cal. 681.

has its own reasons of policy for restricting the enjoyment. The considerations that give rise to restrictions on enjoyment automatically justify restrictions on transfer also.

12.16. *Temples*—The manager of a temple is by virtue of his office administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual but which in course of time has become vested by descent in more than one person.[1]

Thus, the shebait performs a dual role, namely, he has duties to discharge in connection with the endowment and at the same time has a beneficial interest in the debutter property. It was so laid down by B. K. Mukerjea, J. while considering the question whether the office of shebiatship was property for the purpose of Hindu Women's Rights to Property Act, 1937.[2]

12.17. In the case of all Hindu endowments, the inalienability is based upon the principle that no stranger shall be permitted to intrude into the management of the endowment. The reason usually given is that if such an alienation were permitted, the purchaser may be a person belonging to another religion who would be unwilling and unable to perform the worship and thus the object of the endowment may be defeated.[3]

In general, as regards the inalienability of religious offices, it is a dominant consideration whether the right is merely of a proprietary nature, or whether it is primarily based on religious sentiments. It was for this reason that the right of administering 'purohitum' to pilgrims resorting to the temple of Rameshwaram was held to be capable of alienation or delegation.[4]

12.18. *No change*—This clause also needs no change.

12.19. *Section 6(dd)*—Section 6(dd) prohibits transfer of a right to future maintenance, in whatsoever manner accruing, arising, secured or determined. The rationale of the prohibition is the principle that the right to maintenance is recognised for the sustenance of the beneficiary. If the beneficiary parts with it, he or she parts with a benefit which the law regards as essential for his or her sustenance. No man or woman is allowed to deal even with his or her affairs and transfer a right in a manner which defeats the basic purpose of the legal rule conferring the right. The very *raison d'etre* of the rule is defeated by such a transfer.

12.20. *Basis*—All this may sound elementary, but seems to be worth emphasising. The philosophical basis on which section 6(dd) rests is to a great extent similar to that on which the law prohibits a person from taking his own life, or at least contained such a prohibition before certain other considerations, regarded as of over-riding importance, modified the criminal law in this regard. Sustenance of human life is the dominant

1 *Ramanathan Chitty* v. *Murruguppa Chitty*, (1905) I.L.R. 28 Mad. 283 (P.C.).
2 *Angoorbala* v. *Debabrata*, A.I.R. 1951 S.C. 293, 296.
3 *Raja Verma* v. *Ravi Verma*, I.L.R. 1 Mad. 235 (P.C.).
4 *Ramaswamy* v. *Venketta*, 9 Moore Indian Appeals 344.

consideration that overrides the liberty of the individual to arrange his own affairs—including the freedom of disposition of property.[1]

12.21. *Object*—The insertion of clause (dd) by the Amending Act was intended to settle the conflict of views amongst certain previous decisions of the Calcutta,[2] Bombay[3] and Madras[4] High Courts. It is sometimes stated that the amendment is in accordance with the policy which discourages all transfers of an expectancy.[5] This may be so, but there appears to be a broader ground of public policy. A number of considerations support the prohibition against transfer of the right to future maintenance, namely, sustenance of the person entitled, personal nature of the right, and the aspect of future interest. The principal one, however, is the aspect of sustenance.

12.22. *Sum accrued*—The prohibition against the assignment of the right to future maintenance does not seem to disallow the transfer of a sum of money which has accrued due. The sum accrued due is a debt; there is nothing personal about it and the very fact that the amount has been allowed to fall in arrears would seem to indicate that the purpose of sustenance would not be defeated by its assignment.

That arrears of maintenance can be attached or assigned like any other debt, was the position established long before the Act.[6] This position was not intended to be disturbed.

It may be noted that in the Civil Procedure Code, exemption from attachment is conferred in respect of a right to future maintenance by section 60(n). Under that Code, it has been held that it does not apply to arrears of maintenance.[7] It has also been held that a right to future maintenance which is heritable and not personal is not exempt from attachment.[8] Moreover, anything which is in excess of maintenance, pure and simple, is not exempt from attachment.[9] As early as 1900, it was held that arrears of maintenance could be attached.[10]

12.23. It was held in a Madras case of 1919[11] that the right of a member of Malabar Tarwad to maintenance is property, *and can be assigned*. The right to receive future maintenance cannot be alienated—though the position might be different in equity in England. An annuity by way of maintenance is transferable.[12]

12.24. *No change*—No change in clause (dd) is required as a result of the above discussion.

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1 Section 6, opening sentence.

2 *Asad Ali* v. *Hyder Ali*, (1911) I.L.R. 38 Cal. 13, 20.

3 *Diwali* v. *Appaji* I.L.R. 10 Bom. 342, 345. (doubt expressed).

4 *Ranee Annapurna* v. *Swaminath*, I.L.R. 34 Mad. 7, cited in *Raja of Kalhati* v. *Venketappa*, A.I.R. 1928 Mad. 713 (F.B.). (Case before amendment).

5 *Gour*.

6 *Kasheesburee* v. *Greesh Chandra*, (1866) 6 Weekly Reports Miscellaneous 65 (Calcutta), cited in Mulla (1973), page 68, footnote (p).

7 *Palikandi* v. *Krishnan*, I.L.R. 50 Mad. 302.

8 *Ashfac* v. *Nazir*, A.I.R. 1942 Oudh 410.

9 *Chittory* v. *Themana*, A.I.R. 1954 Mad. 946, 947 (Mack J.)

10 *Haridas* v. *Baroda* 1900, 4 Cal. W.N. 87.

11 A.I.R. 1919 Mad. 538.

12 A.I.R. 1917 Mad. 79.

12.25. *Section 6(e)*—Section 6(e) provides that a mere right to sue cannot be transferred. Though this is a rule of substantive law, it has an intimate connection with certain aspects of procedure. Maine, in his Early Law & Custom,[1] wrote as follows :—

> "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms".

The evolution of the law prohibiting the transfer of a mere right to sue is an instance in point.

12.26. *Comparison.*—Under the Code of Civil Procedure, 1908, Section 60, "a mere sight to sue for damages" cannot be attached. In section 6(e) of the Transfer of Property Act, the wording was "a mere right to sue for compensation for a fraud or for harm illegally caused". The amendment of 1900 omitted the restrictive words. The present wording is very brief—a mere right to sue.

12.27. *Simplicity deceptive*—The simplicity of this brief and cryptic provision is deceptive. The word "mere" is crucial in the section. The moment this word is overlooked, difficulty arises. It never was the law, and it is not the law, that the transfer of a right to sue is totally prohibited. What the law desired to discourage was trafficking in litigation. The law of maintenance and champerty are branches of law the discussion of which is now considered of not much importance. But these are the topics which form the basis of the prohibition against transfer of a mere right to sue. If a person indulges in intermeddling with litigation in which he has no legitimate interest, he ought to be discouraged. If a mere right to sue is transferred to such a person, it is not a permissible transfer. It is an abuse of the right of transfer and would lead to an abuse of the right to sue. Common law does not accept in its entirety the doctrine of abuse of rights familiar to continental jurists. But, to the limited extent indicated above, it takes note of the fact that even a legitimate right could be so dealt with as to lead to abuse.

12.28. *Difficulty*—The thesis of the law, taken as an abstract proposition, may be assumed to be productive of no serious difficulty. But difficulty arises when the legislature seeks to give concrete shape to it, and when, after such concrete shape is given to it, courts have to apply the legislative mandate in concrete cases.

At the stage of legislation, the problem is how to distinguish between legitimate and illegitimate dealings with rights. If the transfer of a right of suit is totally disallowed, one would be overhitting the mark, because certain kinds of property are of such a nature that their protection and enjoyment might require action on the part of a third person (other than the transferor and the transferee). A thing *in possession* can, within certain limits, be defended without going to a court of law. Things *not in possession* cannot, however, be so defended. This distinction between two kinds of property, and the special nature of things not in possession, gave rise to the evolution of special rules.

12.29. *Importance*—It is in dealing with the transfer of actionable claims that the question often assumes the greatest prominence. An actionable claim is not a corporeal thing which may change hands by delivery, but represents a right to performance of a duty by another person.

1 Maine, Early Law and Custom (1901) page 389.

Assignment of a chose in action ready amounts to substituting a new duty to the assignee in place of the duty originally incurred.[1] Originally, choses in action were, in England, not transferable and their assignability became recognised only by slow degrees. Before such recognition, the same result was achieved by novation of the contract by a triangular agreement to which the debtor was a party, or by means of the power of attorney which enabled the assignee to sue in the name of the assignor for his own purpose. These, however, were indirect modes, and were sometimes practically inconvenient, and also involved risk. Direct transfer was recognised by equity in the seventeenth century.[2]

12.30 It is well-knownth at with the growth of commerce, changes in the law regarding property and transfer of property become desirable. The emergence of rules permitting the transfer of actionable claims is really an instance of the response of the law to changing economic conditions. The origin of the prohibition against transfer was directed against the multiplying of contentious suits,—briefly described as maintenance. As commerce increased, the rigour of this original rule had to be modified. Equity first gave its aid, and later, statute law gave effect to the doctrines of equity. It now remains for the courts to apply to the law in its true spirit so as to discourage, on the one hand, gambling in litigation or transactions intended to injure or oppress third persons by encouraging unrighteous suits, at the same time fostering the growith of commerce by recognising those transactions which are entered into in the process of modernisation of commercial activities.

12.31. *Legislative formulation*—The problem, then for the legislature was how to reconcile the desire of the law to discourage trafficking in litigation with its equally keen desire to recognise the existence as well as the transferrability of things not in possession which could be the subject matter of beneficial interest. In India, the legislature has dealt with the matter by—(a) providing for the transfer of things not in possession—which are, really speaking 'claims',—provided the claims are recognised by law—'actionable' according to Indian legislative phraseology, and (b) disallowing the transfer of a "mere" right to sue.

The two have been sought to be harmonised by using the word 'mere'. The use of this word takes note of the fact that in certain circumstances a transfer can be a transfer of a right to sue.

12.32. So much as regards the solution adopted by the legislature, which indicates that the whole matter hinges upon the word 'mere'. The legislature having done its job by using that word, it remains for the courts to apply the criterion in such a manner as to achieve both the objectives to which reference has been made above, namely, prevention of trafficking in litigation and, at the same time, leaving unaffected the right to transfer those claims which are not in the nature of things in possession but are in the nautre of claims enforceable by law. Both the aspects are important.

12.33. *Case law under* s. 6(e)—What has been the attitude of the Courts? Judicial decisions applying this clause fall into three categories—

(a) cases where there could be no doubt that the matter related to actionable claims;

(b) cases where there could be no doubt that the matter related to mere right to sue;

(c) border line cases.

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1 Ames in 3 Harvard Law Review, 337, 339.
2 *Fry* v. *Porter* 1 Mod Report 300.
3 Wilson Anglo Muhammadan Law page 280, para 208, cited in *Gulam Abbas*

12.34. *Madras cases*—Thus,[1] where a sale is set aside, the right of the purchaser to recover the purchase money is an actionable claim, assignable under section 130 and the assignment is not prohibited by section 6(e). It is on this principle, again, that rent which is due is assignable, unlike *mesne profits,* which is a claim in tort.[2]

12.35. *Calcutta cases*—As an example of a case where due attention was paid to the two competing considerations which form the basis of the law, we may refer to a Calcutta case.[3] Certain goods booked by A for carriage and delivered through railways were short delivered and a shortage certificate was issued by the railways to him. The goods had been insured by A, and having regard to the shortage certificate, the insurer paid the value of the goods short delivered. A assigned to the insurer all his rights against the railway company arising by reason of the damage or loss and also granted to the insurer power to take any steps in the insurer's own name and to recover the damage or loss. It was held that such an assignment was not a transfer of mere right to sue for damages. The court construed the assignment as an assignment of the goods short delivered, together with the actionable claims relating thereto.[4]

It may also be noted that the contract of insurance is a contract of indemnity. On payment of the amount of the loss, the assured has an indemnity and the insurer has an equitable right of subrogation to the claims of the assured against the carrier or other person insuring his interest. This equitable doctrine does not, however, give the insurer the right to sue third parties in his own name.[5] In the absence of an assignment, the insurer though subrogated to the rights of the insured can sue only in the name of the insured. But since the legal position is that any damages that might be recovered by the assured would be held by him as a trustee of the insurer to the extent of the payment received by the assured from the insurer, the court would compel the assured to permit the use of his name on the usual terms by the insurer. A subsequent assignment of the right to sue would not, for these reasons, be hit by setion 6(e) since it is not a transfer of a 'mere' right to sue. The matter depends primarily on the meaning of the word 'mere' which turns to be crucial in such circumstances.

The assignment enables the assignee to sue in his own name and to enforce the claim which was already held for his benefit by the assignor.[6]

12.36. In a Calcutta case[7] a certified guardian sold some immovable property of the ward to the defendant without the sanction of the District Judge. Subsequently, he sold the same property to the plaintiff with sanction of the District Judge. The plaintiff instituted a suit for recovery of possession on declaration that the previous sale to the defendant was not valid.

It was held that what the plaintiff purchased was not a mere right to sue within section 6, T.P. Act but the entire right of the minor in the property. In a Bombay case,[8] plaintiff sold to defendant three sets of bales

1 *Chinnappa Reddy* v. *Venkateramanappa,* A.I.R. 1942 Madras 209.
2 *Chidambaram* v. *Doraiswamy,* A.I.R. 1916 Madras 974.
3 *Union of India* v. *Alliance Insurance Company,* A.I.R. 1964 Cal. 31 (R. S. Bachawat and A. K. Mukherjea, JJ.).
4 66 Calcutta Weekly Notes 419 approved.
5 *K. M. Prinian Maryam* v. *Benyam & Co.,* A.I.R. 1926 Mad. 544, 550.
6 *King* v. *Victoria Insurance Co.* (1896) A C. 250.
7 A.I.R. 1931 Cal. 131; 34 C.W.N. 948; I.L.R. 58 Cal. 128.
8 32 Bom. L.R. 894; A.I.R. 1930 Bom. 409 (D.B.).

of yarn for three different vayadas at certain rates. Similarly the defendant sold to plaintiff an equal number of bales for the same vayadas. These were cross-transactions between plaintiff and defenant, and no delivery remained to be given and taken, but only adjustments of the rates were to be made. On such adjustments, a certain amount was found due to plaintiff in respect of the three transactions. Plaintiff assigned his right to recover this amount to another person. It was held that the subject of the assignment was a 'debt' and not a mere right to sue within the meaning of section 6(e).

Where a person purchases a tank and brings a suit by virtue of a covenant running with the land, it cannot be said that what was transferred was a mere right to sue.[1]

Where the pre-emptor made a gift of his property, including the right to continue the suit for pre-emption then pending, it was held that the gift, so far as the right of pre-emption was concerned, was not a transfer of a 'mere right to sue.[2]

12.37. *Uncertain amount*—Taking cases at the opposite extreme, the right to recover an uncertain amount cannot be transferred. On this principle, the right to damages accruing after a breach of contract is a mere right to sue for damages.[3] Similarly, a mere right to sue for the remainder of maintenance allowance that may fall due in future is not transferable.[4]

12.38. *Border line cases*—Difficulties, however, could arise in a border-line case. For example, the transfer of a right of action in tort could take place by the effect of a contract of insurance by which the insurer who has paid for the total or partial destruction of the insured goods is subrogated to the rights of the insured. The insurer must sue in the name of the assured, but if the right to sue has been properly assigned to the insurer,[5] the insurer can sue in his own name and it would appear that in such circumstances the right to sue—even the right to sue for damages—has been property assigned to the insurer.

On the other hand, the right to sue for damages on account of fraud cannot be transferred. The right to complain of fraud is not a marketable commodity and if it appears that an agreement for purchase has been entered into for the purpose of acquiring such a right, the purchaser cannot call upon the court to enforce specific performance of the agreement. Such a transaction, if not in strictness amounting to maintenance, savours of it too much for the court to give its aid to the enforcement of the agreement.

12.39. *No change in section* 6(*e*)—The upshot of the above discussion is that the legislative formulation, though not capable of verbal improvement, requires to be applied with some care and after bearing in mind the historical and juristic background in which it was enacted. No changes, are, of course, recommended.

12.39.a. *Res extra commercium*—Before we proceed to the next clause, we may mention that apart from the specific prohibitions contained in the clauses of section 6, there may arise, in effect, a prohibition against transfer because the item sought to be transferred is *res extra commercium*. What can be transferred under the Act must be

1 A.I.R. 1929 Pat. 245.
2 A.I.R. 1922 Oudh 289.
3 A.I.R. 1937 All. 642.
4 A.I.R. 1929 All. 281.
5 *King* v. *Victoria Insurance Company* (1896) A.C. 250. 256.

'property'—section 6, opening sentence goes only to that length. It must be subject matter in regard to which the law recognises proprietary rights. If a right is not recognised by law in its very existence, its transferability is out of question.

12.39.b. *Sacred Bulls.*—Let us draw an example from Hindu law. The ceremony of consecrating a bull (vrishotsarga) forms a part of the sraddha ceremony of the Hindus. This ceremony forms the subject of separate treatises which give the fullest information upon all points. It will be sufficient for our present purposes to state that the ceremony seems to be a survival of the Vedic site of 'gomedha', where the bull is set free instead of being slaughtered.[1] The rationale of this consecration is the use of the animal as a propagator of the breed. Manu[2] declared "that no fine shall be paid for (damage done by) a cow within ten days after her calving by bulls (kept for impregnation) and *by cattle sacred to the gods,* whether they are attended by a herdsman or not." The following explanation occurs in Buhler's Notes :—

> "Bulls, "i.e., 'those set at liberty (see VII. LXXXVI) are meant' (Nar., Kull)., which may be met with near many Indian villages and in many towns. 'Cattle sacred to the gods, i.e., either such are set apart for sacrifices," or 'such as are dedicated to temples' (Medh.). The other commentators prefer the second application."

The same text is quoted by Colebrooke,[3] but he gives the further explanation by Kullukabhatta on the words "attended or unattended" of the text of manu :—

> "Since even consecrated bulls are kept by herdsman among cows for the sake of impregnating them, it is possible they may be attended by a keeper."

The marking of the consecrated bulls is an ancient practice, as will be seen from a text of Usanas, quoted by[4] Colebrook : "for elephants and horse, no fine is allowed.....nor for bulls marked with the token of consecration." "Bulls marked" is explained by Ratnakara as "distinguished by the mark of a trident and the like."

12.40. *Rules of Hindu law*—It may be noted that in regard to religious offices and things dedicated to religious purposes, the rules of Hindu Law[5] and Muslim Law[6] agreed with that of the ancient Roman law in rigidly classifying public trusts and property and offices as *extra commorcium.* Such offices were not transferable like other property, and even where a transfer was allowed, that was within certain well defined limitations.

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1 See मधुपर्व Ashwalayana Grihya Sutra, pages 103, 108 and 109; also Colebrooke's Essays, Vol. I. pages 206, 207. Also see श्रवनक्षतरणी Ashwalayana Grihya Sutra, pages 200, 201 and 209; शूलगं, Ashwalayana Grihya Sutra, page 251, & c.. उत्सर्ग ; in page 260, See वृषोत्सर्ग: Ashwalayana Griha Porisishtafi pages 331 to 333.

2 Manu VIII, 243, See Buhler, page 297 and note.

3 Colebrooke's Digest, Vol. II, page 104.

4 Colebrooke & s. Digest, Vol. II, page 104.

5 *Narayan* v. *Chintamani*, I.L.R. 5 Bom. 393, 396, 397 (Westropp, C.J.).

6 *Shama Charun Roy* v. *Abdul Kabeer*, 3 Calcutta Notes 158.

12.41. *Section 6(f)—To revert to Section 6,* under clause (*f*), a public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable. Public offices are made non-transferable for reasons of public policy. As regards salary of public officers also, the provision is based on obvious considerations of public policy, namely, (i) the salary of public officers is paid in order that they may discharge their public functions efficiently and maintain their dignity, and (ii) public functions, in contrast with private functions, deserve special treatment. Though salary is the property of the person entitled thereto and therefore that person may, in general, have the freedom of disposition thereof, yet, in the case of public servants, other considerations are material.

12.42. *Rationale*—A rule that anyone may renounce and assign his own benefits, applies only to private rights and benefits, and not to a right created on the ground of public policy. An individual cannot waive a matter in which the public have interest.[1] That is the rationale of the prohibition. As the law stands now, this rationale has been considered sufficient to invalidate the transfer of any part of the salary,— and this irrespective of the circumstances which might have impelled the transfer.

12.43. *Limitation*—Though the above discussion shows the width of the prohibition, it should, at the same time, be noted that the clause does not prohibit the incurring of *any monetary obligation* by a public servant. An obligation undertaken by a public servant is not necessarily void merely because it may result in a pecuniary liability. If it is not framed in terms of assignment of salary, it can still be valid.

12.44. *Madras case*—A Madras case[2] must be taken note of at this stage. A was the youngest brother and B the eldest brother. After their father's death, A who was only 10 or 11 years old was educated and brought up by B out of his meagre income. When A had almost completed his college career, he executed an agreement in favour of B. In consideration of the moneys spent by B from B's earnings on account of A and in consideration of the moneys that would be spent by B in future and out of natural love and affection, A relinquished in favour of B, his interest in the joint family properties and further agreed that A would pay B, on account of the maintenance of B himself and the members of his family after A began to earn a salary or income, sums which would represent a *percentage of his monthly income*. When A was appointed to a public office in the Public Works Department, he brought a suit for a declaration that the agreement was void and unenforceable.

It was held (i) that the agreement did not purport to assign the salary of a public officer. It related to the income which *A might earn* after completing his education. The income might be earned either as salary attached to a public office, or as salary in private employment, or as income in independent practice of the profession. The agreement by itself had nothing directly to do with any public office. Further, A was not bound to pay the amount payable under the agreement *out of the salary* or income that he earned every month. He could pay it out of his savings or out of any dowry that he might get or out of gifts of any

1 A.I.R. 1941 Bombay 389.

2 *Ananthayya* v. *Subba Rao*, A.I.R. 1960 Mad. 188. (Subrahmanyan, J.).

other kind. The agreement, therefore, did not of its own force assign, or effect a transfer of any part of A's salary and therefore it was not void under section 6(f), Transfer of Property Act or on any ground of public policy.

(ii) that the payment provided in the agreement was not in the nature of penalty, nor was there anything unconscionable or inequitable in the terms of the agreement so as to grant equitable relief. Nor was it a case for the application of section 74, Contract Act. It appears that at the time when the agreement was made, A was not yet in service.

We need not comment on this decision of the Madras High Court. We may, however observe that the assignment of monthly income may, in certain circumstances, operate practically as an assignment of the salary. On the contrary view, the prohibition incorporated in section 6(f) might, in practice, be defeated in a large number of cases. It is not in every case that a provision for assignment of "income" can be saved. Since the problem is one of correct application of the law and not of any defect in its formulation, we leave the matter at that.

12.45. *Question of maintenance*—The principle underlying section 6(f) is sound, and it is not our intention to recommend any modification of a radical nature. But it is necessary to consider one question which, while preserving the priniciple, suggests itself, having regard to the need to take into account certain realities of life. The precise question to be considered is whether the present prohibition against the transfer of a salary of a public officer should be retained *in toto,* or whether the law should be amended so as to allow the transfer of a part of the salary in certain special situations. The concrete situation which we have in mind is a transfer of salary made by a public officer in favour of his wife or children in order to provide for their maintenance, where the amount or percentage transferred does not exceed the attachable portion of the salary. The attachable portion of the salary is dealt with in section 60(1)(i) of the Civil Procedure Code. Necessity for recognising such a transfer as is posed above might arise where there has been a separation between the spouses, or where there have arisen other special circumstances, necessitating the entering into of an agreement of maintenance. As a part of such an agreement, it might become expedient to make provision for the assignment of a portion of the salary, so as to secure to the transferee payment of the amount promised thereunder.

12.46. At this stage, a question may be raised whether the rules relating to maintenance of spouses have purely legal origin, or whether they have also a sociological importance. In this connection, it is to be pointed out that while, historically speaking, in the common law, these rules might have been the inevitable consequence of the doctrine of unity of legal personality of the spouses,[1] it is not to be forgotten that in modern times their sociological justificaion is the necessity to sustain life, coupled, of course, with the obligation undertaken by the spouses. The obligation to maintain spouses is, so far as England is concerned, now given statutory force.[2] The statutory framework in which that provision is placed—the National Assistance Act—is enough to indicate its sociological importance and we may state that it is for the same sociological consideration that there is

1 Bromley, Family Law (1971), page 401.

2 Section 22(1), National Assistance Act, 1948.

contained in the Code of Criminal Procedure[1] a special procedure regarding proceedings for the maintenance of wife and legitimate and illegitimate children.

12.47. *Need for change*—As the law now stands in India, not only is an agreement for attachment and deduction of the non-attachable portion illegal in case of a public servant, but also an agreement assigning the attachable portion becomes ineffective by virtue of section 6(f). There seems to be some justification for permitting the transfer of so much of the salary of a public officer as is attachable in execution of a decree where the assignment is bona fide for maintenance as stated above of the spouse or child. In such cases, in the first place, there is no serious objection on the ground of public policy—since the proposed amendment would relate only to the attachable portion—and, in the second place, because we should take into account the claims of the spouse as a particular overriding consideration as against the general aspect of public policy, assuming that such aspect can have much importance for the attachable portion.

12.48. *Provision in Civil Procedure Code*—Under the Code of Civil procedure, 1908, section 60(i), as amended, four hundred rupees of the salary of an employee and two-thirds of the remainder is exempt. In addition, there is the following further proviso :—

> "Provided that where any part of such portion of the salary as is liable to attachment has been under attachment whether continuously or intermittently, for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months, and, where such attachment has been made in execution of one and the same decree, shall, after the attachment has continued for a total period of twenty-four months, be finally exempt from attachment in execution of that decree."

It is not our intention that the restriction imposed by the Code on the duration of the attachment should be applied to restrict the duration of the assignment. Attachment is an immediate sanction and exerts a certain amount of psychological pressure, which is absent in the case of an assignment. In any case, the proposed provision is intended to benefit the spouse or child, and for that reason, should be unrestricted as regards duration.

12.49. *Recommendation*—Having regard to the considerations mentioned above, we recommend that in section 6(f), an exception should be carved out—say, by adding a proviso[2]—permitting the assignment of the attachable portion of the salary of a public officer for the maintenance of his spouse or children or both.

12.50. *Verbal point*—Finally, a verbal point. The expression "public office" is defined in section 2(17) of the Code of Civil Procedure, 1908, and the expression "public servant" in section 21 of the Indian Penal Code. There is no definition in the Transfer of Property Act of the expression "public office". It may be presumed that for the purposes of the Transfer of Property Act, it is legitimate to apply the definition in the Code of Civil Procedure. This could be usefully provided for.

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1 Section 125, Code of Criminal Procedure, 1973.

2 This is not a draft.

12.51. *Recommendation*—On the above reasoning, we recommend that clause (f) should be followed by a proviso somewhat on the following lines :—

> "Provided that nothing in this clause shall prohibit the transfer of so much of the salary of the public officer as is not exempt from attachment under the Code of Civil Procedure, 1908, where the transfer is intended to provide for the maintenance of the spouse or child of the transferor whom the transferor is bound to maintain by virtue of the provisions of any law for the time being in force or under a decree or order of a court or an agreement."[1]

Further, a suitable definition of "public officer" (applying the definition in the Code of Civil Procedure) be added.[2]

12.52. *Section* 6(g)—Under section 6(g), stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

12.53. *Provision in the Code*—It may be noted that the corresponding provision in the Code of Civil Procedure[3] reads thus :

> "(g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the State Government in this behalf, and political pensions."

It has been held that the gratuity, referred to in this provision of the Code of Civil Procedure, is a bonus allowed by Government to its servants in consideration of past service. It may be allowed to a pensioner in addition to his pension or it may be allowed to a person who is not a pensioner. It is exempt in both cases.[4]

12.54. *Rationale*—In the case of political pensions, two considerations are operative, namely, they were granted in view of considerations of a political nature and those considerations were peculiar to the grantee. In the case of Government servants, the primary consideration of public policy is also two-fold, namely, the pension is granted in order that the pensioner may not have to live in penury or discomfort, and secondly, the ultimate object is that the prestige of the Government should also remain untarnished. Considerations similar to the above have led to the enactment of provisions for exemption from attachment in the Code of Civil Procedure and also appropriate provisions in the Pensions Act. Some points relating thereto will be discussed at the appropriate place.

12.55. *Pensions Act*—The same policy that justifies the prohibition enacted in section 6(g) equally renders invalid any assignment of all pensions—whether political, Civil or military—under the Pensions Act.[5] The policy of prohibiting the transfer of a pension is to insure its enjoyment by the pensioner in comfort. Being an offering made to the recipient in gratitude for his past services, and being almost always less than the salary which the pensioner was accustomed to draw, it is considered right, that its enjoyment shall be assured to the recipient.[6] But, being a limitation on

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1 Para 12.49, *supra*.
2 Para 12.50, *supra*.
3 Section 60(g), Code of Civil Procedure, 1908.
4 *Bawan Das* v. *Mul Chand*, (1884) I.L.R. 6 All. 173.
5 Sections 11 and 12, Pensions Act (23 of 1871).
6 Gour.

the rights of the creditor, the term should be construed strictly so as to include only a periodical allowance or stipend granted not in respect of a right, privilege, perquisite or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants.[1]

12.56. *Pensions Act*—Sections 11-12 of the Pensions Act, 1871, practically cover the same ground as section 6(g), but there are certain differences. Both deal with pensions of all kinds, but while section 6(g) prohibits their *assignment generally*, section 12 of the Pensions Act prohibits only their assignment before they are "payable"—a term understood[2] to mean "due and demandable by the person entitled".

The leading case is a Madras one,[3] in which the Zamorin of Calicut, who was entitled to a political pension of Rs. 6,000 a month payable quarterly, devised to the plaintiff whatever might be in arrears at the time of his death. The Zamorin died on the 6th August, 1892 before the quarterly instalment became payable. The plaintiff sued for its recovery. It was contended that section 12 was not contravened since the transfer was after accrual of a right to receive payment, though not after the payment was actually due.

The Court overruled the contention and held that the word "payable" referred to the time when the payment was ripe and demandable. It then went on to add that even if section 12 of the Pensions Act did not authorise that construction, section 6(g) of the Transfer of Property Act was in point, as it was more positively worded and prohibited all transfers of political pensions. The Court applied the law in section 6 to the will, since wills amongst Hindus had been treated as developments of gifts.

12.57. *Meaning of pension*—The term "pension" is a relative term and while it is true that the character of non-transferability is not indelibly impressed upon it even after it reaches the hands of the pensioner, still it undoubtedly retains that character so long as it remains unpaid in the hands of the Government, irrespective of whether the intended beneficiary is alive or dead.[4]

12.58. *Recommendation*—It appears to us that the phraseology of section 60(g), Code of Civil Procedure, which is wider, is also more precise and should be adopted. We recommend accordingly[5].

12.59. *Section* 6(h)(1)—Under section 6(h), there is a prohibition against three kinds of transfers, namely, 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 unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be the transferee.

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1 (a) *Secretary of State* v. *Khemchand*, I.L.R. 4 Bom. 432;
(b) *Lachmi Narain v. Mokund Singh*, I.L.R. 26 All. 617.

2 Gour.

3 *Sridevi* v. *Krishnan*, I.L.R. 21 Mad. 105, 108.

4 *Valia Thamburatti* v. *Anjani*, I.L.R. 26 Mad. 67, 91.

5 Para 12.53.

The first sub-clause in clause (h), as is often pointed out, is really an example of circumlocution, because all that it means is that if the nature of the interest sought to be transferred is such that the interest is not transferable, then it may not be transferred. In this sense this clause tells us nothing new. In any case it cannot be applied without an understanding of the nautre of the interest. Recourse, therefore, has necessarily to be had to the nature of the interest, which is determined by the rules of law recognising or creating the particular interest. In illustration of this prohibition, mention is usually made of things which are nobody's property and to the use of which all are equally entitled, such as air, light and water. How far water can be appropriated—for example, water in a pool or tank—is a matter dealt with not in the Transfer of Property Act, but by the relevant rules of other branches of law.[1] In particular, the owner of an artificial watercourse might come to have proprietary rights to the water, and in such a case the water may be the subject matter of private dominion[2].

12.60. *Section* 6(h)(2)—*Unlawful object or consideration*—The second sub-clause of clause (h) deals with an entirely different topic. The prohibition here does not depend on the nature of the interest, but on the unlawfulness of the object or consideration pertaining to the transfer. Whatever be the nature of the interest, this prohibition applies and in this sense this prohibition is *sui generis*, unlike clauses (a) and (g). The expression "object" implies the purpose or intention in an overt act. For example, a person hires a house for a lawful consideration, but with the unlawful object of using it as a gambling house.[3] Here the object is unlawful. Similarly, where money is borrowed for the purpose of marriage of a minor which is prohibited by the Child Marriage Restraint Act, 1929[4] the consideration may not be illegal—the consideration being the loan. But the object is to defeat the provisions of the Child Marriage Restraint Act.

12.61. *Dominant object of legislation to be concerned*—Students of the law of contracts are familiar with difficult questions concerning section 23 of the Contract Act that arise when it becomes necessary to determine whether the object or consideration of an agreement is "unlawful" as defeating the provisions of any law. The dominant purpose of the legislation is to be taken into account in this context. Is the dominant purpose one of imposing a prohibition as a matter of policy, or has the law been passed primarily for facilitation of collection of revenue or for effecting other administrative object? If the conduct, which is now challenged as illegal, was forbidden as a matter of policy, the transaction would be void. If, on the other hand, the legislation infringed was intended merely to prescribe certain terms and conditions for administrative purposes, then a transaction which infringes the law by failing to comply with the statutory requirements may not necessarily be void, although the transgression may be visited with a statutory penalty.

The effect of a transfer in violation of the land ceilings law—a situation more likely to arise in modern times—is discussed in a judgment of the Supreme Court.[5]

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1 *Dorumal* v. *Ramaswami*, I.L.R. 11 Mad. 16.

2 (a) *Inderjit* v. *Lachme*, 14 Weekly Reports 349;
(b) *Debi Prasad* v. *Joynath*, I.L.R. 24 Cal. 865 (P.C.).

3 Gour.

4 *Chandrasrinivas Rao* v. *K. Rajaram Mohan Roy*, A.I.R. Mad. 579.

5 A.I.R. 1968 S.C., 1358; (1969) 1 S.C.J. 279.

12.62. *Effect of illegality on parties*—For the present purpose, it is not necessary to discuss in detail the various situations in which object or consideration becomes unlawful. From the practical point of view, the more important question relates to the effect of the illegality on the rights of the parties to the illegal transfer. The law on the subject is complex and not very satisfactory. When one or other of the parties seeks to enforce or repudiate such a transfer, the question how far that party will succeed depends on several factual elements—which is the reason why the law is complex. These factual elements acquire relevance by reason of certain rules of law—some of them based on equitable doctrines—which we shall discuss in due course.

The effect of the provisions relating to illegality in section 6 is not completely stated in the section. Even though the section provides that the transfer cannot be made, that does not mean that if possession has been delivered, it can be recovered by the transferor.[1] The transferee (except in certain special situations) is allowed to retain the property transferred. This is the effect of another rule of law, namely, that the court will not assist a person taking advantage of his illegality. If possession has been given, the transferor cannot recover back what he has transferred, except in certain special cases which will be dealt with in due course.

12.63. *Malaya case*—Let us illustrate this. The Privy Council, in an appeal from Malaya, held that where two persons agreed together to a conspiracy to achieve a fraudulent or illegal purpose and one of them transfers property to the other in pursuance of the conspiracy, then, so soon as the contract is executed and the illegal purpose is achieved, the property (be in general or special) that has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin.[2] In that case the transfer of a lorry was made in Mallacca (Malaya) in violation of legislation relating to road transport prohibiting the transfer in question, that is to say, the transfer of a registered motor vehicle without a written permit from the Registrar.

Subsequently, the seller of the lorry had taken it back from the purchaser and refused to return it and the action by the purchaser was against the seller in detinue.

Title was held to have passed to the transferee. The reason is that the transferor having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the object with which he did it and the transferee, having got the property, can assert his title against all the world not because he has any merit of his own, but because there is no one who can assert a better title. The court has no power to confiscate the property. To quote Lord Eldon L.C., "Let the estate lie where it falls"[3]

While the matter, no doubt, is governed by statute in India, the principle that the transferor cannot recover in the circumstances mentioned above, would be true of Indian law also.

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1 Mulla (1973), Page 77.

2 *Sajan Singh* v. *Sardara Ali*, (1960) 1 All England Reports 269, 272 (P.C.).

3 *Muckleston* v. *Brown*, (1801) 31 English Report 19, 34.

12.64. *Section* 84, *Trusts Act*—The circumstances in which the transferor can recover are dealt with in the Trusts Act. The general rule under section 84 of the Trusts Act[1] is as follows :—

> "84. Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

For the present, we shall not enter into the question whether section 84 is exhaustive of all the special situations. But it is fairly well settled that it is not in every case that the transferor who is party to an illegal transfer can sue on the basis of illegality. That there are limitations is not now doubted, even in India.

12.64A. We take up, for the present, the limitations contained in section 84, Trusts Act.

In the first case, there is a *docus poenitentiae* until the fraud is carried out and the transferor may sue to recover his property.[2] The second case is where the transferor is not so guilty as the transferee. In the analogous case of contract, section 27(1)(b) of the Specific Relief Act, 1963, allows a contract to be rescinded if the defendant is more to blame than the plaintiff. As to the third case mentioned in section 84, Trusts Act, its application again depends on the object underlying the legislative prohibition.[3]

12.65. *English law—Reason for bar*—In English law, ordinarily speaking, a person cannot recover back money paid under an illegal contract, or property transferred by him under such a contract. There may be no strong reasons against recovery, but there are no strong reasons justifying it. The principle seems to be that as there is no strong reason to act, inertia prevails.

12.66. *Exceptions*—To this general rule, there are exceptions in special cases. These may be enumerated as—

(a) class-protection "Statutes";

(b) oppression;

(c) fraud;

(d) repudiation of illegal transaction in time by a voluntary act.

(e) cases where the plaintiff does not rely on the illegal transaction as such for recovery, and the cause of action is based on any other ground.

Examples of this are[4]—

(i) Expiry of the period of hire in case of goods let out on hire under illegal contract;

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1 Section 84, Indian Trusts Act, 1882.

2 *Kedar Nath Motani* v. *Prahlad Rai*, (1960) 1 S.C.R. 861; A.I.R. 1960 S.C. 213; (1960) S.C.J. 1072.

3 *Qadir Ruksh* v. *Hakim*, A.I.R. 1932 Lah. 503 (F.B.).

4 The categories are based on Troitol, Contracts (1966), pages 342 to 350.

(ii) Money deposited with a stake holder under an illegal wager;

(iii) Expiry of illegal lease;

(iv) Establishment of a title without reference to the contract or its illegality.

12.67. The case where there has been fraud or oppression,[1] on the part of one person, is really an instance of a situation where the guilt is not equal—not a case of *par delictum*. "It can never be predicated as *per delictum* where one holds the rod and the other bows to it."[2]

In particular, this aspect might become important in rent restriction cases where the tenant is made to pay an illegal premium in order to obtain a lease or sub-lease. This is so even where there is no provision in the relevant legislation enabling the premium to be recovered back. Courts have so held,[3] on the ground that the duty of observing the law being placed on the shoulders of the landlord *for the protection of the tenant,* the parties were not *in pari delicto*.

As regards the case of repudiation,[4] the law encourages repentance and therefore, assists a man who has paid money under an illegal contract, provided he repudiates the transaction before the illegal purpose is carried out. Such repentance must be proved, and assistance is not given to a party who is prevented from fulfilling the illegal purpose by the refusal of the other party who refuses to co-operate.[5]

12.68. *Locus Poenitentiae*—In a case in which the transaction is still inchoate, or the grantor still retains a *locus poenitentiae,* the formal act may be relieved against by reference to the real intention of the parties, the reason being that in such cases the violation or infringement of the law had not been completed.[6]

Hence, when an illegal purpose has been effected by a transfer of the property, the transferee is not to be treated as holding it for the benefit of the transferor.[7] and the transferor is ever afterwards precluded from proving the real nature of the transaction.[8]

12.69. Incidentally, this aspect is not clearly brought out in section 84 of the Trusts Act,[9] where that section refers to the fact that such purpose is not carried into execution apparently because the provision in the Trusts Act might have been based on the observations of Mellish, L. J. in a case[9-a] reported in 1876. His observations were as follows :—

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1. Para 12.66 (b) and (c), *supra.*

2 *Smith* v. *Cuff.* (1817) 6 M & S 160, 165 (Lord Ellenborough).

3 *Kiriri Coton Co. Ltd.* v. *Ranchordas Dewani,* (1960) 1 All E.R. 179, 180 (P.C.).

4 Para 12.66 (d), *supra.*

5 *Bigos* v. *Bausted,* (1951) 1 All E.R. 92.

6 *Sham Lall* v. *Amarendro Nath,* I.L.R. 23 Cal. 460; and the cases therein cited.

7 (a) *Chenvirappa* v. *Puttapa,* I.L.R. 11 Bom. 708, 719;
(b) *Tamarasherri* v. *Maranat Vasudevan,* I.L.R. 3 Mad. 21.

8 (a) *Goberdhan* v. *Ritu Roy,* I.L.R. 28 Cal. 962;
(b) *Kali Charan* v. *Basik Lal,* I.L.R. 23 Cal. 962 note.

9 Para 12.64, *supra.*

9a *Taylor* v. *Bowers,* (1876) 1 Q.B.D. 291, 300.

"If money is paid for goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods *may recover them back before the illegal purpose is carried out.*"

These are too wide if divorced from the facts. The transferor in that case took proceedings in time thus showing repentance.

12.70. *Discretion*—It would appear that where a person who has transferred property for an unlawful object or consideration seeks to rescind the transfer the courts have a discretion in the matter. This discretion is not conferred in so many words by statute, but can be inferred from certain statutory provisions and judicial decisions. The statutory provisions of principal relevance are sections 27, 31 and 34 of the Specific Relief Act, 1963 and section 84 of the Indian Trusts Act, 1882[1]. The judicial decisions on the subject emphasise the equitable principle which has been followed in cases where the plaintiff seeks the assistance of the court to regain property after transferring it for purposes of illegal activities.

12.71. Although the provisions in the specific Relief Act, referred to above, do not in so many words apply to transfers and are framed with reference to agreements, courts seems to have applied them to transfer either directly or by analogy.[2]

12.72. *Other limitation—Calcutta case*—We have so far dealt with certain special situations in which courts allow or refuse a transferor to recover property illegally transferred.

Are there any other situations in which the transferor can recover? Where the owner of a house lets out the property to the defendant for the immoral purpose of running a brothel, the executors and trustees of the will of the owner, who were not *in pari delicto* or *in particeps criminis*, it has been held[3] can sue to eject the defendant on the basis that the transfer is void and the court will accord relief to the claimants.

P. B. Mukerji J. held that *Averst* v. *Jinkins*, (1874) 16 Eq. 275 had been misapplied and misunderstood in many cases in India.

It is elementary that property can be transferred only by a person who owns it or who, though not owning it, is authorised to do so. A transfer by any other person has no legal effect—that is, of course, a rule subject to certain qualifications.[4] The general rule is that no man can confer a better title than that which he himself has. However, occasionally, by either accident or design, a testator or transferor gives his own property to a beneficiary and purports to give some of the beneficiary's property to a third party. In this case, the beneficiary becomes subject[5] to a general principle that a person cannot take under a will without conforming to all its provisions.[6] If, therefore, he is to take the testator's or transferor's, it was held that the principle in that case should not be

1 Para 12.64, *supra*.

2 *Kamarbai* v. *Badri Narain*, (1976) 78 Bom. L.R. 579 (Vaidya and Shimpi, JJ.).

3 *Pranballav*, A.I.R. 1958 Cal 713, para 44, 114, 117 (P. B. Mukherji & R. S. Bachawat, JJ.).

4 E.g. see sections 35, 37, 38, 41, 43, Transfer of Property Act, and Certain provisions in the Sale of Goods Act.

5 Mellows, Law of Succession (1973), page 485.

6 Corrington v. Codrington, (1875) L.R. 7 H.L. 854, 861, 862 (Lord Cairns).

understood as laying down an invariable and inflexible rule of disqualification for a plaintiff seeking the aid of court. The principle of that case should be understood with the limitation referred to by Lord Selborne himself in that judgment. The true boundaries of *Averst* v. *Jenkins,* when applied in India were rightly indicated by Sir Subramania Ayyar, J. in I.L.R. 28 Mad. 413 and Lokur, J. in A.I.R. 1947 Bom. 198 Refusal by the courts to grant relief on the basis of such maxims as *ex turpi cause non oritur octio* or *pari delic* to or *particeps criminis* is based on grounds of public policy and therefore if the same or higher public policy demands in a particular context that relief should be given, then such maxims should not be used any more as a bar and the courts should not deny relief. The rule in *Averst* v. *Jenkins* should never be used to (a) defeat statutes like section 6(h)(2) of the Transfer of Property Act, (b) make the plaintiff liable to prosecution, conviction and punishment under such statute as the Bengal Suppression of Immoral Traffic Act, and (c) violate the express prohibition of the Constitution such as Article 23 saying that traffic in human being is prohibited. This rule in any event should not be extended to the class of innocent trustees and executors who are administering the estates under orders of court.

12.73. Bachawat, J. agreed, but his reasoning was slighty different. In English law—(a) A completed transfer of property made under an unlawful agreement or for an unlawful purpose is valid at law. (b) The title so acquired is protected and enforced and may be used by the transferee both as a shield and as a weapon of offence. (c) In the absence of some special ground of interference a Court of Equity will not on the ground of illegality set aside a transfer valid at law and will let the estate lie where it falls. (d) *Averst* v. *Jenkins,* (1874) 16 Eq. 275 laws down the principles upon which a Court of Equity may or may not set aside such a transfer.

The case of *Averst* v. *Jenkins,* (1874) 16 Eq. 275 has no application where the transfer is void.

In Indian law a transfer for an unlawful object or consideration within the meaning of section 23 of the Contract Act is prohibited by section 6(h), clause 2 of the Transfer of Property Act. Such a transfer is void and need not be set aside.

In Indian law the transferee cannot recover the property on the strength of such a transfer.

12.74. In Indian law, according to Bachawat, J., the transferor claiming that the transfer is void may sue to recover the property on the strength of his original title and in general he may be given relief though he is *particeps criminis* in the following cases :

(a) Where his case falls within one of the three exceptions recognised by section 84 of the Indian Trusts Act, or

(b) (i) Where public interest or the interest of third parties requires that the relief should be given, or (ii) where denial of the relief may defeat a legal prohibition, or (iii) where the transaction is such that it ought to be allowed to stand on grounds of public policy.

Relief may be given upon such terms as the justice of the case may require.

It is an open question whether the transferor should be given relief under other circumstances also.

12.75. According to Bachawat, J., further when an instrument is void on account of illegality not appearing on the face of it and the transaction is such that it cannot stand on grounds of public policy, the Court will decree its cancellation at the suit of the *particeps criminis* on equitable terms. The power of the Court to decree cancellation of void instruments of transfer must be exercised in accordance with sections 39 to 41 of the Specific Relief Act. The power of the Court to decree cancellation and rescission of unlawful contracts in writing is regulated by sections 35(b), 38 and 39 to 41 of the Specific Relief Act.

Reasons of public policy allow the defendant to take the plea of *particeps criminis*. Greater reasons of public policy may allow the plaintiff to repel the plea.

12.76. It would appear that the decision in the Calcutta case should be confined to the special facts of the case. There were several extraordinary features. Illegality in this case was represented by conduct which, if not rectified, might have involved innocent parties in a criminal prosecution. There was also the constitutional directive and further the fact that the executors did make their repudiation at the earliest possible opportunity available to them.

12.77. *Section* 24, *Contract Act*—It may be stated that the Transfer of Property Act contains no provision corresponding to section 24 of the Contract Act, and judicial decisions on the subject do not lead to a very definite position,[1] in this regard. Where, therefore, a transaction comprises two transfers for one consideration and the consideration is lawful but the "object" of one of the transfers is void, it does not necessarily follow that the transfers are all void.

In the Allahabad case, Mukherjee, J. has discussed at length the applicability of section 24 of the Contract Act to section 6(h) of the Transfer of Property Act and has taken the view that section 24 does not apply. He has criticised the contrary view taken in an earlier case.[2] In the same case, Suleman, J. agreed with him.

12.78. *No change*—Having considered all aspects of the matter, we have come to the conclusion that the clause does not need any amendment, and it may be expected that the provisions of law—statutory and the non-statutory—which should be read along with the section will be kept in mind by those concerned with illegal transfers.

12.79. *Section* 6(h)(3)—This takes us to section 6(h)(3), under which a person who is disqualified to be a transferee cannot be a transferee—really a self evident proposition which has been enacted only in order to make the section complete as far as possible. The question who can be a transferor is dealt with in section 7. The question who can be a transferee is not dealt with in a general way in the Act, except that certain persons are prohibited from purchasing actionable claims. The answer

1 *Dip Narain* v. *Nageshar*, A.I.R. 1930 All. 1.
2 *Kanhai* v. *Tilak* (1912) 16 Indian Cases 542.

to this question must therefore be sought elsewhere. Even other legislative measures do not comprehensively deal with the subject, though the Code of Civil Procedure has certain provisions restricting purchases in execution of a decree at the instance of specified persons.

Legal disqualifications in regard to being a transferee might be imposed either in order to protect the interest of a transferee who is deemed not to be competent enough to look after his interest, or in order to prevent a conflict of interest with duty, or in order to prevent trafficking in litigation or for certain other reasons of policy.

12.80. *Minors*—The question has often been discussed how far a minor can be a transferee. The correct position seems to be this— that a minor, though he cannot transfer property, can receive benefits under a transfer. Where therefore there is no contractual obligation undertaken by the transferee, a minor can be a transferee. Cases, however, where the transferee undertakes an obligation—e.g., the case of a lease—stand on a different footing. A minor cannot sign such instruments. The position is the same as regards other persons incompetent to contract.

12.81. Some of the statutory provisions prohibiting the purchase of property by specific persons, contained in the Act[1] or in the Code of Civil Procedure,[2] are based on specific reasons.

Chancellor Kent, adopting Blackstone's definition says,[3] that it is a principle common to the laws of well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. It is called "maintenance" because one man gives or delivers to another—plaintiff or defendant in an action—a sum of money or other things to maintain his plea, or takes great pains for him when he has nothing to do therewith.[4]

12.82. *Section* 6(h)(3)—*Disqualified transferees.*—The law against the transferability of property to a person legally disqualified to be a transferee is, in part, a branch of the law against maintenance and champerty. For it is to discourage the malpractices which arose out of the law officers trafficking in questionable claims that the early statutes against champerty were directed.[5] Thus, in England, it was provided by the Statute of Westminster that "no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters; having in the King's Courts, for lands, tenements or other things, for to have part or profit thereof by covenant made between them; and he that shall be punished at the King's pleasure."[6] Another statute passed in the same reign further extended the scope of the prohibition by prescribing that "the Chancellor, treasurer, justices, nor any of the King's Council, no clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the King's house, clerk ne-lay shall not receive any church, nor advowson of a

1 Section 136.

2 Order 21, Rule 78.

3 Kent's Commentaries, Part VI, Lecture 76, quoted in *Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1, 5, 6.

4 Adapted from Terms de La Ley, as quoted in *Bradlaugh* v. *Newdegate*, (1883) 11 Q.B.D. 1, 5, 6.

5 Gour.

6 3 Edw. I, c. 25.

church, land, nor tenement in fee, by gift, nor by purchase, nor to far, nor by champerty, nor otherwise so long as the *thing is in plea before us, or bejore any of our officers;* nor shall take no reward thereof."[1]

12.83. This statute was again extended by another which ordained that "The King wills that no officer, nor any other (for to have part of the thing in plea) shall not take upon him the business that *is in suit;* nor none upon any such convenant shall give up his right to another."[2] The penalty of attainder was provided for disobedience "but it may not be understood hereby that any person shall be prohibited to have counsel of pleaders, or of learned men in the law for his fee, or of his parents, or next friends."

12.84. A similar prohibition is separately and more specifically enacted by the Act[3] and the Code of Civil Procedure,[4] Section 136 of the Act enumerates the class of persons legally disqualified to be transferees under which judges, legal practitioners, mukhtars, clerks, bailiffs and other officers connected with courts of justices are disqualified from buying any actionable claim.

Under Order 21, Rule 73 of the Code of Civil Procedure, 1908, no officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

We have no further comments on section 6(h)(3).

12.85. *Section* 6(i)—Section 6(i) provides that nothing in this section shall be deemed to authorise 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 the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

This clause needs no comments.

12.86. *Recommendation to add Explanation to section* 6—In order to avoid any misapprehension that every item enumerated in section 6 is property, we recommend that an Explanation (or other appropriate provision) should be added to section 6 to the effect that nothing in this section shall be construed as implying that every thing mentioned in a clause of the section is property.

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1 13 Edw. 1, c. 49.

2 28 Edw. I, c. 11; 1 Rich. II, c. 4, extended the restriction to all persons.

3 Section 136.

4 Order 21, Rule 73, Code of Civil Procedure, 1908.

CHAPTER 13

PERSONS COMPETENT TO TRANSFER

13.1. *Persons competent to transfer*—The subject of persons competent to transfer is thus dealt with in section 7—

> "7. Every person competent to contract and entitled to transferable property, or authorised 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."

13.2. *Contract Act*—Section 11 of the Indian Contract Act, 1872 defines persons who are competent to enter into contracts. It provides "Every person is competent to contract who if of the age of majority *according to the law to which he is subject,* and who is of sound mind, and is not disqualified from contracting by any law to which he is subject." Thus, excepting persons who are of unsound mind, all adults may enter into any lawful contracts, unless they are disqualified from contracting by any law to which the contracting party may be subject. The disqualification need not be explicit, but may be implied from a reasonable construction of the law.[1] One who is usually of unsound mind but occasionally of sound mind, may enter into a contract when he is of sound mind,[2] but not when he is of unsound mind.

13.3. *Majority Act*—Under the Indian Majority Act,[3] which applies to all persons domiciled in India, the period of minority lasts until the completion of the eighteenth year. This holds good for persons of either sex, and supersedes the personal and local laws by which the question was formerly decided.[4]

13.4. *Majority Act*—Under section 3 of the Indian Majority Act, 1875, first paragraph, every person domiciled in India shall be deemed to have attained his majority when he shall have completed the age of eighteen years and not before. We do not quote the second paragraph of the section relating to minors of whose person or property or both a guardian has been appointed by the court or of whose property the superintendence is assumed by a court of wards. So far as the question of capacity is concerned, it seems to be well-established that it is domicile which governs capacity to contract.[5-6]

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1 *Dhunput* v. *Shoobhudra*, (1882) I.L.R. 8 Cal. 620.

2 Section 12, Indian Contract Act, 1872.

3 Indian Majority Act, 1975.

4 *Reede* v. *Krishna*, I.L.R. 9 Mad. 391;
Sarat Chandra v. *Foreman*, I.L.R. 12 All. 213.

5 *Kashiba* v. *Siripat*, (1895) I.L.R. 19 Bom. 697.

6 *Dhanraj Mull* v. *Shamji*, A.I.R. 1961 S.C. 1285.

13.5. *Domicile*—In cases where the matter is governed by private international law, special rules come into existence and domicile becomes important, for the purpose of determining the capacity to contract.

For the present purpose, we shall leave aside contracts of immovable property situated outside India as of no consequence for the purposes of the Transfer of Property Act. In relation to other contracts, domicile may assume great importance. This is by reason of the fact that according to at least one theory,[1] the law of domicile governs the capacity to contract. In fact, it is this view that has been recognised in section 3 of the Indian Majority Act, 1875.

13.6. *Allahabad case*—The importance of domicile is illustrated by an Allahabad case[2] in which a European, not domiciled in India, but only temporarily residing in India, was held not to be governed by the Indian Majority Act.

13.7. *Theories in English law*—In English private international law, the position is not settled beyond doubt, but one view currently accepted is that the law of domicile governs the contractual capacity of a person.[3] In India, this view has been recognised in section 3 of the Majority Act.

According to another theory, the law of the place of contract may govern the contractual capacity. According to yet another theory it is "the proper law" which should be applied. The test of proper law here is an object test and—speaking broadly—means the law of the country with which the contract is most substantially connected. Whichever view is correct, this controversy is not of much importance for the present purpose, because it primarily pertains to the interpretation of the Indian Contract Act, 1872, as read with the Indian Majority Act, 1875. So far as section 7 of the Transfer of Property Act is concerned, the matter is sufficiently stated by the requirement that there must be competence to contract.

13.8. *Importance*—That the age of majority is determined by the law of domicile is an aspect which becomes important where the contract is entered into in India by a person not domiciled in India and the law of the country where that person is domiciled, prescribes an age of majority different from that to which the Indian Majority Act applies.[4] This aspect was of particular importance in relation to Englishmen, since, in England, until the age of majority was lowered,[5] the age was higher than in India--21 years.

13.9. *Artificial persons*—That contractual capacity and the capacity to transfer property is subject to any law for the time being in force is an aspect of particular importance in relation to artificial persons, such as,

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1 Cheshire, Private International Law (1970), page 221.

2 *Rohilkand Bank* v. *Row*, I.L.R. 7 All. 490.

3 Cheshire, Private International Law (1970), page 221.

4 For a comparative survey, see Hartwig in 15 I.C.L.Q. 780.

5 Section 1, Family Law Reform Act, 1969, (Eng.)

corporations, and also as regards the trustees of religious and charitable endowments and, of course, the capacity of a person to transfer property may be limited to certain circumstances in other cases, as, for example, in the case of a Hindu widow under Hindu law as unmodified by statute[1].

13.10. *Trusts Act*—Finally we may note that section 7 of the Transfer of property Act is closely analogous to section 7 of the Indian Trusts Act.[2] The competence to transfer property under section 7 and the competence to create a trust under the Trusts Act are both co-incident with the competence to contract.

13.11. *No change*—The above discussion necessitates no change in section 7.

CHAPTER 14

ACQUISITION OF PROPERTY OF HOMICIDE
SECTION 7A (PROPOSED)

14.1. *Effect of death on transfer*—One aspect of public policy which is not dealt with expressly in the Act may now be discussed in view of its ethical interest and juristic importance. The precise question for consideration is this—can a person who has been guilty of the culpable homicide—(whether amounting to murder or not) of another person acquire, (otherwise than by succession), an interest in property where the acquisition of such interest is, by the terms of a transfer, conditional on the death of the person who is the victim of the culpable homicide? Acquisition of interest (otherwise than by death) conditional on death could be envisaged in several circumstances even apart from succession. Examples will be given later.[1] For the present, let us consider a few theoretical and general aspects.

14.2. The principle *Nullus commodum capers potest de injuria sus propria* (No man can take advantage of his own wrong[2-3]) is familiar to lawyers.

It is a well-established general principle that a person who kills another is not entitled to enjoy any property which he would otherwise have acquired as a result of that death.[4-5] We are now concerned with the application of that principle to the law of transfer.

14.2A. *Equity*—"Equity does not demand that its suitors shall have led blameless lives."[6] What bars the claim is not a general depravity, but one which has "an immediate and necessary relation to the equity sued for".[7] We are now dealing with the question whether there is justification for applying this principle in the law of transfer.

14.3. This is not a mere question of abuse of existing rights. The question is whether rights should be allowed to be acquired under a transfer where their acquisition offends the deepest moral sentiments of the community. No doubt, it is not possible to give effect in the legal system to every norm of ethics. Law presents itself as an external regulation of human conduct.[8] Ethical theory is concerned with the question of the content of a man's own will, in whose heart there must be no opposition of being and seeming.[9] Law is neither ethics nor religion, it is true. But the law is not safe when it is totally diverced from ethics.[10] Such ethical

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1 Para 14.14, *infra.*

2 Chadwick, "Tostator's Bounty to his slayer" (1914) 30 L.Q.R. 211.

3 Toohey, "Killing the goose that lays the golden eggs" (1958) 23 Australian L.J. 14.

4 T. C. Youdan, "Acquisition of Property by Killing" 89 L.Q.R. 235.

5 *Re Callaway,* (1956) Ch. 559.

6 *Loghran* v. *Loughran,* 292 U.S. 216, 229 (1934), per Brandeis, J.

7 *Dering* v. *Earl of Winchelsea,* (1787) 1 Cox Eq. 318, 319, 320; 2 W. & T.L.C. 488 489, per Eyre C. B.; *Moody* v. *Cox,* (1917) 2 Ch. 71, 87; 34 T.L.R.

8 Rudolf Stammler, Justice, page 441.

9 Rudolf Stammler, Justice, page 441.

10 Dr. Nathniel Micklem, Law and the Laws (1952), page 59.

mandates as are universally accepted, and as are immediately relevant to the subject, deserve consideration.

14.4. *Position in law of Succession*—Let us first refer to a few branches of the law where the principle that a man shall not profit by killing has been given concrete legal recognition. In the law of Succession it is well recognised that it is a rule of public policy that a person shall not be allowed to benefit from his crime. If, therefore, A makes a will in favour of B, and B shoots A dead. B is not allowed to claim the property to which he would otherwise be entitled under the will. Likewise, he is not entiled to claim under an intestacy in such circumstances.

In England, before the Forfeiture Act, 1870, the interest of a murderer was forfeited to the Crown, so that where a fellow was a beneficiary under the will, the murderer's interest was forfeited, by reason of this rule. The Forefeiture Act, 1870 abolished the common law as to the property of the felon and since then the basis of the rule has been altered. It was in 1892 and Fry, L.J. formulated the rule thus[1]—

> "It appears to me that no system of jurisprudence can with reason include among the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. In other words, the rule is expressed in terms that the law will not lend its aid to assist a criminal to recover. It left open the question whether the executors could nevertheless pay."

14.5. The Indian Succession Act does not contain any specific provision on the subject. But it should be noted that the Act does not embrace the whole field of intestate succession for persons of all communities. In this sense, it does not deal exhaustively with the law of succession. In any case, such Acts should be read[2] as not intended to affect paramount questions of public policy.

14.6. *Position in Hindu law*—In regard to Hindus, this was the position[3] in respect of Hindus, even before the passing of the Hindu Succession Act.

14.7 It was held by the Privy Council[4] even before the Act that the "High Court has rightly *decided* that the principles of *equity, justice* and *good conscience* exclude the murderer." The Privy Council also laid down that "statutes regulating heirship or descent, or giving force to wills should be read as not intended to affect paramount questions of public policy or depart from well settled principles of jurisprudence."

Amongst the persons disqualified to succeed in Hindu law were those criminally responsible for the death of the propositus.[5] This position was not modified by the Hindu Inheritance (Removal of Disabilities) Act, 1928. It was reinterated by the Hindu Succession Act, 1956. Section 25 of that Act expressly disqualifies a murderer.

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1 *Cleaver* v. *Mutual Reserve Fund Life Association,* (1892), 1 Q.B. 147.

2 Para 14.7 *infra.*

3 *Kenchava* v. *Girimallappa,* A.I.R. 1924 P.C. 209.

4 *Kenchaya* v. *Girimallappa,* A.I.R. 1924 P.C. 209, 211.

5 *Chanda* v. *Chameli,* A.I.R. 1962 Punjab 162, commented upon in A.I.R. 1963 Journal 5, 6.

14.8. According to Hindu law, then, even before the passing of the Hindu Succession Act, no heirship to another can be claimed by or through a person who has been a privy to his murder. This rule is one of public policy. It has been given effect to by the Privy Council, relying on ancient texts.[1]

The Hindu Succession Act—The Hindu Succession Act now provides as follows [2]:

> "25. Murderer disqualified,—A person who commits murder or abets the commission of murder, shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder."

14.9. The rule amongst Muslims is the same.[3] The rule of law is that he who kills another cannot take a legacy from the deceased. in Hanafi law this provision is applied with great severity, and the manslayer is excluded whether the homicide is intentional or not. In Ithna "Ashari law, the more logical view is taken and only intentional homicide leads to exclusion, but the Fatimids have apparently adopted the Hanafi rule.[4]

Rule in England—The general rule[5] in England is that a person may not recover *a benefit resulting from his own crime.*[6]

As early as 1892,[7] it was, in England, laid down that a murdered forfeits all benefits under the will of his victim.[8] In 1914, this principle was extended from murder to man-slaughter.[9] In regard to intestacy, it was decided in 1935 that the same rule of public policy applies.[10]

14.10. *View of Ames*—Ames, in his famous study "Can a Murderer acquires. Title by his Crime and keep it;[11] said that three results were possible where a person acquires property by killing: (i) the legal title does not pass to the killer; (ii) the legal title passes to the killer, and he may retain it in spite of his crime; or (iii) the legal title passes to the killer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition.

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1 *Narada,* II-13, 31 cited in Mitakshara II.x.3 relied upon in *Kenchava* v. *Girimallappa,* A.I.R. 1924 P.C. 209.

2 Section 25, Hindu Succession Act, 1956.

3 Tyabji, Muslim Law (1968), pages 762—820, 865.

4 Fyzee, Outlines of Muhammadan Law (1974), citing Tyabji, 682; Wilson 478; Fitzgerald 170; Fat. Law 446.

5 Halsbury (3rd Edn.), Vol. 1, page 10, para 15.

6 (a) *Boresford* v. *Royal Insurance Co. Ltd.,* (1936) 2 All. E. R. 1052; recsd. C.A. (1937) 2 All E.R. 243; affd. H.L., (1933) 2 All E.R. 602; (1938) A.C. 586, 107, L.J.K.B. 464; 158 L.T. 459

(b) *Cleaver* v. *Mutual Reserve Fund Life Association,* (1892) 1 Q.B. 147;

(c) *In the Estate of Crippen,* (1911) Probate page 108;

(d) *Dixon* v. *Sutten Heath & Lea Green Colliery Ltd.,* (No. 2) (1930) 23 B.W.C.C. 135 (C.A.); Halsbury, 2nd Ed. Vol. 34, page 865(i).

7 *Cleaver* v. *Mutual Association,* (1892) 1 Q.B. 147.

8 See Ames, Lectures on Legal History, page 310.

9 *Re Hall,* (1914) Probate 1.

10 *Re Sigsworth,* (1935) Ch. 89.

11 Ames, Lectures on Legal History, pages 310-311.

14.11 *No title passes*—English courts[1] have rejected the second possibility and have generally considered that the killer does not gain legal title. However, as to the theoretical basis for a deprivation, there are two methods that have been used to justify this result in Anglo-American law. Both methods are sometimes employed in the same judgment and the difference between them is more superficial than real. The first approach is to say that all laws—whether made by statute or judicial precedent—must conform to a "higher law". The second approach is to interpret the law so as to make it conform to the judge's conception of what it should be. A case which is a good example of the former approach is *Riggs* v. *Palmer*[2] where the New York Court of Appeals held that a legatee did not gain title to property which he would have received as the result of murdering the testator.

Earl J. observed that there are certain principles that "have their foundation in universal law administered in all civilised countries" and that "all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law."

14.12. *Position in Commonwealth*—The same view is accepted in—

(b) Australia,[4]

(b) Australia,[4]

(c) New Zealand.[5]

14.13. *Position in U.S.A.*—In many states in the U.S.A. there is legislation dealing with the question.[6] The restatement of Restitution provides *that a person should not be allowed to acquire property* by murdering another.[7]

In some jurisdictions in the U.S.A. motive is material[8] before the disqualification can attach.

14.13A. *Need for change*—Notwithstanding the absence of a statutory or special provision regulating the consequences of such action on the part of a transferee, it would appear that the established usages of the community should be taken as furnishing a supplemetary criterion for deciding the legal position. A recognition in an undiluted form of the power to dispose of property and the power to take interest in property under a disposition, unrestrained by the considerations of ethics, would be undesirbale in the particular situation which is now under consideration.

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1 T. G. Youdan, "Acquistion of Property by Killing", 89 L.Q.R. 235.

2 *Riggs* v. *Palmer,* (1889) 115 N. Y. 506, 22 N. E. 188, 190 (New York Court of Appeals).

3 (a) *Re Johnson* (1950) 2 D.L.R. 69 (*Manitoba*);
(b) *Re Pupkowaki,* (1957) 6 D.L.R. 2d 519 (B.C.);
(c) *Schobell* v. *Barber,* (1967) 59 D.L.R. 2d 519 (Ont.).

4 (a) *Re Jane Ticker,* (1920) 21 S.R. 176 (N.S.W.);
(b) *Re Sangal,* (1921) V.L.R. 355.

5 *Re Cash,* (1911) 30 N.Z.L.R. 577.

6 See Scott on Trusts (3rd Ed.), Section 492; Wade, "Acquisition of Property by Wrongfully Killing Another—A Statutory Solution".

7 Restatement of Restitution sections 187—189.

8 Case Comment (1914), 28 Harvard Law Rev. 426.

It is to be noted that in the case of a gift, Manu declared that a gift induced by force, possession by force and document obtained by force, in short, everything brought about by force should be regarded as null and void.[1] No doubt, Manu was peaking of the immediate instrument of gift which was obtained by force. But we are concerned, at the moment, with the moral principle underlying this mandate. If force or fraud is regarded as nullifying a transfer when such force or fraud has brought about an immediate transfer, the approach ought not to be different where after the transfer heinous crime is committed with the intention of acquiring, or accelerating the acquisition of, an interest in property. A clear case of acquisition of property dependent on the death of another person is the gift wherein interest is conferred on A provided he survives B. In such circumstances A has certainly a self-interest in the death of B and if that self-interest takes the form of B's murder the law ought not to recognise the acquisition of interest by A.

14.14 *Need for codification of the principle*—So much as regards the principle that can be recognised and the position elsewhere. The principle, it would appear, is worth codification and since it is a universally accepted one, there should be no objection to its incorporation in a suitable form in the Act at all. The exact form in which it could be put in the Act will be indicated later on.[2] But it may be useful to refer to a few typical situations wherein a legislative provision would be useful.

The first situation is where the death converts an interest vested in ownership into one in possession. This may arise where property is given to A for life and after his death to B, *the gift to B not being dependent on his surviving A*. B kills A.

The wrongdoer *increases the value* of property which he owned before killing,—when a person entitled to a remainder interest in property kills a person whose death occasions the end of a prior life interest.[3]

Secondly, where the wrongdoer's remainder interest is contigent on *surviving the prior life tenant* (or is vested subject to divestment if the former should predecease the latter), then[4] as the wrongdoer's interest might, in the ordinary course of events, have never vested in possession, he should be deprived of his whole interest. A similar argument would be relevant where the wrongdoer is himself a life-tenant who kills a prior life-tenant.

These are typical situations, and not of infrequent occurrence. There could be many other permutations and combinations—the illustrations to section 19 to 31 (vested and contingent interests) furnish ample hypothetical material. It appears to be unnecessary multiply examples.

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1 Manu, 8.168; quoted by P. N. Sen, Hindu Jurisprudence (1913), page 89.

2 Para 14.15, *infra*.

3 T. C. Youdan, "Acquisition of Property by Killing" 89 L.Q.R. 235.

4 Scott, Trusts, Vol. 3, section 493.1.

14.15 Having considered the theoretical justification[1] and the practical need[2] for a provision on the subject, we recommend the insertion of a new section on the following lines. It could be conveniently placed as section 7A.

Recommendation to insert Section 7A. "7A. A person who commits or abets the commission of culable homicide, whether amounting to murder or not, shall be disqualified from acquiring under a transfer any property, in furtherance of the acquisition of which he committed or abetted the commission of the homicide."

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1 14.13 to 14.14 *supra.*
2 For typical situations, see para 14.14, *supra.*

CHAPTER 15

OPERATION OR TRANSFER

SECTION 8

15.1. *Introductory*—Assuming that the property is one which can be transferred and that the transferor and the transferee are competent to make the transfer or take under the transfer respectively, the next question to be considered is on what interest the transfer operates. Of course, since a transfer is the result of a contract, the answer primarily depends on the intention of the parties. But it is well known that the parties do not always express their intention clearly in exhaustive terms, and it is also well known that the words which they employ in effecting the transfer may not be regarded as exhaustive. In aid of the presumed intention of the parties the Act, in section 8, makes a specific provision regarding the operation of the transfer. This provision is mainly intended to do away with clumsy and prolific conveyancing and to guard against the raising of frivolous pleas based on the supposed incompleteness of the formula employed by the transferor.

Three important propositions are laid down in the first paragraph of section 8. Unless a different intention is expressed or necessarily implied, it provides, in the first place, that a transfer of property passes all the interest which the transferor is then capable of passing in the property. In the second place, it provides that such passing of the interest takes place forthwith. In the third place, it provides that the legal incidents of the interest are also transferred forthwith.

15.2. *Legal incidents*—What the expression "legal incidents" comprises is dealt with in the remaining paragraphs, though not in an exhaustive manner. Those paragraphs deal separately with five kinds of property, namely,—(1) land, (2) machinery, (3) house, (4) debt or actionable claim and (5) money or other property yielding income. Legal incidents of each are mentioned by an inclusive formula.

This part of section 8 reads—

> "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 movable 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;
>
> and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debt 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."

15.3. *Previous law*—The provisions of section 8 closely conform to the corresponding provisions of the English Conveyancing and Law of Property Act, 1881 (section 63)—now the Law of Property Act, 1925 (section 163).

Before the English Conveyancing Act, it was necessary to insert in each deed, under "general words" minute details of the property, easements and incidents intended to be conveyed. The prolix lengths to which deeds in consequence used to run often rendered them as imperspicuous as insensible.[1] In *Wood* v. *Saunders,* Hall, V.C. observed :

> "General words we all know are almost always, if not always, unmeaning; and you can in fact only lay hold of them to sometimes extend the operation of instruments; as, for example, to easements which have become extinguished by unity of seisin of enjoyment, or in some other way. They have no operation, and the only wonder is, that they have been allowed to remain so long in the pigeonholes to be put in every deed, when in truth they have no meaning or effect at all."

Its provisions therefore, had the effect of not only cutting down the length of deeds, but of simplifying them by doing away with the "general words" which have now become a thing of the past. But they are of great assistance in interpreting the corresponding provisions of the Indian law, as, in drafting the Indian Act, the English Statute was before the Legislature and its advisers.[2] The marginal notes[3] appended to the Bill of 1879 show that the principles embodied in the section were recognised in this country from before the Act.[4-5]

15.4. *Privy Council*—Referring to the law in force anterior to the enactment of this section, the Privy Council said :

> "It is not necessary to decide whether the Transfer of Property Act enacts what was unquestionably the law before. The rule of law was that indefinite words of grant were calculated to convey all the interest of the grantor, but that it was necessary to read the whole instrument togather the intention. It is a question to be decided when it arises, whether the framers of the Act have not conciously or otherwise so expressed themselves as to lay down a more positive rule in favour of absolute gifts."[6]

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1 *Wood* v. *Saunders,* 44 L. J. Ch. 514, 520.

2 See Writley Stokes, Introduction to the Act, in his Anglo-Indian Codes and *Wutzler* v. *Sharp,* I.L.R. 5 All. 270, 285.

3 The marginal notes cite the following cases as authorities on the section *Ram Dhone* v. *Ishanee,* 2 W.R. 123 (125); *Kishen Gir* v. *Busgeet Roy,* 14 W. R. 379; *Faqueer* v. *St. Khuderun,* 2 N.W.P.H. C. R. 251 (252); *Mahomed Ali* v. *Bolakee,* 24 W. R. 330 (trees), "everything grown on it", Morley N.S. 259.

4 Cour.

5 So a lease given in 1865 "with all rights" was held to comprise the minerals despite section 108(c) of this Act, which shows that the principle had even a wider application before its enactment here : *Megh Lal* v. *Raj Kumar,* I.L.R. 34 Cal. 358.

6 *Kalidas Mullick* v. *Kanhaya Lal.* I.L.R. 11 Cal. 121, 131, P.C.

15.5. *Principle—First maxim*—The principle embodied in the section is one of universal application and may be found in the ancient legal maxims which have become a part of the common law of England. These maxims are (i) *Eujus est solum, ejus est usque ad coelum ad inferos,*[1] (ii) *Quicquid plantaur solo, solo cedit.*[2]

Under the rule embodied in the first maxim, it has been laid down that, since land in its general signification has an indefinite extent both upwards and downwards, a conveyance of land is sufficient to pass all buildings, growing timber, emblements and water thereon as also mines and minerals thereunder : from which it follows that the owner cannot put erections on his own land so as to project on his neighbour's land, or throw the rain water from his roof on his neighbour's land, or grow trees so that their boughs overhand the adjoining land of another.[3] The right of light and air is similarly traceable to the same rule. The owner of the soil having a right to subterranean springs can maintain a suit for its diversion under circumstances which would have given a right for action if the stream had been above-ground.[4] On the other hand, he cannot dig on his own land, so as to undermine the foundation of his neighbour's building.[5]

15.6. *The second maxim*—The second maxim relates to accessories and things affixed to land. In a mortgage or lease of property, "a different intention" is necessarily implied, inasmuch as the transferor does not obviously intend to pass all his interest in the property, but only creates a limited interest in the transferee, the extent and nature of which forms the subject of two separate chapters of the Act. Where the nature of the interest conveyed is defined by the transferor, the question depends upon the construction to be placed upon the document, the terms of which alone must then afford a basis for decision. But the relationship of the parties may also be material. In the absence of an express agreement to the contrary, the Act further provides rules for the construction of the presumed intention which depends upon the nature of the interest conveyed.[6]

15.7. *Rule of construction*—The section lays down a rule of construction, which must be applied to the case of a transfer which, *ex hypothesia,* does not tell us whether any particular interest, possessed by the transferee, was meant to pass, by the conveyance or not. The object of the section is, therefore, to stabilize title and to remove, from the region of pure speculation, what passed in the mind of the transferor or the transferee at the date of the transfer.[7]

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1 "Whoever has the soil, has it even up to the firmament, and to the middle of the earth."

2 "Whatever is planted on (or fixed to) the soil follows the soil."

3 Gour.

4 Section 17(d), India Easement Act (V of 1882), *Action* v. *Blundell,* 12 M & W, 324; *Chasemore* v. *Richards* 7 H.L.C. 349.

5 *Pindu* v. *Johnai,* I.L.R. 24 Cal 260 Cf. *Balabhai* v. *Balakbidas,* 2 B.L.R. 114; *Waman* v. *Parasharam,* 2 B.L.R. 688; *Deoki* v. *Dhian Singh,* I.L.R. 8, All. 467.

6 Sale section 55, mortgage, section 65; leases, section 108; exchange, section 119.

7 *Fazal Ahmed* v. *Har Prasad,* A.I.R. 1929 All. 465, 474.

15.8. *Effect of transfer of debts on decrees subsequently passed*—An important question with reference to section 8 concerns that part of the section which relates to debts or other actionable claims. The fifth paragraph of the section, so far as is material, provides that the incidents of a property include, "where the property is a debt or other actionable claim, the securities therefor". The main paragraph of the section—first paragraph—so far as is material—provides that a transfer of property passes forthwith to the transferee the interest which the transferor is "then capable" of passing in the property and in the legal incidents thereof. The precise question to be considered is whether the transfer of a debt is to be construed (in the absence of a contrary intention) as also a transfer of a decree to be passed later in proceedings then pending at the instance of the transferor.

15.9. *Supreme Court case*—In Jugal Kishore[1] a firm in the name of M/s. Habib & Sons of Bombay had filed a suit in the year 1948 against Jugal Kishore Saraf for the recovery of Rs. 7113/-. When the suit was still pending, the firm of M/s. Habib & Sons transferred their business to Raw Cotton Co. Ltd. in the year 1949 along with all debts due to the firm. In December 1949, a decree was passed in this suit for a total sum of Rs. 8428/- in favour of M/s Habib & Sons. In April, 1951, the Raw Cotton Co. Ltd. applied for the execution of the decree, which was opposed by Jugal Kishore Saraf on various grounds. One of the grounds was that the decree was not transferred to the respondent company (Raw Cotton Co. Ltd.) as the suit was still pending when the business of M/s Habib & Sons was transferred to them and the decree had been passed subsequently. The executing court rejected this plea of the judgement-debtor and his appeal was also dismissed by the High Court. The matter came up before the Supreme Court under Article 133(1) of the Constitution of India.

Das J. held that under section 9 of the Transfer of Property Act, the true position is that at the date of the transfer of the debt to the respondent company, the transferors could not transfer the decree, because the decree did not exist. This section does not operate to pass any future property for the section passes all interest which the transferor can "then" ' i.e. at the date of transfer pass. He also held that under the Transfer of Property Act, there can be no transfer of property which is not in existence at the date of the transfer. Therefore the purported transfer of the decree that might be passed in future could only operate as a contract to transfer the decree to be performed in future i.e. after passing of the decree.

Bhagwati J., however, took a different view. He observed that section 8 of the Transfer of Property Act provides that 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. These incidents include, where the property is an actionable claim, the "securities ..... but not arrears of interest accrued before

1 *Jugal Kishore Saraf* v. *Raw Cotton Co.*, A.I.R. 1955 S.C. 376 (1955) 1 S.C.R. 1369 (Das, Bhagwati & Imam JJ.).

the transfer", In case of transfer of debts or property coming within the definition of actionable claim, there is, therefore, necessarily involved also a transfer of the transferor's right in a decree which may be passed in his favour in a pending litigation and the moment a decree is passed in his favour by the Court of Law, that decree is also automatically transferred in favour of the transferee by virtue of the written assignment already executed by the transferor.

The debt which is the subject matter of the claim is merged in the decree and the transferee of the actionable claim becomes entitled by virtue of the assignment in writing in his favour, not only to the book dent but also to the decree in which it has merged. The transferee is, without anything more, entitled to the transfer of the decree passed by the Court of Law in favour of the transferee.

15.10. *Judgments summed up*—Das J. took[1] the view that the subsequent decree is not transferred. Bhagwati J., however, took the view that the decree was transferred. He primarily based himself upon two propositions, namely,—first, though there can be no transfer as such of future property, yet the transfer should, on equitable principles, be given effect as contract, and secondly, the decree merely represented the debt.

15.11. *Need for change*—The question to be considered by us is not which of these views is correct, but which view is of practical benefit. To take the narrow and strictly literal view, namely, that because of the word "then" in section 8, first paragraph, the subsequent decree is not transferred, leads to an anomaly. The transferor of the debt, having transferred his rights, would not be interested in executing the decree.

On the narrow view, the transferee of the debt would not get any right to execute the decree as an assignee. The result would be that the transferee of the debt would be required to file a suit for specific performance of the contract to transfer the decree and it is only when he obtains a decree in that suit that he can apply for execution of the money decree as an assignee. If this is the correct position, it should be remedied. The law should aim at shortening rather than lengthening litigation—unless, of course, there are any other considerations of justice to the contrary. In this particular case, there appear to be none. Such procedural formalities, if any, as are required under the Code of Civil Procedure, 1908, should, of course, be complied with by the purchaser of the debt in his capacity as the transferee of the decree even after the proposed amendment. That applies to express transfers also. But the expression "securities" in section 8 should, in this special case, be widened so as to cover, in the situation where a suit has already been instituted, the decree that may be passed in favour of the plaintiff.

15.12. *Order* 21, *Rule* 16—One of the major points of difference between Das & Bhagwati JJ. related to Order 21, Rule 16, of the Civil Procedure Code. which is quoted below :

> "16. *Application for execution by transferee of decree.—Where* a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which

1 For the view of Imam J., see para. 15.15, *infra.*

passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

Provided, that, were the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgement-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution;

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others."

15.13. *Propositions underlying each judgment*—It would appear from the judgements of the three Judges—S. R. Das, J., Bhagwati, J., and Iman, J.,—that while they all agreed that the purchaser of the debt could avail itself of the provisions of section 146 of the Civil Procedure Code, there was a sharp cleavage of opinion amongst them as the applicability of Order 21, Rule 16, of the Civil Procedure Code and as to the exact position of the purchaser company. S.R. Das, J. based his decision on the following propositions.

(a) Section 8 does not operate to pass any future property and the transfer of the book debts did not transfer *the decree as a legal incident*.[1-2]

(b) If the document could be construed as a transfer of, or an agreement to transfer, the decree *to be passed in future*, the beneficial interest in the decree would, by operation of equity, have passed to the purchaser and the purchaser company would become within the meaning of Order 21, Rule 16, transferee by operation of law.[3] In this case, however, there was no agreement to transfer the decree.

(c) But, in the eye of the law, the transferor of the debt, vis-a-vis the purchaser of the debt was nothing more than a benamidar for the purchaser and on this basis it was the purchaser who was the real owner of the decree. Since the purchaser was, after the transfer, the owner of the debt and the legal incidents thereof, it was the real owner of the decree.[4] This dictum, with respect, is in apparent conflict with the previous dictum.[5]

(d) Since the purchaser company became the owner of the decree immediately on its passing in the above sense, it could come under section 146.[6]

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1 Para. 15.12, *supra*.
2 Pages 1379, 1380 of the S.C.R.
3 Pages 1401, 1402 of the S.C.R.
4 Pages 1405 of the S.C.R.
5 Pages 1379, 1380 of the S.C.R
6 Pages 1405 of the S.C.R.

15.14. The propositions, —so far as they are material, —enunciated in the judgment of Bhagwati J. can be stated as follows :

(a) In cases of transfer of book debts or property which is actionable claim, there is necessarily involved also a transfer of the transferor's right in a decree which may be passed in his favour in a pending litigation, and the moment a decree is passed in his favour by a court of law, that decree is also automatically transferred in favour of the transferee by virtue of the assignment in writing already executed by the transferor.[1] This is by virtue of section 8.

(b) Of course, this transfer is subject to the provisions of section 132 of the Transfer of Property Act to the effect that the transferee should take the actionable claim subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.[2-2a]

(c) So far as Order 21, Rule 16, C.P.C. is concerned, the transferee in the above-mentioned circumstances is a transferee by "assignment in writing[3]" and not by operation of law.

(d) Of course, there is nothing in Order 21, Rule 16, prohibiting the transferee from availing of section 146 of the Civil Procedure Code.[4]

15.15. The propositions on which the judgment of Imam J. was based may be stated as follows :—

(a) The purchaser should be permitted under section 146 to execute the decree as one claiming under the decree-holder.[5]

(b) While a transfer of, or an agreement to transfer, a decree that may be passed in future may in equity entitle the transferee to claim the beneficial interest of a decree after it is passed, such equitable transfer does not render the transferee a transferee of the decree by assignment in writing within Order 21, Rule 16.[6]

(c) No opinion is expressed as to whether the expression "by operation of law" in Order 21, Rule 16 can be given the interpretation suggested by Das. J.[7]

15.16. *Resultant uncertainty*—It should be pointed out that while, for the particular purpose under consideration before the Supreme Court, the applicability of section 146 enabled the alleged transferee of the debt to execute the decree, the position resulting from the judgment on the more material question, namely, whether there was or was not an assignment and, if so, whether it was by act of parties or by operation of law,

1 Page 1418 of the S.C.R.
2 Page 1418 of the S.C.R.
2a Para 15-12, *supra.*
3 Page 1418 of the S.C.R.
4 Page 1421 of the S.C.R.
5 Page 1425 of the S.C.R.
6 Page 1426 of the S.C.R.
7 Page 1427 of the S.C.R.

was not established with certainty. The applicability or non-applicability of Order 21, Rule 16 of the Civil Procedure Code to the situation under consideration remained indefinite, because while Das, J. excluded its applicability on the ground that there was no agreement to transfer the future decree, Bhagwati J. included it by reason of his construction of section 8 of the Transfer of Property Act, while Imam, J. did not express any opinion as to whether there was an assignment by operation of law. It should also be stated that Order 21, Rule 16, makes a distinction (in the proviso) between cases of assignment by act of parties and assignment by operation of law. In the first case, notice is given to the transferor and the judgment debtor, while, in the second case, notice is not given. Again, the uncertainty in regard to the assignment by act of parties or operation of law leads to uncertainty as to the application of section 132 of the Transfer of Property Act. It is for these reasons that a clarification is necessary.

15.17. It is also legitimate to point out that—High Court decisions (some of them referred to in the Supreme Court judgement) also reveal a difference of views. Bombay cases discussed in the judgment, the Calcutta case in *Purna Chandra Bhomik* v. *Barna Kumari Debi*[1] and the Madras judgement in *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa and another*[2] are illustrations. The Madras judgement observed that if the matter were *res integra*, much might perhaps be said for the contention that the assignee under similar circumstances could excute the decree under Order 21, Rule 16, Code of Civil Procedure, 1908.

15.19. *Need for change*—It is for these reasons that a clarification is necessary. Whatever be the correct position in theory under the present section as it is worded, practical considerations justify an amendment to the effect that in the situation under discussion, the transfer of a debt[3] should operate so as to transfer the decree to be ultimately passed in favour of the transferor subject to the following conditions[4] :

(a) The transfer was made after the institution of proceedings for recovery of the debt.

(b) The provisions of Order 21, Rule 16, C.P.C. should apply as they apply to an express assignment in writing.

(c) The provisions of section 132 of the Transfer of Property Act, 1882 should apply in relation to the assignment—this, in fact, need not be expressly provided.

The merit of the proposed amendment is that :—

(i) it states the position with reasonable certainty;

(ii) it leads to shortening of litigation, since the purchaser of the debt will not be required to institute a suit again calling upon the seller of the debt to transfer the decree;

(iii) it brings into operation the safeguards provided in Order 21, Rule 16, C.P.C. leaving no doubt in the matter;

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1 *Purna Chandra Bhowmik* v. *Barna Kumari Debi*, I.L.R. (1939) 2 Cal. 341.

2 *Kangati Mahanandi Reddi* v. *Panikalapati Venkatappa and Another*, A.I.R. 1942 Mad. 21.

3 For brevity "debt" is used. Same position will apply to "actionable claims".

4 This is not a draft.

(iv) it potects the rights of the transferor, the transferee and the judgment debtor by providing for application of Order 21, Rule 16 C.P.C.

(v) last, but not the least, it defines the position *as between the transferor and the transferee* in express terms.

15.19. *Recommendation*—In the light of the above discussion, we recommend that to section 8, a suitable Explanation should be added on the lines indicated above.

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CHAPTER 16

ORAL TRANSFERS

SECTION 9

16.1. *Oral Transfer*—According to section 9, a transfer of property may be made without writing in every case in which a writing is not expressly required by law.

There are several cases in which the Transfer of Property Act requires a written instrument, namely—[1]

(1) Sale or exchange of immovable property of the value of one hundred rupees and upwards;

(2) Sale of a reversion or other intangible interest in immovable property irrespective of value;

(3) Simple mortgage;

(4) Other mortgages where the principal money is one hundred rupees and upwards—but not including a mortgage by the transfer of title deeds;

(5) Leases from year to year or for any term exceeding one year or reserving a yearly rent;

(6) Gifts—but in certain cases delivery is sufficient;

(7) Assignment of actionable claims.

Besides this, there may be other laws requiring writing.[2]

16.2. *Reasons*—The reasons for requiring a writing in these cases are various, but in the case of most of the transactions, the law not noly reflects a policy of ensuring accurate and permanent record to prevent disputes, but also shows its anxiety that such transactions should not be entered into without some deliberation. In the case of assignments of actionable claims, there is the additional reason that an actionable claim being incorporeal property, it cannot, by its very nature, be transferred by delivery of possession because the transferor has no present possession to deliver. Therefore, it can be transferred only by words. A writing is required in preference to an oral grant, since the interest of third parties may be involved and also because the properties not being visible, it is considered that some particularity describing the nature of the property sought to be transferred may be useful.

16.3. *Objects*—Thus, the objects of requiring a written instrument are manifold. A written instrument affords an indelible record of the transfer—this is the aspect of evidence—but there is a more vital aspect to it, namely, that it secures title by defining the nature of the interest conveyed. In this sense, it is not only an immutable memorial of the transaction, but also a more reliable source of the essence as well as the details of the transaction.

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1 Sections 54, 59, 107, 118, 122, 130, 131.

2 E.g. Section 5, Trusts Act.

The object of the law in requiring writing is one of substance, even though occasionally it may appear that such requirement assumes an over-technical importance in practice. Domat,[1] an eminent French jurist, has described the object of writing in words which cannot be bettered, as follows :

> "The force of written proofs consists in this, that men have agreed together to preserve by writing the recollections of things past and of which they were desirous to establish the remembrance, either as rules for their guidance, or to have therein a lasting proof of the truth of what they write. The agreements are written to preserve the remembrance of what the contracting parties have prescribed for themselves, and erect that which has been agreed on into a fix and immutable law for them. So wills are written to establish the recollection of what a person who had the right to dispose of his property has ordained, and make thereof a rule for his heirs and legatees. In like manner are written sentences, decrees, edicts, ordinances and everything intended to have the effect of title or of law, etc. The writing preserves unchangeably what is entrusted to it, and expresses the intention of the parties by their own testimony."

16.4. Of Course, the fact that a document has been employed to effectuate a transfer does not avoid controversy, but, in contrast with an oral transfer, the controversy, if any, will now be as to the *construction* of the document, and not as to the *contents* of the transfer.

16.5. *Previous position*—It would appear that before the passing of the Act,[2] no writing was necessary for the sale of immovable property. This shows how the Act has altered the previous position.

16.6 *Hindu law*—The marginal note appended to the Bill[3] shows that this section was adopted from the New York Code. By the Hindu law, a verbal grant of immovable property is good, if followed by delivery of possession to the grantee.[4] Indeed, in no case does the Hindu law appear absolutely to require writing[5] though, as evidence, it regards writing as of additional force and value.[6]

16.7 *Transfer at the time of marriage.*—It has been held[7] that section 9 is not applicable to the transfer of immovable property made at the time of marriage by a Hindu. This decision can be explained only on the special facts of the case relating to a family arrangement. In this connection it is to be remembered that the expression "transfer of property" is to be construed with reference to section 5, of which an essential ingredient is the act of "conveying the property". We have already

1 Domat, Civil Law, para. 1.3, Titles 6—Section 2, cited by Cour.
2 A.I.R. 1914 P.C. 27.
3 N. Y. Code, s. 453, 7 Exch. 581; Cour
4 *Doed Seeb Kristo* v. *East India Co.*, 6 M.I.A. 267;
Hurrish Chunder v. *Rajender* 18 W. R. 293, Anonymous, 1 I.J. (O.S.) 135.
5 *Mantena* v. *Chekuri*, 1 M.H.C.R. 100; *Palanivappa* v. *Arumugam*, 2 M.H.C.R. 26; *Criniva* v. *Vijayammal*, 2 M.H.C.R. 37; *Krishna* v. *Rayappa*, 4 M.H.C.R. 98; *Hurpurshad* v. *Sheo Dyal*, 26 W.R. 55 (P.C.).
6 Gour.
7 AI.R. 1968 A.P. 291.

explained, while discussing section 5, that where there is no "conveyance" of property, there is no transfer, and the transaction is outside the Transfer of Property Act.

There was, strictly speaking, no need for a provision of the nature contained in section 9, which seems to have been inserted out of abundant caution.

16.8. *Part-performance*—To the rule that where a writing is required by the law there must be a writing, there seems to be no exception —not even the doctrine of part performance,[1] because that doctrine does not apply unless the contract to transfer for consideration any immovable property is in writing, signed by the transferor. An oral agreement will not be sufficient for the purposes of the application of the doctrine of part performance—which seems to be a departure from the English law.[2]

16.9. *Position in England as to Part-performance*—In England, the doctrine of part-performance which was evolved to mitigate the hardship caused by the Statute of Frauds is not confined to written agreements. Under this doctrine, a party who has partly performed the contract can enforce it even though there is no written evidence of the contract. It is certainly a requisite that there must be parol evidence of the contract which is let in by the act of part-performance.[3] But the absence of writing is immaterial.

16.10. *Material alteration*—We have, in the Report[4] on the Stamp Act, discussed the question how far a material alteration in an instrument after its execution affects its validity. The general principles applicable to the question, apart from the position for the purposes of the stamp law, have also been discussed, and we do not consider it necessary to go over the ground again.

16.11. *Other formalities*—Besides writing, there might be other formalities, such as attestation and registration and (under special laws) the affixation of a seal. Confining ourselves to writing, we might state that so far as the general rule is concerned, it is not necessary that the transfer should be contained *in a single document.* The transfer might be made out of several documents, so long as they can be connected together without parol evidence. There are certain requirements of Stamp Law[5] particularly applicable to such a case, but the provisions of that very law indicates that our legal system does not rule out the effectuation of a transfer by more than one document.[6]

16.12. *No Change*—The above discussion discloses no need for amending the section.

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1 Section 53-A.

2 *Bechar Dass* v. *Ahmedabad Municipality*, A.I.R. 1941 Bom. 346.

3 Fry, Specific Performance, 6th Ed., pages 276-277, cited by Treitel, Contracts (1966), pages 119, 121.

4 Report on the Stamp Act.

5 Section 4, Indian Stamp Act, 1899.

6 Compare *Pearce* v. *Gardener,* (1897) 1 Q. B. 688.

CHAPTER 17

CONDITIONS RESTRAINING ALIENATION

SECTION 10

17.1. *Introductory*—The Act has so far deat with transferable property, capacity to transfer, operation of the transfer and mode of transfer. What terms can be lawfully inserted in a transfer is dealt with in a group of sections. In general, parties ought to be allowed to transfer property on such terms as may be agreed upon between the parties, or, in the case of a unilateral transaction, as may be decided by the transferor and accepted by the transferee. In this sense, freedom to dispose of property—section 7—may be said to include freedom to choose the conditions upon which the transfer is to be operative (conditions precedent), the conditions upon which it should cease to be operative conditions subsequent), the terms upon which the interest transferred should be enjoyed and the terms upon which that interest should pass from the immediate transferee to his successors. The terms upon which the interest transferred may itself be transferred by the transferee may even be regulated. The imposition of these terms is a part of the power to transfer property under section 7. But that section itself lays down that the power shall be subject to the provisions of any law for the time being in force—this is the gist though not the precise text. Thus, that section itself contemplates that the law may impose restrictions upon the freedom of disposition. The scope and content of those restrictions form the subject matter of the next few sections. On the ground of public policy, and primarily on the ground of the policy of the law favouring the vesting of interests in property, and also on the ground of the policy of favouring the circulation of property rather than its being tied up within a particular group or to a particular person, the law has imposed certain limits as to the terms of a transfer. Whether the breach of a particular term renders the transfer void or whether it keeps the transfer intact and the term becomes invalid is a matter which we need not go into for the present purpose. We are now primarily concerned with what are the permissible and what are the impermissible terms of a transfer.

17.2. *Sections* 10—18 —*Common thread*—The most important sections of immediate interest in this context are sections 10 to 18, which principally, though not exclusively, deal with the invalidity of restraints on alienation, accumulation of income and the rule against perpetuities. Notwithstanding the complexity of these sections, a close analysis will reveal that the golden thread connecting them is one salutary principle that the law favours the freedom of transfer of property—the corpus as well as the income—and property should not be transferred upon terms which destroy or substantially impair this freedom. This is often pithily expressed by saying that the freedom of disposition should not be allowed to be so exercised as to lead to its own destruction. One could more elaborately state the considerations of policy by saying that if a person is free to dispose of his own property, he must so exercise the freedom that those to whom he transfers an interest in property are not deprived of that very freedom. The connection of the rule against perpetuities with this principle may appear to be tenuous, since that rule is often attributed to

another principle—the law favours the vesting of estates within a reasonable time. But even this rule has, as its foundation, the broader principle that the tying of property for an unreasonably long period and the postponement of its vesting defeats the enjoyment thereof by those who derive their rights under a transfer burdened with such conditions. To put the matter in different words, the law requires that a person transferring property should not merely look to his own immediate interests, but should also have regard to the interests of future generations. In this sense, a balance is sought to be achieved between the immediate present and the distant future—which is indeed a function of law as social engineering.

17.3. *Difficulty of formulation*—These principles, sound as they are, do not yield easily to legislative formulation. By reason of the very fact that the immediate past and the distant future have both to be borne in mind and reconciled, the issues that arise present difficult problems of legal policy. So many alternatives present themselves. The choice is not always easy. Opinions could veer from one extreme to another. Personal feelings and sentiments, not lightly to be brushed aside, have to be reconciled with social and economic considerations. For example, a person may very much wish that the property disposed of by him should remain within the family. He may desire that the property should be so enjoyed as to have regard to the welfare of certain other members of the family also, particularly by providing for allocation of a certain part of the income to them. These are personal sentiments. But those who are to live in future generations may not necessarily share the same sentiments, or not to the same degree. Even if they do so, they may have their own social or economic reasons of a compelling nature raising countervailing considerations. It is then the business of law to evolve a set of rules that will reconcile sentiment with reason, the immediate and visible past with the remote and invisible future. The exact content of the set of rules to be so evolved must, in the very nature of things, be a matter of opinion. Orthodoxy and modernism each have their say.

17.4. *Section* 10—With these aspects of policy in the background, let us examine the first section concerned with the permissible terms of a transfer of property. This is the text of section 10, which deals with a condition restraining alienation—

> "10. Where property is transferred subject to a 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 Hindu, Mahammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

17.5. *Analysis*—The section thus consists of three parts—the general prohibition, the exception and the proviso. The general prohibition is against an absolute restraint on "parting with or disposing of" the interest. The exception is in regard to a particular mode of transfer—lease—and is confined to a condition for the benefit of the lessor or those claiming under him. The proviso is in regard to a particular class of persons—married women of certain communities. Although worded as a provision

permitting restraint on the rights of women, it originated in a desire to protect the women. The restraint is thus for the benefit of the transferee. We shall advert later to the question how far such a restraint is consistent with modern notions.

17.6. *Absolute restraint—Rationale*—So far as the general prohibition in section 10 is concerned, the most important element, is that indicated by the requirement of absolute restraint. The term in a deed of transfer is void if it absolutely restrains the transferee from transferring his interest. If the transferor in categorical and unqualified terms provides that the transferee shall not transfer his interest at all. there can hardly be any difficulty in the application of the rule. The policy of the law is clear enough. If there is freedom of disposition for the immediate transferor. there ought to be a similar freedom for the transferee as well. If he is absolutely restrained from transferring his interest, his freedom of disposition is totally taken away, so that—if the condition were to be recognised by law—in regard to that particular property, the freedom of disposition would cease to exist at all. The freedom of disposition of the transferor would then be exercised to its own destruction. As observed by us in the introductory discussion in this Chapter[1] this is against the policy of the law. Such an absolute restraint on alienation would hardly be favoured by any legislator, even if he is not a person introduced to the learning of the law. It may be of interest to note that article 19 of the Constitution is based on a similar principle, although, of course, its operation is against the State.

If the section were to be taken as confined to absolute restraints pure and simple,. hardly any problems would have arisen and the section would not require any elaborate discussion. But, in practice, limitations on alienation are not so simple in their language or unqualified in their scope. And the question naturally arises whether restraints not absolute in that sense are within the mischief of the section. Restraints limited to transfers to particular persons, or transfers except to a particular person or limited to transfers with a certain period, have often been held to be void. as will apear from a few cases discussed below. It would thus appear that the word "absolute" is not to be taken in a literal sense. The section has been construed to apply to all transfers repugnant to the nature of the interest.

17.7. *Restraints with reference to duration*—First, as to restraints limiting transfers in point of time. The section has been construed to apply to restraints limited to last for only a limited time.[2] For example, the seller cannot stipulate with the purchaser that the purchaser shall not build a slaughter-house upon his land or that he shall not lease his land, or sell it for the next twenty years. or that he shall put it only to such use as the seller sanctions; the condition is repugnant to the nature of the interest created and is void under sections 10 or 11. As Jessel, M.R., observed[3] :

> "The test is whether the condition takes away the whole power of alienation *substantially;* it is a question of substance and not mere

1 Para. 17.1, *supra.*

2 (a) *Chamaru* v. *Sona Koer,* 14 C.L.J. 303; 11 I.C. 301;
(b) *Nageshar* v. *Muta Prasad.* A.I.R. 1922 Oudh 236, 244

3 *In re Mackay,* L.R. 20 Eq. 186.

form. You may restrict alienation in many ways. You may restrict it by prohibiting it to a particular class of individuals or you may restrict alienation by restricting it to a particular time."

So Lard Eldon said :

"It is clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate."[1]

17.8. *Duration*—There is, therefore, nothing in the bare fact that the estate carved out is a life-estate, to bar the application of the rule of repugnancy. Nor is the restraint any less obnoxious to the rule because it provides for alienation to a speecified class of persons.[2] The question whether a condition or a limitation has the effect of absolutely restraining a transfer so as to attract the prohibition in the section is to be answered on a consideration of several factors. In judging of the validity of the restraint, the court not only sees whether it is absolute, but also whether the right to cancel the transfer is based upon some reason or upon a purely capricious exercise of the transferor's will, in the effectuation of which he has no conceivable interest.

17.9. *Restraints as to persons*—Restraints concerned with the persons to whom the interest created may be transferred, may assume one of two alternative forms. There may be a restraint on transfer to a particular person—for example, that the property shall not be transferred to A or B or other specified person. In general such restraints would not be regarded as absolute.

In practice however many cases present a situation of a different Kind. The transferor seeks to prohibit alienation *except to a specified person or group of persons.* The transfer is then allowed to the specified persons or group only and every person is excluded from the range of the permitted transferees, if the terms are to be recognised . It is in this situation that problems arise. In general, the matter is decided after taking into account whether the restraint though not absolute, yet practically operates so as to exclude a very large class of persons and if so, whether in the circumstances of the case there is any justification.

17.9A. *Restrictions as to price*—Besides limitations as to persons and time, there are sometimes to be found restrictions as to the price at which property should be sold by the transferee. Such restrictions are often coupled with restrictions as to the person to whom it can be transferred. Usually, this situation is illustrated by restrictions to the effect that if the property is transferred, it shall be first offered to a particular person who shall have the option to purchase it at a particular price. A right of pre-emption is thus created, but, in addition, considerable advantage is also secured to the beneficiary of the right of pre-emption, since usually the amount of price specified or the method for determining it is advantageous as contracted with the market price that is likely to prevail at the date of the intended sale by the transferee. If, in regard to such clauses contained in

1 *Bradon* v. *Robinson,* 18 Ves. J. 429; 34 E.R. 370.

2 (a) *Teja Singh* v. *Moti Singh,* 80 I.C. 918;

(b) *Asghari Begam* v. *Maula Baksh,* A.I.R. 1929 All. 381.

instruments of transfer—we shall also deal later with instruments of partition—the section is construed literally and the expression "absolutely" taken in its dictionary meaning and given a narrow scope, serious inconvenience would arise in practice.

17.10. Appreciating this reality of life, courts have, in many cases, given a wide meaining to the word "absolutely". They have weighed the advantage conferred on the prospective pre-emptor—which is the obverse of the restriction placed on the immediate transferee—as against the effect thereof upon the freedom of the immediate transferee. They have, in other words, considered the needs of the pre-emptor and the sentiments of the transferor in balance against the interests of the transferee. Any such balancing is bound to involve an assessment of social and economic realities, consciously or unconsciously undertaken by the Court.

17.11. *English case*—In illustration of what is said above, let us refer to the English case of *Rosher* v. *Rosher*.[1]. It was a case of testamentary disposition. but the principles would be the same as regards disposition *inter vivos*. A testator devised an estate to his son in fee, providing that if the son, his heirs or devises should desire to sell the estate during the life-time of the testator's wife, she should have the option to purchase it at a fixed price named, which was one-fifth of the real purchasing value of the estate at the date of the will and at the time of the testator's death. It was held that the prohibiion to sell at a fixed price much below its real value, during a given period, was equivalent to an absolute prohibition, and as such void.[2]

17.12 *Position summed up*—The question really is not how the transfer was designed, but what was really its effect, the true test being whether the condition takes away substantially the whole power of alienation; it is a question of substance and not of mere form.[3] If the condition substantially deprives the transferee of the power of alienation, it is void. but if it only so restrains it that in effect he still has the power in substance, it is valid[4]. So a prohibition on transfer *in the father's life*-time held to be valid in a Lahore case[5].

The salient points could be thus summed up—

(a) A restraint which though apparently not absolute, has substantially that effect, would be regarded as repugnant.

(b) A conditnon in restraint of alienation is none-the-less absolute because its operation is limited to a particular period or to a particular person.

(c) Such a condition may be regarded as an absolute restraint by reason of the price at which the alienation is required to be made.

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1 *Rosher* v. *Rosher*, 26 Ch. D. 801, 811.

2 See also *Doe Singh* v. *Khub Chand*, 19 A.L.J. 848.

3 In *re Mackay*, L.R. 20 Eq. 186. 189, a part of whose jugment was, however, animadverted upon by Pearson. J., in *Rosher* v. *Rosher*, 26 Ch. D. 801, 817, 818.

4 *KcLean* v. *McKay*, L.R. 5 P.C. 327;
London and S. W. Ry. Co. v. *Comm*, 20 Ch. D. 562.

5 *Took Chand* v. *Radha Kishan*, A.I.R. 1935 Lahore 503.

17.13. *Valid restrictions*—In contrast, let us see a few cases where the restraints were not regarded as absolute. An agreement to retain a court-yard undivided for the convenience of the adjacent dewellings is valid.[1] Similarly, where a Hindu widow executed an agreement in respect of her husband's property in favour of her husband's cousins, by which she agreed not to lease the property without obtaining their signatures, adding, that if the document be not signed and consented to by both the parties, it shall be null and void, it was held that the agreement was valid.[2] So again, where a house was conveyed to the transferee, subject to a covenant on his part not to use it for any purpose other than a private residence, and the transferee conveyed it to another who converted it into a boarding house, the covenant not to use the house for any other purpose was held not repugnant to the nature of an estate, and might be enforced by an injunction.[3]

17.14. *Personal interest*—Restraints may also be upheld where they merely emphasise the nature of the interest conveyed. The settlement of an annuity with the direction that it should, from time to time, be paid to *himself only*, and that a receipt under his own signature and no other shall be a a sufficient discharge, was construed to point to an intention on the part of the testator that the annuity should cease if it is alienated, and it was held to have ceased on the bankruptcy of annuitant.[4] A similar intention may be gathered from the direction to pay a sum of money to an individual named, *but not to his assigns,* for his natural life with a limitation over if the devisee should alienate.[5]

17.15. A grant of any interest in land, whether limited or unlimited, would be subject to this rule. But it must be the grant of land and not merely of its profits. The adopted son of a Hindu widow granted to her for her maintenance, the usufruct of certain land, she being expressly forbidden by the terms of the grant "to mortgage, make a gift of, sell or assign the land in any way to any person". Her judgment creditor sought to attach the land, but his application was rejected on the ground that what was granted to the widow was the usufruct and no interest in the corpus which, therefore, could not be attached.[6] A will containing clear words of inheritance, but containing a clause forbidding alienation, will take effect as if the clause did not exist.[7]

17.16. Then, it has been held in Allahabad[8] that a gift subject to the power of revocation is not repugnant to this section. In that case, A had sold his village to B, whereupon B granted A some land for his maintenance, stipulating that it would be liable to resumption if A transferred it. A's

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1 (a) *Ramalinga* v. *Virupak,* I.L.R. 7 Bom. 538, 541;
(b) *Western* v. *Macdermott.* L.R. 6 Ch. A. 72;
(c) *Maclean* v. *Mackay,* L. R. 5 P.C. 327.

2 *Kuldip* v. *Khetrani,* I.L.R. 25 Cal. 869.

3 *Hobson* v. *Tulloch,* (1898) 1 Ch. 424.

4 *Dommett* v. *Bedford,* 3 Ves. 149.

5 *Cooper* v. *Wyatt,* I.L.R. 5 Mad. 482.

6 *Diwali* v. *Apaji,* I.L.R. 10 Bom. 342, 345; distinguished in *Golak Nath* v. *Mathura Nath,* I.L.R. 20 Cal. 273.

7 *Kannu Pillay* v. *Challathamal,* 10 M.L.J. 203.

8 *Makund Prasad* v. *Rajrup Singhfi* 4 A.L.J. 708.
See contra *Brij Devi* v. *Shiva Nanda,* I.L.R. (1939) All. 298. (Power of revocation reserved for himself and his heirs in case of alienation).

transferee sued for a declaration that he was a tenant of the land, but Banerji, J., held the plaintiff's assignor's gift to be subject to the power of revocation, and, therefore, not necessarily repugnant to the provisions of section 10. Reference was also made to section 126, but reference to section 6(d) would also have been apposite. Such grants are, necessarily, excluded from the rule.

17.17. *Mortgages*—It is customary in Indian conveyancing for the mortgagor to insert a clause in his mortgage-deed to the effect that the mortgagor will not, pending the mortgage, execute another mortgage or otherwise alienate, or charge the property with another incumbrance. Such a convenant, standing by itself, does not amount to a martgage.[1] But what is its effect upon the rights of the parties and of the subsequent alienee ? Allahabad cases on the subject are of interest. It has been held that a transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable only in so far as it is in defeasance of the mortgagee's rights. Where in contravention of a condition not to alienate, the morgagor had transferred his proprietary right in the mortgaged proporty to a third person for a term of years, the Allahabad High Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt unless he desired its continuance.[2] But it was again held[3] by the same High Court that a transfer of mortgaged property in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee, and with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee, specially if the transfer was made for the *bona fide* purpose of paying off the mortgage,[4] in which case a condition not to alienate cannot operate to annul it;[5] but the debt must be at once discharged by the transfer.[6] Now, it has been held[7] that a similar convenant on the part of the alienee is absolutely void; then, why should it be otherwise in the case of the transferor ? The rule thus laid down by the Allahabad High Court has, in fact, been considerably relaxed by that very High Court.

17.18. *Leases*—Lease deeds often contain conditions against alienation. If they are not absolute or if they fall within the Exception to section 10, they are valid. Assuming now, that the stipulation against alienation is valid, the real question in such a case is, whether by reason of an alienation in breach of such stipulation, the permanent lease is determined, where there is no express condition providing that, on breach of the stipulation against alienation, the lessor may re-inter, or that the lease shall become void. On this point, the authorities are clear that in the *absence of some such express condition,*

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1 *Gunoo* v. *Latafut*, I.L.R. 3 Cal. 336.

2 (a) *Chuni* v. *Thakur Das*, I.L.R. 1 All. 126;
(b) *Mulchand* v. *Galeobind*. I.L.R. 1 All. 610;
(c) *Lachmi* v. *Koteshar*, I.L.R. 2 All 826.

3 *Ali Hasa* nv. *Dhirja*, I.L.R. 4 All. 518.

4 *Ram Saran* v. *Amrita*, I.L.R. 3 All. 369.

5 *Dookhchore* v. *Haiji Hidayatoolah*, (1866-67) N.W.P.H.C.R. (F.B.) page 7.

6 *Mahomad* v. *Banea*, (1869) N.W.P.H.C.R. 135, cited in *Chunni* v. *Thakur Das*, I.L.R. 1 All. 126, 128, footnote.

7 *Mohram* v. *Ajudhia*, I.L.R. 8 All. 452.

there can be *no forfeiture of the lease.*[1] The lessor may enforce the convenant by using for damages for its breach and by obtaining an injunction to restrain the lessee from making an assignment, in breach of the same.[2] The case would, however, be different where non-transferability is shown to be one of the incidents of the lease,[3] in which case ejectment would follow on transfer a clause for re-entry being unnecessary.

17.19. *Recommendation as to the word "absolute".*—It would be apparent from the case law discussed above,[4] that the word "absolute" has been construed by the Courts as including cases where the restraint is not absolute in the literal sense, but is substantially so. It appears that the sense of the section, the intention of the legislature and judicial construction thereof would be better expressed if the word "absolutely" is suitably explained as including cases where the restraint is substantially of an absolute character. We recommend accordingly, so that the section may better reflect its true scope. In such an important provision as section 10, the principle should be more precisely expressed where practicable. Such an amendment will not, we know, avoid the tasks which the Courts have to perform of determining whether, having regard to all the circumstances of the case, the restraint is to be regarded as absolute in substance. But the amendment will have the merit of drawing the attention of the citizens to the wide scope of an important ingredient of the section.

17.20. *Effect of void condition*—Where a restraint on alienation is void by reason of the principles discussed above, it is obvious that an alienation made in violation thereof is as operative as if no such restraint existed The transfer containing the restraint is valid, and is to be read as if no such condition existed. This much is clear so far as the rights of subsequent transferees are concerned. But since the restraints are imposed usually in reciprocal transfers having a contractual element, the question naturally arises whether *as between* the parties, the restraint possesses any validity, so as to confer a cause of action on a party to the transfer against the defaulting party.

17.21. On this point the authorities are not unanimous. It has been held in Calcutta[5] that as between the immediate parties to it, the convenant is binding. But a different note was struck by Phear, J., in a case,[6] since affirmed,[7] in which he observed :

> "It is not competent for the owners of property in this country by any arrangement made in their own discretion to alter the ordinary incidents of the property which they possess, for instance, in this particular

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1 (a) *Tamaya* v. *Timapa,* I.L.R. 7 Bom. 262;
(b) *Nilmadhub* v. *Narottam,* I.L.R. 17 Cal. 826;
(c) *Narayan* v. *Ali Saiba,* I.L.R. 18 Bom. 603:
(d) *Madar Sahib* v. *Nahawa Guiranshah,* I.L.R. 21 Bom. 195;
(e) *Parameshri* v. *Vittappa,* I.L.R 26 Mad. 157;
(f) *Basarat* v. *Vittappa,* I.L.R. 36 Cal. 745.

2 (a) *Mohan* v. *Shekh Sadoodi,* 7 B.H.C.R. (A.C.) 69;
(b) *Tamaya* v. *Timapa,* I.L.R. 7 Bom. 262, 265;
(c) *McEachurn* v. *Cotton,* (1902) A.C. 104;
(d) *Parameshri* v. *Vittappa,* I L.R. 26 Mad. 157.

3 Section 6(i) : *Achuta* v. *Sankaran,* 13 I.C. 1007.

4 Paras 17.10 to 17.18, *supra.*

5 *Ramdhun* v. *Arund,* 2 Hyde 93; *Rajendra* v. *Sham Chund,* I.L.R. 6 Cal. 106; follow in *Muthuraman* v. *Ponnuswamy,* 29 M.L.J. 214.

6 *Radhanath* v. *Tarrucknath,* (1874) 3 Cal. 126, 128.

7 *Krishnendra* v. *Debendra,* (1883) 12 Cal. 793.

case, to say that the joint-property shall remain the joint-property of the joint--family in perpetuity but shall not possess the incidents which the law of the country attaches to property in such condition, namely, that every independent co-parcener is entitled, at any time, to his share dividend of the rest. No doubt, any one member of the family and, therefore, all, might, for sufficient consideration, bind themselves to forego their rights for a specified time and definite purpose, by a contract which could be enforced against them personally."[1]

The Bombay High Court has, similarly, held that an agreement between co-parceners never to divide certain property is invalid as tending to create a perpetuity,[2] and the same view has been taken in Allahabad[3] and Madras[4] where the introduction of a condition against alienation in a great absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is the essence of the grant. So, where parties to a division agree that the property of any one of the parties to the agreement or their heirs dying issueless, should not be sold or transferred as a gift, but should, on his death, be divided by the other shareholders, and where, subsequently, the property was sold in contravention of this agreement and a party to the original agreement sued to recover, it was held that the condition was void.[5] A decision of the Privy Council[6] tends to the same conclusion.

17.22. It seems that such stipulations, since they would, within the meaning of section 23, Contract Act, be agreements whose object or consideration is unlawful, could be regarded as void for that reason. In any case, the matter is one of construction and application of section 23 of the Contract Act, the question being whether the stipulation defeats section 10 of the Transfer of Property Act.

17.23. *Partition and family arrangements*—So far as the main paragraph of the section is concerned, we have dealt with the existing position above at some length, in view of the importance of the section. We have a few points on which an amendment is required in the main paragraph—besides, of course, the amendment regarding the meaning of the word "absolutely" which we have already discussed.[7] The question to be considered is the applicability of the section to partitions and family arrangements. Since the section opens with the words "where property is transferred.....", it may not apply to partitions, if regard be had to the strict meaning of the

1 *Radhanath* v. *Tarrucknath*, (1874) 3 Cal. 126, 128.

2 *Ramalinga* v. *Virupakshi*, I.L.R. 7 Bom. 538; citing.
Rajendra v. *Sham Chund*. I.L.R. 6 Cal. 106;
Ananth v. *Nagamuthu*, I.L.R. 4 Mad. 200;
Asutosh v. *Doorga*, I.L.R. 5 Cal. 438; P.C.;
Chimonroo v. *Rambha*, 4 Bom. L.R. 508;
Chandar Shekhar v. *Kundan* Lal, I.L.R. 31 All. 3.

3 *Chander Shekhar* v. *Kundan Lal*, I.L.R. 31 All. 3.

4 (a) *Anantha* v. *Nagamuthu*, I.L.R. 4 Mad. 200, 202;
(b) *Venkataramanna* v. *Brammanna*, 4 M.H.C.R. 345;
(c) *Promotho* v. *Radhika*, 14 B.L.R. 175;
(d) *Parameshri* v. *Vittappa*, 12 M.L.J. 189, 193;
(e) *McEacharn* v. *Cotton*, (1902) A.C. 104.

5 *Venkataramanna* v. *Brammanna*, 4 M.H.C.R. 345.

6 *Padmanund* v. *Hayes*, I.L.R. 28 Cal. 720, 733 (P.C.).

7 See recommendation as to "absolutely", *supra*—Para 17.19.

word "transfer".[1] Position in this regard is not, however, free from doubt, as is apparent from the case law to be discussed presently.

17.24. *Partition deed*—It appears from reported decisions that partition deeds have contained conditions which provide that the share of a particular person shall not be sold or that if it is sold, the other co-sharer would have the right of pre-emption, and that too at a fixed price. Judicial decisions also show that such conditions have raised controversy as to whether they are valid, or whether they should be construed as substantially imposing an absolute restraint on alienation. The last mention query, in its turn, involves an examination of the question whether section 10 applies to deeds of partition at all. This query arises because under section 5 a transfer of property is defined as an act by which a property is *conveyed*—and a partition is not, in terms, a transfer.

Recognising the hardships caused by such harsh provisions in partition deeds, courts have, in general, tried to do substantial justice by refusing to recognise them, but the reasons for the conclusions so arrived at have varied. Some High Courts have taken section 10 as applicable. Some High Courts, while not going to that length, have decided the matter on the ground of justice, equity and good conscience. Since the situation is of frequent recurrence, an examination of the case law is useful and this examination ,it is hoped, will show the need for clarification in the matter.

17.25. *Madras view*—One shade of view is that the section applies to a partition.[2] A Madras decision of 1939 illustrates this approach :[3]

In a partition deed between the father and his sons in a Hindu family, it was provided that certain houses (which had been used as the family residence) should be held by the members of the family as tenants in common, that no member should have the right to dispose of his share to a stranger, that if any of the sons chose to live in the houses mentioned, he shall not be at liberty in any manner to let or lease, etc. his undivided share to a stranger to the family but shall do so only to any of his brothers or his heirs for a sum not exceeding Rs. 1,000 and it is found that the price of Rs. 1,000 fixed is far below the real price of the share and that there is no corresponding obligation on the part of the other members to buy the share of the members wishing to sell, the restriction against the alienation is void. The estate created is a tenancy in common, and the restriction against alienation amounts to an absolute restraint on alineation within the meaning of section 10, and, therefore, must be disregarded as void; the sons take the property as tenants-in-common without fetter.

It is not clear whether section 10 was regarded as applicable in terms. Perhaps the principle was applied.

17.26. *Bombay case*—A term restraining alienation during the lifetime of the widow in a partition deed was held by the Bombay High Court[4] to

1 Compare section 5 and para 17.24.

2 A.I.R. 1955 Mad. 350 (reviews case law).

3 *T. V. Sangam* v. *Shanmukha Sundaram,* A.I.R. 1939 Mad. 769, distinguished in A.I.R. 1957 Pat. 571.

4 *Jagannathpuri,* A.I.R. 1968 Bom. 25, 25, para 8 (Deshmukh, J.), (contra *Sanatan,* A.I.R. 1946 Cal. 129—distinguished in A.I.R. 1951 Bom. 94).

be void, and it even held a partition to be a "transfer" for the purposes of section 10, Transfer of Property Act.[1]

17.27. *Family Settlement*—It may be noted that even in a family settlement, an absolute restraint on alienation is void.[2] In contrast, a partial restraint on alienation in family settlement would be valid if otherwise reasonable.[3]

The principle underlying section 10 would be applied to a family settlement if there is an absolute restraint on alienation.[4]

17.28. *Calcutta case*—A Calcutta case,[5] however, leaves the matter somewhat uncertain.

17.29. *Price*—On the question whether a provision compelling transfer to a particular person on an *artificially* narrow price is an absolute restraint or only a partial one, the position seems to be fairly clear.

In this context, it is pertinent to refer to an Allahabad case.[6] In that case, the transfer was from X to Y, on the condition that Y shall have no right to rtansfer the property except to the seller X and his heirs for *a fixed sum of money*. This was held to be an absolute restraint, for all practical purposes,[7-8] and was held to be void.

17.30. *English case*—In the English case of In re Rosher,[9] a testator devised an estate to his son in fee, subject to the proviso that if the son, his heirs or devisee, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof during the lifetime of the testator's wife, she (the testator's wife) should be given the option to purchase the estate at the price of £ 3000 for the whole, and at a proportionate price for any part or parts thereof. *The selling value* of the estate at the date of the will and at the time of the testator's death was £ 15,000.

It was held that the proviso compelling the son to sell at such an *under-value* amounted to an absolute restraint on alienation during the lifetime of the widow, and was consequently void.

The same principle was applied by Eve, J. in *In re Cockerill.*[10] In that case, a testator by his will devised land subject to the proviso that if within 20 years of his death the devisee should desire to sell the land, he was to give the governors of a certain school the option of purchasing it at the price of £ 300 an acre. The total area was about 22 acres, and

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1 Compare also—
(a) *Waman* v. *Ganpat*, A.I.R. 1946 Bom. 10, 12;
(b) *Rasagoundan*, A.I.R. 1923 Mad. 577; 44 M.L.J. 513.

2 *Nageshar Sahai* v. *Mata Prasad*, A.I.R. 1925 P.C. 272, 280, affirming A.I.R. 1922 Oudh 236, 244 (case of compromise).

3 *Mationed Ruza* v. *Abbas Bandi*, A.I.R. 1932 P.C. 158 affirming A.I.R. 1929 Oudh 193.

4 *Venkatachallum* v. *Kabalamurthi* A.I.R. 1955 Mad. 350, 358.

5 *Sanatan*, A.I.R. 1946 Cal. 129.

6 *Gayasi Ram* v. *Shahabuddin*, A.I.R. 1935 All. 493, 494, 495 (Sulaiman, C.J. and Bennet, J.)

7 To the s ame effect, *Hari* v. *Jehomal*, A.I.R. 1935 Sind 182, 184.

8 See also *Dal Singh* v. *Khub Chand*, A.I.R. 1921 All. 97 (Tudball & Lindsay, JJ.).

9 In *re Rosher*, (1884) 26 Ch. D. 801; 53 L.J. Ch. 722.

10 In *re Cockerill*; *Mackaness* v. *Porchival*, (1929) 2 Ch. D. 131; 98 L.J. Ch. 281

the land was worth £ 670 an acre at the date of death. It was held that the condition amounted to a restraint on alienation and was void for repugnancy.

It may be noted that these English cases were relied on in the Sind case[1] for holding that a condition for pre-emption at an artificially small price is void in a will.

17.31. *Need for amendment*—It appears to us that the matter should be dealt with specifically in section 10 by extending that section to partitions and family arrangements.

In particular, while in a partition deed, it is permissible to create a right of pre-emption, it should not be permissible to impose stringent conditions narrowing down the range of the price, and without any corresponding obligation on the other party to sell his or her share within the family. Such restrictions particularly partake of the nature of an absolute restraint on future transfer, and are therefore against justice, equity and good conscience. They are harsh and unconscionable in so far as they place an undue limit on the price. The freedom of transfer is restricted in a manner which practically amounts to an absolute prohibition.

Even if a partition may not technically be called a transfer, the principle underlying section 10 is so vital to the interests of society that by express amendment it will be just and fair to extend it. This is not to say that a partition is to be construed as a transfer under all sections of the Act. The amendment will be framed so as to extend the provisions of section 10 to partitions and family arrangements. So far as other sections of the Act are concerned the need for similar amendment should, wherever necessary, be examined on the merits with reference to the subject matter of each particular section.

17.32. *Position in the Punjab*—In this connection, it should be noted that the principle of section 10 has been applied in the Punjab to transfers, even though the Act has no application in the whole area of the State.[2] This at least shows that the principle is one deserving of adoption even where technically the section does not apply, since the rule enacted in the section is one based on allowing the free circulation and disposition of property. There is, therefore, sufficient justification—at least prima facie—for applying the section to partitions.

17.33. *Family settlements*—As to family settlements,[3] at present the section does not apply, and the reasons for extending the section to such transactions are the same as those in the case of partitions. It may be noted that in Hindu law even in the case of grants for maintenance, a restraint on alienation was not encouraged[4] A family arrangement and a compromise of dispute claims are not "transfers" and the section does not in terms, apply to them.[5] But the principle would be applicable were the condition involves an absolute restraint on alienation.[6]

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1 *Hari* v. *Jathomal*, A.I.R. 1935 Sind 182, 184 (case of Will).
2 A.I.R. 1924 Lak. 674.
3 A.I.R. 1955 Travancore 231.
4 I.L.R. 38 Mad. 867.
5 (a) *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*, 1 Ind. App. 157, 166 (P.C.);
(b) *Khunnilal* v. *Gobinda*, 33 All. 356 (P.C.);
(c) *Kapura* v. *Madsodan Das*, A.I.R. 1943 Lah. 168.
6 *Pritami Chand* v. *Sundar Das*, A.I.R. 1946 Pesh. 12.

17.34. *Compromises*—Where, however, the terms of a compromise were embodied in a decree, the legality of a convenant inserted therein was judged by the test of the rule in section 10. Where, therefore, in a partition-suit the parties entered into a compromise whereby the defendant transferred a house to the plaintiff on the condition that though he should be thenceforward its owner, he could not transfer it to another without the defendant's consent, and the plaintiff afterwards sold the house without his consent, it was held that the clause restraining alienation was repugnant to the grant and was, therefore, void, though its terms had been embodied in a decree.[1]

17.35. *Recommendation as to partitions and family arrangements*—Having regard to the various aspects discussed above, we are of the view that section 10 should, by an express amendment, say, by adding a new sub-section—be extended to partitions and family arrangements.

17.36. *Exception for leases—Extention recommended to movable property*—This disposes of the main paragraph of the section, and the amendments relevant to that paragraph. There is, in the section, an exception for leases, as to which we have no comments, except that we think that the principle of the exception should be the same as regards hire of movable property. We recommend that the exception should be so extended.

17.37. *Position as to married women—Recommendation*—Next, we come to the proviso. We have, in an earlier Report,[2] referred to the proviso to section 10 under which property can be transferred to a married woman who is not a Hindu or a Muslim, with a condition restraining her absolutely from alienating during marriage.[3] We said in that Report that "this proviso is in derogation of the general rule enacted by section 10 in its main paragraph, prohibiting the imposition of an absolute restraint on alienation. In our view, the proviso is not justified, in view of the growing social consciousness in the country. Christians and Parsis—to whom the proviso primarily applies,—are not less educated than others. There is no such restriction for other communities. The proviso is linked up with section 8, Married Women's Property Act. In our new scheme, its deletion is unavoidable."

Our recommendation in that Report may be quoted—

> "Having taken into account the social conditions of the present day and the considerations mentioned above, we are of the view that in section 10 of the Transfer of Property Act, the proviso relating to restraint on alienation should now be removed, and we recommend accordingly."

In conformity with that recommendation, we recommend again that *the proviso in section* 10 *relating to Married Women should be deleted.*

Another exception in favour of charities appears to have been overlooked in this section, but it is recognised[4] by section 18.

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1 (a) *Khiali Ram* v. *Raghunath,* 3 A.L.J. 621;
(b) *Gayadin* v. *Syed Mumtaz* (1907) 10 O.C. 136.

2 66th Report (Married Women's Property Act), para 15.2.

3 Also see 66th Report, para 5.7.

4 As amended by Act 20 of 1929, formerly section 17 of the Act.

17.36. *Charity—Recommendation*—There appears to be need for expressly mentioning in this section an exception for charities. It is well-recognised that where there is a gift in favour of a charity, a restraint can be imposed upon the alienation of the property gifted. Not only can a charity claim exemption from the rule against perpetuities to the extent allowed by law[1] but also it is permissible to restrain alienation where the object of the restraint is to preserve the property for the charity and thus to advance its charitable objects. Though not stated in so many words in section 18, it is a well-recognised principle of law.[2] In fact, when section 18 exempts charities from the rule against accumulation of income, it gives an indication of the policy of the law in this regard. For these reasons, we recommend that a specific exception should be inserted in section 10, saving the validity of absolute restraints where the beneficiary is a charity.[3]

17.37. That perpetuities and the restraint on alienation are connected with each other in their spirit may be well substantiated by the following extract from Jarman on Wills.[4]

> "The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider, for a moment, what would be the state of a community, in which a considerable proportion of the land and capital was locked up. The free and active circulation of property which is one of the springs as well as the consequences of commerce, would be obstructed : the improvement of land checked, its acquisition rendered difficult; the capital of a country withdrawn from trade, and the incentives to exertion in every branch of industry diminished."

17.38. *Points for amendment summed up*—It is now time to sum up the amendments that we have recommended in section 10—

(i) Addition of an Explanation regarding the meaning of "absolutely".

(ii) Extension of the section to partition and family arrangements.

(iii) Extension of the proviso (leases) to hire of goods.

(iv) Addition of an exception for transfers in favour of charities.

(v) Deletion of the proviso relating to married women of certain communities.

17.39. *Revised draft*—In the light of the above discussion, we recommend that section 10 should be revised as follows :—

> "10. (1) Where property is transferred subject to a 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 *of immovable property* or *letting out of goods on hire* where the

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1 Section 18.

2 (a) *Mrs. Goudoin* v. *Venkatesan*, I.L.R. 30 Mad. 378, 379;
(b) *Babulal* v. *Ghansham*, I.L.R. 44 All. 633;
(c) *Nizamuddin*, I.L.R. 19 Bom. 264.

3 This is not a draft.

4 Jarman on Wills, 4th Ed., pp. 250-251, cited by Gour.

condition is for the benefit of the lessor *or the person letting out the goods on hire,* or those claiming under him.....

(Proviso omitted)

Explanation.—

A condition or limitation which in the circumstances of the case operates as a substantially absolute restraint shall, for the purposes of this section, be consrtued as an absolute restraint.

"(2) *Nothing in this section applies to any condition or limitation in any such transfer of property as is mentioned*[1] *in section* 18.

(3) *The provisions of this section apply as far as may be, to a partition or family arrangement, as they apply to a transfer and the expressions "transferred" and "transferee" shall be construed accordingly.*

1 Section 18 applies to a transfer of property for the benefit of public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

CHAPTER 18

SECTION 11

RESTRAINT OF ENJOYMENT

18.1. *Introductory*—We come to another topic dealing with another type of restraint. This time, the law is concerned not with a condition or a limitation imposing a restraint on alienation, but a restraint on enjoyment or application. The matter is dealt with in section 11. The section consists of two paragraphs. The first paragraph contains the main provision, while the second paragraph is really in the nature of an exception, or at least in the nature of a saving.

Under the first paragraph, where, on a transfer of property, an interest 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.

Under the second paragraph, where any such directions has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he (the transferor) may have in respect of a breach thereof. The second paragraph was modified by the amendment of 1929 and is generally regarded as a codification of the equitable doctrine of negative covenants, but it is wider than that.

In the case of a negative covenant,—for example, a covenant not to build so as to obstruct a view or not to use a piece of land otherwise than as a garden,—the court has power to interfere and the covenant is enforceable. Of course, where specific relief is claimed, the grant thereof is subject to the general principles regulating the grant of specific relief.

18.2. *First paragraph*—The first paragraph raises no serious problems. It is enough to point out that it applies only where an interest is created absolutely on a transfer of property. The general rule enacted is that a direction for application or enjoyment is void.

18.3. *Object of the grant*—Where the main object of the grant is clear, conditions clearly inconsistent with that object cannot be held to be valid. In dealing with a question of this kind, there is sometimes a difficulty. If one is to regard it as a question of construction, one asks oneself the question what the parties mean by first saying in the instrument that ownership is to be transferred and then saying that what is transferred is not ownership in the proper sense. In such a case every attempt to reconcile these statements should be made. But if no reconciliation is possible, the courts give effect to the main object of the parties and the provisions inconsistent therewith are treated as void. The court has to see whether the clause so far detracts from the enjoyment conveyed that to uphold it would be contrary to public policy.

18.4. *Need to decide whether absolute interest created*—It is, however, a difficult question to decide whether the transfer in a particular case is absolute and therefore the condition restricting enjoyment is void as repugnant, or whether the transfer, by reason of the condition, is not to be

regarded as an interest "created absolutely" within the meaning of section 11. In the former case, the condition is void under section 11, but not so in the latter case. The difficulty illustrated by two Calcutta cases. In a case decided in 1954,[1] a person conveyed certain property to another person but reserved for himself a subordinate or tenancy right under the transferee. The reservation was held to be valid. The transfer is to be regarded not as a transfer of the entire interest of the owner, but only of a portion—actual possession of the property remaining with the transferor on his undertaking to pay rent to the transferee. Reservation of a subordinate interest is in no way inconsistent with the proprietary interest.

In another Calcutta case,[2] property was transferred absolutely but a clause in the sale-deed—the clause usually described in conveyancing practice as habendum—was so framed that the interest of the immediate transferee was, in substance, restricted to a life interest. The clause was as follows :—

> "To have and to hold the said messuages tenements or dwelling houses lands hereditaments and premises hereby granted or expressed so to be free from all encumbrances unto and to the use of the said purchaser Sreemati Kalidashi Devi to be held by her for the term of her natural life as the estate of a Hindu widow and from and after her death to her three sons Samaresh Chandra Mukherjee, Sikharesh Chandra Mukherjee and Sunilesh Chandra Mukherjee to be held by them as tenants in common during their respective lives without power of anticipation and after their death unto and to the use of their respective heirs absolutely and for ever."

It was held that the transfer was of an absolute interest and no transferor can, when executing an absolute transfer, restrict the nature of the interest passing to the transferee in such a manner.

In the last mentioned case, unfortunately, the conveyancer seems to have used a inconsistent language,—first describing the instrument as a sale-deed and then inserting a restrictive clause in the terms quoted the rule in section 11. This does not, however, mean that in every case such a clause must be regarded as in operative. The first duty of the court, when it is called upon to apply section 11, is to decide whether the transfer creates an absolute interest. It is then only that occasion for applying the operative portion in the section arises.

18.5. *Gifts*—In regard to gifts, a question would arise whether the gift was conditional or absolute with a condition attached. If the gift is conditional, the condition is valid; in the latter case, the condition is void. Restrictions in an absolute grant that the grantee shall live at a particular place or that the property shall not pass to the grantee's daughter, are void.[3] In an earlier case,[4] where, by a trust-deed, it was provided that a dwelling-house dedicated to the worship of the deities should not be alienated for twenty years, the court gave effect to the prohibition.

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1 *Bejoy Krishna* v. *Iswar Damodar*, A.I.R. 1954 Cal. 400, 402 (R. P. Mookerjee Benusengupta Mukherjee, JJ.).
2 *Manjusha Debi* v. *Sunil Chandra*, A.I.R. 1972 Cal. 310 (Amiya Kumar Mookerji, J.).
3 *Saraju Bala* v. *Jyotirmoyee*, I.L.R. 59 Cal. 142 (P.C.).
4 *Ananth* v. *A. B. Mackintosh*, 8 B.L.R. 60.

This case was referred to and commented upon in another case[1] in which Wilson, J., observed :

> "That case decided, I think, no more than this, that there was a valid trust for the performance of certain worship in the dwelling-house and as incidental to that trust, a restraint upon partition or alienation during the period of the trust, and that a mortgagee with notice was bound by it."

18.6. *Second paragraph*—The second paragraph is primarily, though not exclusively, meant for the convenient enjoyment of adjacent properties. The leading English case of *Tulk* v. *Moxhay*,[2] illustrates the principle. Thus, a covenant between the vendor and the purchaser that the purchaser and his assigns shall abstain from using the land in a particular way would be enforceable in equity, not only against the immediate purchaser but also against subsequent purchasers with notice[3]—and this is independently of the question whether the covenant at law runs with the land so as to bind even purchasers without notice. We are not, at the moment, concerned with the question how far subsequent purchasers should be bound —a matter dealt with, to some extent, in section 40. For the present, it is enough to state that the second paragraph takes out of the operation of the first paragraph the case under consideration. In other words, the provision in the first paragraph that the transferee shall be entitled to receive and dispose of such interest "as if there were no such directions" which, on its text is absolute and unqualified, is modified to the extent mentioned in the second paragraph, so far as the general validity of such a covenant is concerned.

18.7. *First paragraph*—It may be noted that the first paragraph of the section broadly corresponds to section 138 of the Indian Succession Act, 1925, quoted below :—

> "138 Where a fund is bequeathed absolutely to or for the benefit of any person but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction:"[4]

That section has an illustration as follows :

> "A sum of money is bequeathed towards purchasing a country residence for A, or to purchase a commission in the army for A, or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so."

18.8. *Negative covenants*—The second paragraph of section 11 is an exposition of the equitable doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct it. Where there is a negative convenant expressed or implied—as, for instance, a covenant not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden,—the court interfers unless its hand is stayed on

1 *Rajender* v. *Sham Chund*, I.L.R. 6 Cal. 106, 116, 117.
2 *Tulk* v. *Moxhay*, (1848) 2 Phill 774.
3. *C.f.* section 40.
4 Section 138, Successoin Act.

the ground of greater inconvenience. Thus, a covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall abstain from using the land in a particular way will be enforced in equity against all subsequent purchasers with notice independently of the question, whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.[1] So, where the owner of a plot of land sold a part of it to another and covenanted that the land "should never be hereafter sold, but let for the common benefit of both parties and their successors," it was held that the agreement to keep the land open was binding between the parties and their representatives, and that, therefore, the person who might hold the vendee's land, had the right to enforce the obligation against the person who might hold the vendor's land"[2]

18.9. Thus, if the plaintiff sells one of his two neighbouring houses; a stipulation in the sale-deed that the vendee should not construct windows or doors to the southern side of the house but that there should be only Zarookas of 1¼' by 1¼' for light is not void and is enforceable.[3]

18.10. *Second paragraph not confined to negative covenants*—Of course, the second paragraph of section 11 is not confined to negative covenants. As between the transferor and the transferee, it would appear that even affirmative covenants, if intended to secure the beneficial enjoyment of a piece of immovable property are, in general, valid. Such covenants are distinguishable from easements which, if otherwise legally created, would bind the whole world irrespective of notice. The point to be made is that as between the transferor and the transferee, even an affirmative covenant would be saved by the section, whatever be the position as regards enforcement by caliming specific relief and whatever be the position as regards enforceability against subsequent transferees. The grant of specific relief would, of course, depend on circumstances—including even changed circumstance.[4]

18.11. *Importance of covenants*—The emergence of multi-storeyed buildings with what are popularly known as ownership flats usually necessitates covenants binding the co-owners *inter se*. These covenants are absolutely necessary for the proper enjoyment of the property by each owner of the flat according to the true purport of the scheme. Sometimes the legislature intervenes by passing legislation relating to "condominium" titles.[5-7]

It has been recognised ever since the time of Coke that a man may have an inheritance in an upper chamber, though the lower buildings and soil be in another[8] But the situation is now of more frequent occurrence, thus increasing the importance of the subject.

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1 *Tulk* v. *Moxhay*, (1848) 2 Phill. 774.

2 *McLean* v. *McKay*, L.R. 5 P.C. 327;
Dhannu Lal v. *Bansidhar*, A.I.R. 1929 Pat. 349.

3 1962 Nag. L.J. (Notes) 40 cited in the Yearly Digest.

4 *McLean* v. *McKay*, L.R. 5 P.C. 327, 337.

5 Condominium Act, 1970 (No. 54) (Newfoundlaind).

6 Act of respecting the co-ownership of immovables. Statutes of Quebec (1969).

7 Condominium Ordinance North-West Territories (1969).

8 Code on Littleon, 48b. See further *Sunvill Enterprises Proprietary Ltd.* v. *Berger Bros. Trading Co. Proprietary Ltd.*, (1971) 45 A L.J.R. 203.

18.12. *Common instances*—The most common instance of the rule embodied in the second paragraph is to be found in those cases where a person who owns a house and adjoining land and sells the land, enters into a covenant with the purchaser that the latter shall keep a portion of the land transferred vacant and free buildings, so as not to obstruct the air and light of the vendor's house. Such a covenant, being one intended for the beneficial enjoyment of the vender's house, is enforceable, as against the purchase.[1]

18.13. *Arbitrary condition*—A covenant which is not made for the beneficial enjoyment of the transferor's property, but is merely an arbitrary condition imposed for its own sake, is not enforceable against the transferee, and the latter may ignore it; e.g., a covenant to use the transferred land as a garden, a covenant to build a second story, a covenant to improve the transferred land. There are affirmative covenants which can be rarely enforced against the transferee.

18.14. *English law*—In England, it was considered to be an important contribution of equity that subject to certain conditions the burden of covenants could be assigned. This is, of course, confined to restrictive covenants.

With the growth of population, the law relating to restrictive covenants affecting the user of land has been developed. The cases range themselves conveniently under one or other of two heads, but under which the particular instance is to be classed is a matter of great difficulty, depending as it does upon a consideration of al lthe facts. Land may be sold upon terms which make the restrictive stipulations a bargain between the immediate contracting parties, who are at liberty to vary the terms of the contract between them[2] and this they may do either in express terms or by waiver or acquiscence will generally be limited in effect to the particular breach.[3] And benefit of covenants of this description may be made to run with the land at law and in equity,[4] although the burden can only be made to run with the land sold in equity.[5] On the other hand, there may be what is known as a building scheme which confers a right upon purchasers of lots to sue purchasers of other lots for failure of observe restrictive stipulations relative to the use of land.[6] And in this case the common vendor cannot dispense with the conditions or refuse to observe them.[7]

18.15. *History of the section*—It may be noted that while affirmative covenants, that is to say, covenants to compel the enjoyment in a particular manner, are not, in general, enforceable against subsequent trans-

1 See *Tulk* v. *Moxhay*, (1848) 2 Phill. 774; *Mc-Lean* v. *McKay*, L.R. 5 P.C. 427.
2 *Rupala* v. *Cowlishaw*, 11 Ch. D. 866;
Osborne v. *Bradley*, (1903) 2 Ch. 446.
3 *Sayers* v. *Collyer*, 28 Ch. D. 103;
Knight v. *Simmonas*, (1896) 2 Ch. 294.
4 *Rogers* v. *Hosegood*, (1900) 2 Ch. 388.
5 *Haywood* v. *Burnswick Permanent Benefit Building Soc.*, 8 Q.B.D., 493.
6 *Rowell* v. *Satchell*, (1903) 2 Ch. 212.
7 *Spicer* v. *Martin*, 14 App. Cas. 12;
In re Birmingham and District Land Co. v. *Allday*, (1893) 1 Ch. 342.

ferees, they are still enforceable between the transferee and the transferor. Before 1929, the second paragraph of section 11 read as follows :—

> "Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner."[1]

The amendment of 1929, although it made a verbal change in this paragraph, did not restrict its scope and was not, in fact, intended to restrict its scope. A change of substance was intended only in section 40, that is to say[2] as regards enforceability against subsequent transferees.—

The first paragraph of section 40, before its amendment in 1929, also contained the words "compel its enjoyment"—words which were wide enough to apply to affirmative covenants. After the amendment which omitted these words, an affirmative covenant cannot be enforced against a purchaser from a transferee and only a negative covenant can be enforced, provided that the other conditions in section 40 are satisfied.

18.16. *Allahabad case*—An Allahabad case[3], though decided under the pre-amendment section, supplies factual material which can be used in illustration of the amendment. In that case, the purchaser entered into a covenant to pull down, when required by the vendor, rooms for a passage between the house of the vendor and the house purchased by the purchaser. This covenant was held to be enforceable against the purchaser under section 11, second paragraph, and against the transferee from the purchaser under section 40, as it stood then. After the amendment of 1929, as Mulla has pointed out[4], the covenant can still be enforced against the immediate purchaser—no change is made by the amendment in section 11—but, being an affirmative covenant, it cannot be enforced against a purchaser from the vendee.

18.17. *Exceptions to the rule against restrictive enjoyment*—There are several exceptions to the general rule that conditions restrictive of the enjoyment of the absolute interest are void. Covenants or other obligations annexed to the ownership of property may control the enjoyment of property. They seem to fall under the following principal categories, namely :—

(i) Easements;
(ii) Covenants running with the land;
(iii) Restrictive covenants,
(iv) Personal covenants;
(v) Contractual obligations annexed to the ownership of property.

18.18. *Brief discussion*—A brief discussion of each category follows :

(i) Where property is subject to an easement, the easement is enforceable against the purchaser. Creation of easements and the general subject of easements are outside the province of the Transfer of Property Act.

(ii) Certain covenants run with the land.

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1 Mulla (1973), page 102.
2 Mulla (1973), p. 102.
3 *Nandgopal* v. *Batuck Prasad,* A.I.R. 1932 All. 778.
4 Mulla (1973), page 105.

The definition of this concept in England[1], is as follows :—

> "A covenant runs with the land when the benefit or burden of it, whether at law or in equity, passes to the successors in title of the covenantee or the covenantor, as the case may be."

Although, in India, there is no distinction between law and equity, this provision is helpful as explaining the concept of covenants running with the land. Many covenants of the lessee run with the land. Then there are covenants for title created by statute in the case of sale of land and running with the land in India[2].

(iii) A restrictive covenant restrains the covenantor from putting his property to certain specified use. An affirmative covenant compels him to enjoy the property in a specified manner. A covenant to keep the land uncovered with buildings is an example of the former; a covenant to dig a well on the land for the supply of water to the dwelling house of the covenantee is an example of the latter.

Ordinarily speaking, the burden of an affirmative covenant does not run with the land. In contrast, the burden of a restrictive covenant is transferred to the subsequent transferees, subject to certain requirements. Developments in England in this field are represented by three leading cases, namely :

(a) *Tulk* v. *Moxhay*[3],
(b) *Austerberry* v. *Oldman Corporation*[4];
(c) *'Haywood' case*[5].

The position in equity under the rule in *Tulk* v. *Moxhay*, as modified and interpreted by later decisions, was thus stated by Maitland[6]

> "Any one coming to the land with notice actual or constructive of a covenant entered into by some previous owner of the land restraining the use to be made of the land, will be prohibited from doing anything in breach of that covenant."

It is now well settled that affirmative covenants are not enforceable against the transferees of the land, even where they have notice. But they are binding on the covenators.[7]

(iv) Personal covenants cannot be enforced against transferees. This is so even if they have notice.[8] However, this does not affect their validity as between the immediate parties.

(v) Contractual obligations annexed to ownership are illustrated by an obligation undertaken under a contract of sale.

18.19. *Covenants for supply of goods*—Covenants in leases for the sole supply of goods sold on the lease premises have often come up before

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1 Section 80. Law of Property Act, 1925.
2 Section 55(2) of the Act.
3 *Tulk* v. *Moxhay*, (1848) 41 E.R. 1143.
4 *Austerbarry* v. *Oldham Corporation*, (1885) 28 29 Chancery Division 750.
5 *Haywood* v. *Burnswick Permanent Building Society*, (1881) 8 Q.B.D. 403.
6 Maitland, Equity (2nd Ed.), page 163.
7 *Wolverhampton Corp.* v. *Emmons*, (1901) 1 K.B. 151.
8 *London Country Council* v. *Allen*, (1974) 3 K.B. 642.

English courts. In an English case decided in 1969,[1] Lord Denning M. R. discussed the aspect of restraint of trade. If a person out of possession is let into possession by an Oil company on the terms that he has to tie himself to that company—in the sense that he has to take all his supplies from that company—such a tie was described as good by Lord Denning. On the other hand, if an owner in possession ties himself for more than 5 years to take oil supplies from the company, that is an unreasonable restraint of trade and is invalid.

The relationship between the restraint of trade doctrine and the covenant also came up before a court in New South Wales, Australia.[2] An action between covenantee and covenantor involved a covenant executed by a purchaser of land not to use the property for the sale of wine products sold or produced under the name "Dalwood". The covenant was not capable of benefitting the land of the covenantor, though the land was retained by him. It was held that only covenants in leases and covenants which benefited retained land were excluded from the operation of the doctrine of restraint of trade.

18.20. *Incompleteness*—There appears to be a certain amount of incompleteness in the second paragraph of section 11. Before the amendment of 1929, it was clear[3] that both the right to restrain the enjoyment and the right to compel the enjoyment in a particular manner were saved. This does not appear very clearly in the section after its amendment. We have gone through the Statement of Objects and Reasons[4] and the Report of the Select Committee, relating to the amendment of 1929, but, with respect, it does not give any adequate reasons why the benefit of this clarification was sought to be sacrificed.

Whatever difficulties might have been felt in section 10, there was hardly any necessity to dispense with those words in the second paragraph of section 11, which at least made it clear that both affirmative and negative covenants were intended to be covered. Having regard to the fact that conveyancing in India is not in a very advanced stage of perfection and also having regard to the fact that there is a likelihood that a controversy,—if it has not arisen so far,—might arise by reason of the terseness of the language, it appears to be desirable to make it clear that an affirmative covenant is not invalid as between a transferor and transferee under section 11, second paragraph. In fact, this was the object of the Select Committee, namely, to make it clear that "although an affirmative covenant is not, by itself, invalid as between a transferor or a transferee, negative or restrictive covenants only can be specifically enforced against other parties". In so far as section 40 is concerned, the amendment of 1929, no doubt, follows the trend of later English cases.[5] But in so far as the amendment, as a matter of language, makes it less clear than before that section 11, second paragraph, was intended to cover both the types of covenants, it was not, in our opinion, properly executed. It is not without some effort that one is able to spell out from the paragraph, as amended, that both the types of covenants are covered. Readers might not immediately perceive the difference between the phraseology of section 11 and section 40. Even if they

1 *Cleveland Petroleum* v. *Dartatones*, (1969) 1 All. E.R. 211.

2 *McGuigan Investment Proprietary Limited* v. *Dalwood, Wineyard Proprietary Ltd.* (1970) 1 New Southwales Reports 686.

3 See "History of the section", *supra*.

4 Para 18.21, *infra*.

5 *Haywood* v. *Burnswick Building Society*, 8 Q.B.D. 403.

perceive the difference, they might not be readily able to spell out the effort of that difference. In any case, there appears to be hardly any harm if the position is made specific on the point discussed above.

18.21. *Statement of Objects and Reasons*—In the Statement of Objects and Reasons to the Amendment Bill it was stated—

"Sections 11 and 40 of the Act refer to affirmative and negative covenants in a transfer. *Section 11 refers to rights as between a transferor and transferee,* while section 40 relates to the rights of third parties against transferees. The words 'to compel is enjoyment', used in the second paragraph of section 11 and in the first paragraph of section 40, indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced. The paragraph seems to have been based on the observations of Lord Cottonham in 2 Ph. 774, a case decided in 1848. But in later English decisions such as 8 Y.B.D. 403, the observations in that case were not approved, and it is now settled that except in certain special cases affirmative covenants cannot be specifically enforced. Thus, in (1885) 29 Ch. D. 750, a covenant to spend money on the land was held as not binding on *the purchaser of the land,* although he had notice of the same. Indian Courts have followed the same principle.[1] We propose that the second paragraph of section 11 and the first paragraph of section 40 could be amended as to make it clear that, although an affirmative covenants is not, by itself, invalid as between a transferor and transferee (section 11), negative or restrictive covenants only can be specifically enforced against a third person (section 40)."[2]

The amendment unfortunately does not improve the second paragraph in point of precision. One cannot help observing that it makes it less precise than before.

18.22. *Need for change*—Having regard to what is stated above, we are of the view that section 11, second paragraph, should be amplified so as to make it clear that it applies to affirmative as well as to negative covenants.

18.23. *Charity*—Further, there should be an exception for charities, as in section 10, as proposed to be amended.[3]

18.24. *Re-draft of section* 11—In the light of the above discussion, we recommend that section 11, should be revised on the following lines :

Revised section 11

(1) Where, on a transfer of property, an interest there in 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.

(2) Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment

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1 27 Bom. L.R. 73; 1925 Bom. 183.
2 Statement of Objects and Reasons.
3 See discussion as to section 10 *supra.*

of another piece of such property, nothing in this section shall be deemed to affect any right which, the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof; *whether such direction restrains the enjoyment of the first mentioned property in a particular manner or compels the enjoyment thereof in a particular manner.*

[Also add Exception for charity,[1] as in amended section 10].

1 Para 17.39, *supra.*

CHAPTER 19

CONDITION MAKING INTERST DETERMINABLE ON INSOLVENCY OR ATTEMPTED ALIENATION
SECTION 12

19.1. *Section* 12, *first paragraph*—The power of the transferor to impose conditions while making a transfer of property is restricted by a further provision contained in section 12 which invalidates two kinds of conditions or limitations—(i) a condition or limitation which makes any interest to cease on the person becoming insolvent; (ii) a condition or limitation making any interest to cease on a person endeavouring to transfer or dispose of the same. The reasons for invalidating the condition in each case may be stated. In the first case, the consideration is not a purely legal one, and the aspect of public policy involved is of greater importance than in the second case.

The law does not consider it proper that while a person should, in other respects, enjoy an interest in an unrestricted manner, that interest should cease as soon as he becomes insolvent. Such a provision, if recognised, would practically defeat the law relating to insolvency. If it were to be permitted in an unqualified form, a time would come when no property would ever become available on insolvency to the creditors, because every person would get such a condition inserted in a transfer. It may not help the transferee directly, but at least it would defeat his potential creditors on insolvency.

19.2. *Section* 12, *first paragraph—Interest terminable on alienation*—The second condition sought to be invalidated by section 12, pertains to alienation. An attempt to transfer or dispose of an interest reserved or given to a person should not be made a ground for termination of the interest, the rationale here being that such a condition would be repugnant to the nature of the interest. The law favours the circulation of property and if an interest is once transferred, the transferee should further have power to transfer it. In any case, the transferor is not allowed to create, by private contract, a non-transferable interest and thus add to the list of things which cannot be transferred.[1]

19.3. *Section* 12 *compared with section* 10—Since the subject of restraints on alienation has also figured in section 10, it would be useful to point out that section 12, first paragraph, is in some respects wider than section 10. Section 10 applies only to restraints which are absolute—as the text goes,—or restraints which are substantially absolute—as interpreted by judicial decisions. In section 12, however, a partial restraints also seems to be covered. It may also be stated that section 10 deals with a condition against alienation in the abstract, while section 12 is confined to conditions or limitations which expressly provide for cesser of an interest on an endeavour to transfer or dispose of the same.

19.4. *Section* 12, *first paragraph and English law*—It may be noted that section 12 enunciates an exception to the general rule enacted in sections 31 and 32, which provide that an interest "may be created" with the

1 Section 6.

condition super-added that it shall cease to exist on the happening of an uncertain event. Out of the range of permissible conditions, section 12, first paragraph, takes out two kinds of conditions.

19.5. *English law in regard to insolvency*—It is to be noted that in regard to insolvency, the section departs slightly from the English rule. A provision terminating the interest on bankruptcy is a common forfeiture clause in English conveyances.[1] But a man cannot settle property on himself, determinable on bankruptcy. A settlement so made is void, it being fraudulent for a man so to deal with his property as to disappoint the just claims of his creditors.[2-3].

19.6. *Succession Act*—The law is also different under the Indian Succession Act. Section 120 of that Act recognises the legality of a condition terminating an interest on insolvency. If "an estate is bequeathed to A, until he shall take advantage of the Act for the relief of insolvent debtors, and after that to B, B's interest in the bequest is decluared to be contingent until A takes advantage of such a law". So says one of the illustrations of section 120.[4]

19.7. *Problem arising on second paragraph*—So much as regards the first paragraph of section 11. We shall now deal with an important question that is raised by the second paragraph of the section. Operating as an exception to the first paragraph, the second paragraph saves conditions in a lease which are inserted "for the benefit of the lessor or those claiming under him". It is well-known that conditions are often inserted in leases, prohibiting or restricting the lessee from assigning the lease or subletting the leased premises. While in the absence of such a condition, the assignment or sub-lease would be permissible under the Act[5], that position is expressly made subject to a contrary provision in the lease.[6] Now, when such a condition is expressly inserted in a lease, the question arises whether it is to be construed as one intended for "the benefit of the lessor" within the meaning of the second paragraph of section 12. At first sight, it would appear that[7] the answer should be in the affirmative and that there can hardly be any doubt on the subject.

It would appear, however, that a Calcutta case throws some doubt on the subject.[8] Though the observations in that case were, strictly speaking, obiter, they have, with great respect, created some confusion.

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1 *Brandon* v. *Robinson*, 18 Ves. 429;
Natton v. *Mav*, 3 Ch. D. 148, 152;
In re Machu, 21 Ch. D. 838;
In re Bedasons' Trusts, 28 Ch. D. 523;
Metcalfe v. *Metcalfe*, 43 Ch. D. 633, C.A. (1891) 1 Ch. 1, distinguishing *White* v. *Chitty*, L.R. 1 Eq. 372; *Llyod* v. *Llyod*, L.R. 2 Eq. 722.

2 Compare the Presidency Towns Insolvency Act (3 of 1909), section 9, clause (b); Provincial Insolvency Act (5 of 1920), section 6, clause (b).

3 *Hormusji* v. *Dadabhoy* (1895) I.L.R. 20 Bom. 310.
(Case decided on 30th September, 1895, after the act had been extended to the Bombay Presidency on 1st January, 1893).

4 Section 120, Indian Succession Act, 1925, Illustration (vii); Section 107 of the Indian Succession Act (10 of 1865), paragraph III.

5 Section 108(j).

6 Section 108, opening lines.

7 See para 19.29 (*infra*).

8 *Nilmadhab* v. *Naruttam*, I.L.R. 17 Cal. 627 (See *infra*).

19.8. *Effect of covenant on validity of assignment*—Even if the point just now mentioned is kept aside, there yet remains to be considered another point also arising out of the second paragraph on the same subject. If such covenants against assignment of a lease are violated, and an assignment or a sub-lease is made in violation thereof, is the assignment or sub-lease ineffective? In other words, assuming that a condition prohibiting an assignment or sub-lease is one for the benefit of the lessor and therefore not invalidated by section 12, does it so operate as to render the assignment or sub-lease void? One would have thought, that to this question also, the answer should be in the affirmative. But it would appear from the reported decisions, to be discussed presently, that while one view on the subject is that the assignment is void, another view would merely recognise a right to damages in favour of the lessor for breach of the covenant, at the same time treating the assignment as valid notwithstanding that it is in violation of an express covenant.

19.9. *Aspect of power of re-entry*—At this stage, it is also necessary to refer to the law relating to forfeiture of leases. Under the Act,[1] the mere fact that the lessee commits breach of a covenant of the lease does not, in general, suffice to confer a right on the lessor to forfeit the lease. It is further required in general that the covenant should state that the lessor has a power to re-enter the premises for breach. This restriction seems to have been inserted in view of the hardship that may be caused to the lessee by a forfeiture. This general rule applies to covenants against assignments, as well as to other covenants.

The scope of this rule is restricted to cases where the lessor proposes to forfeit the lease. It has, in the scheme of the Act, no express relevance to—(i) the question whether the covenant in valid as between the lessor and the lessee, or (ii) whether the covenant is to be regarded as for the benefit of the lessor, or (iii) whether action taken in breach of the covenant would be legally recognised and what, if any, would be the legal remedies for the breach—leaving aside forfeiture, for which, as already stated, the covenant must contain an express power of re-entry.

Now, what has happened is that the requirement that there should be a power of re-entry, which, according to the scheme of the Act, *is relevant only in the context ofa claim to forfeit the lease*[2], has somehow been considered to be relevant also for deciding the other queries listed in the immediately preceding discussion. The view is sometimes taken—expressly or impliedly- *that where there is no power of re-entry,* then an assignment in breach of a covenant to assign is valid, *qua* asignment, though the lessor can sue the lessee for damages. This view has been taken in a later Calcutta case[3], holding that an assignment in breach of such a covenant is nevertheless valid. There is no elaborate discussion of the various aspects.

19.10. *Three shades of view*—Thus, case law reveals three shades of opinion—

(i) the covenant is void;

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1 Section 111 (5). Para 19.13 *infra.*
2 Para 19 9 supra.
3 ***Basarat Ali Khan*** v. *Manirullaa,* I.L.R. **26 Cal.** 745, 746.

(ii) the covenant is valid, but the assignment is also valid even though in breach of the covenant;

(iii) the assignment is void.

19.11. *Later Calcutta case*—The extreme view that *the covenant is void,* which was taken in the earlier Calcutta case,[1] was not approved by the same High Court in a judgment of a Division Bench consisting of Jenkins C.J. and Mokherjee J.[2] That Bench at least held that the covenant was valid, though it did not regard it as nullifying the assignment.

19.12. *Madras view*—In a Madras case,[3] Bhashyam Ayyangar, J., dealing with the question of forfeiture, expressed himself strongly against the Calcutta view in these words—Moore J. concurred with him :

> "The stipulation that the lessee shall have no right to transfer his interest is clearly one intended for the benefit of the lessor and it would [illegible] able to hold, following the dictum in *Nil Madhab Sikdar* v. ***Narattam Sikdar***[4] that the condition against alienation cannot be said to be for the benefit of the lessor and hence it is void under the provisions of section 10 of Act IV of 1882. The stipulation against alienation is not void "but valid (***Vyankatrayya*** **v. *Shivrambhat*)**[5] and if the plaintiffs had sued for an injunction to restrain the defendants' assigner from making the assignment or sued for damages for breach of the stipulation, they would have been entitled to the remedy sought for (*Jivandas Keshavji* v. *Framji Nanabhai*[6], *Tamaya* v. *Timana Ganjaya*,[7] *McEacharan* v. *Colton*,[8] and Foa on 'Landlord and Tenant' 2nd edition, page 211). It may also be that a transfer by the lessee, absolutely or by way of mortgage or sub-lease, in breach of the covenant not to alienate, will be void as against the lessor and he may realise arrears of rent due by the lessee, by attaching and selling his interest in the lease as effectually as *if there had been no transfer by the lessee* and the transfer will also be inoperative to secure to the transferee, as against the lessor, the benefit of the lessor's contract under section 108(c) of the Transfer of Property Act."

19.13. *Other provisions in the Act*—Under section 111(g), so far as is material, a lease of immovable property determines by forfeiture, that is to say, in case the lessee breaks an express condition which provides that on breach thereof a lesser may re-enter and the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

Under section 108(j), so far as is material, in the absence of a contract or local usage to the contrary, the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property

1 *Nilmadhab* v. *Narattam*, (1890) I.L.R. 17 Cal. 826.

2 *Basarat Ali Khan* v. *Manirulla* (1909) I.L.R. 36 Cal. 745, 746, followed in *S. K. Roy Choudhury* v. *A. L. Khan*, (1960) 65 Cal. W. N 1050, 1052.

3 *Parameshri* v. *Vittappa*, (1903) I.L.R. 26 Mad. 157, 161 (Bhashyam Ayyangar & Moore, JJ.).

4 *Nil Madhav Sikdar* v. *Narattam Sikdar* I.L.R. 17 Cal. 827.

5 *Vyankatraya* v. *Shivrambhat*, I.L.R. 7 Bom. 256.

6 *Jivandas Keshavji* v. *Framji Nanabhai*, 7 Bom. H.C.R. (A.C.T.) 69.

7 *Tamava* v. *Timana Ganjaya* I.L.R. 7 Bom. 262. 265.

8 *McEacharn* v. *Colton*, (1902) A.C. 104 (P.C.).

and any transferee of such interest or part may again transfer it. The lessee shall not, by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease.

19.14. *Confusion between right of forfeiture and validity of assignment* —The case law discussed above shows the uncertainty. It would seem that the difficulty has arisen because a confusion has been made between the lessor's *right to forfeit* under section 111(g),—for which the Act requires an express provision for re-entry—and the effect of the breach of the prohibition against assignment on the validity of assignment—a matter on which section 111 has no relevance. The point to be determined is the meaning of the words "for the benefit of the lesser" in sections 10 and 12.

19.15. *Calcutta case*—The earlier Calcutta case[1] is often cited in support of the narrow construction of "for the benefit". But what that case decided was that the *compulsory sale of the lessee's interest* in execution of a decree obtained against the lessee was valid. The observation that since there was no right of re-entry, the condition against alienation was not for "the benefit of the lessor", was obiter. From other points of view also, this observation was obiter, because the lessor did not sue to declare the assignment as void, but sued for a declaration that the lease was forfeited. That relief he obviously could not claim as there was no power of re-entry.

19.16. *Position under case law in India*—The position then seems to be that while (i) the earlier Calcutta view would invalidate the very covenant, (ii) the later Calcutta view would recognise it to the extent of permitting a grant of damages, and (iii) observations in the Madras judgment would not only permit the grant of damages, but also validate the covenant and nullify the assignment—though, of course, forfeiture cannot be ordered in the absence of a provision conferring a right of re-entry.[2]

19.17. *Anomaly caused by Calcutta view*—Apart from the position under case law, the question should be examined on the score of principle. Whatever be the reasons in equity for denying the *right to forfeit* a tenancy in the absence of an express clause conferring a power of re-entry, is there sufficient justification or juristic reason for recognising the assignment as valid, where there is a valid covenant against it? The anomaly of taking such a view could be illustrated by taking a hypothetical case. A lessor who is a vegetarian creates a lease in favour of A, who is also a vegetarian; the lessor inserts a covenant that the lessee shall not assign the lease to a non-vegetarian. There is no express provision for re-entry. The lessee attempts to assign the lease to a non-vegetarian. Is it adequate justice if the lessor is merely given the right to compensation for the loss caused? In its very nature, such a loss cannot be adequately estimated in terms of money. It is true that before the assignment the lessor could have sued for an injunction, but what is to happen if the assignment has already been executed by the lessee? To take the position that such an assignment is valid notwithstanding the covenant and that the lessor can sue only for damages—even if such a position is supported by a few cases—is not really doing substantial justice. Substantial justice, it is urged, would be better achieved if the lessor has a right to get the assignment set aside—without, of course, forfeiting the lease. The assignee will not, under such a provision,

1 *Nil Madhav* v. *Narattam*, (1890) I.L.R. 17 Cal. 827.
2 Section 111 (g).

get the right to occupy the premises. It may be that the lessee is not interested in the lease. If so, the lessee can surrender the premises. The doctrine of equity which gave birth to the provisions against forfeiture, does not necessitate the further position that the assignment must also be recognised.

19.18. *English law*—It is usually stated in the commentarios on the Act that in English law, in the absence of an express covenant providing for re-entry, the assignment is valid. This does not, however, appear to be a totally accurate statement of the position. The case of *Commissioners of Works* v. *Hull*[1] is one of the cases cited in support of the proposition. But actually in that case the clause prohibiting assignment provided for forfeiture and proceedings of the lessor against the assignee for ejectment were successful. The case of *Williams* v. *Erle*[2] was one relating to the question of damages. Other cases also do not directly relate to the *validity of the assignment.*

19.19. The assumption that in English law in the absence of a power of re-entry an assignment is valid seems to be debatable. Of course, a lease may contain an express proviso for re-entry or forfeiture by the landlord on specified events. Such a proviso leaves it optional to the landlord whether he will exercise his right of determining the lease upon a cause of forfeiture arising. The lease is not void but voidable, and only the landlord can avoid it[3].

19.20. *Aspect of condition*—But English law also recognises the rule that the lease may be made determinable *without an express proviso for re-entry,* if the event specified is a "condition" subject to which the term was created[4] and the event happens.

In this context English law makes a distinction of much the same nature found in the law relating to sale of goods between condition and warranty. If the clause which is put forward constitutes only an "agreement" on the part of the lessee to do or not to do a specific act, and if the clause is not tantamount to a "condition", the landlord cannot re-enter for breach of it except under an express proviso for re-entry. It will thus be obvious that even in the absence of a proviso for re-entry under English law, a stipulation in a lease may amount to a condition and in that case the lesser is even allowed to terminate the lease. Now, if the lessor is competent to terminate, then it follows that in the case of a covenant against assignment being broken, the covenant (if construed as a condition) gives the lessor the right to nullify the assignment. If he has got the right to forfeit the lease, it follows that he is competent not to recognise the assignment. In fact, the true position in English law seems to be that since forfeiture is a *matter stricti juris,* an assignment *which is void* does not give cause for forfeiture *ipso facto.*[5] Of course, where a covenant against assignment or underletting with a proviso for re-entry on breach of covenant is broken, the lessor can either re-enter for the forfeiture or sue for damages for the breach. The option is his, subject to the provisions as to relief against forfeiture. It is also true that an assignee

1 *Commissioners of Works* v. *Hull,* (1922) 1 King's Bench 205; (1921) All E.R. reprint 508; 3 Halsbury, 3rd Ed., Vol. 23, page 665.

2 *Williams* v. *Erle,* (1868).

3 Halsbury, 3rd Edition, Vol. 23 pages 665-666, para 1389; *Jardino* v. *Attorney-General for Newfoundland,* (1932) A.C. 275 (P.C.) and other cases.

4 Halsbury, 3rd Edition, Vol. 23, page 666, para 1390.

5 *Doed Llyod* v. *Powell,* (1826) 5 B. & C. 308, 313 Halsbury, 3rd Ed., Vol. 23, page 630, footnote (1).

in possession must comply with the stipulations of the lease notwithstanding the want of the landlord's consent requisition under the clause against assignment.[1]

19.21. *Injunction*—But the very fact that the breach of a covenant against assignment or underletting may be restrained by injunction[2] shows the attitude of the law. It has also been held that the law will restrain the breach of a covenant not to assign without the landlord's consent.[3] This is in contrast with the refusal of the law to grant specific performance in some cases such as breach of a covenant to repair or of a covenant to build, the assumption being that in such cases damages would be, in general, an adequate remedy. In short, the whole trend of the judicial attitude in England would seem to be in the direction that there is no categorical rule that every assignment in breach of a prohibition in nevertheless valid.

19.22. *Equity*—The jurisdiction of equity by way of grant of injunctions, to restrain the alienation of property (in the largest sense of the word) is certainly exercised where the grant of the injunction is indispensable to secure the enjoyment of a specific property or to preserve the title to such property or to prevent frauds and irremediable injustice. It is on the same principle that courts of equility refuse to grant a relief against forfeiture for the breach of a covenant not to assign a lease without the landlord's consent, because from such breaches it is not possible to make a clear estimate of damages.[4]

19.23. *Equity's attitude towards forfeiture*—It is to be noted that the principle which governs the court in granting relief against the forfeiture of lease is that the court will grant relief only where the court can give compensation in lieu of the forfeiture. Therefore, in general, equity granted relief only when the forfeiture clause in substance was merely a security for the payment of a monetary sum. Save in very exceptional circumstances, no relief was granted against forfeiture for breach of a covenant not to underlet without consent.[5]

No doubt, forfeiture in England, as in India, is now governed by statutory provisions,[6] but the point to be made is that equity did take into account the aspect of compensability in exercising jurisdiction concerned with the consequences of an assignment of leases.

19.24. *Story's view*—The following exposition of the position by Story is instructive[7] :

> "1324. Be this as it may, it is clearly established, that courts of equity will not interfere, in cases of forfeiture for the breach of covenants and conditions, where there cannot be any just compensation decreed for the breach. Thus, for example, in the case of a forfeiture for the breach of a covenant, not to assign a lease without

1 *McBacharn* v. *Colton,* (1902) A.C. 104 (P.C.).
2 *McBacharn* v. *Colton,* (1902) A.C. 104 (P.C.).
3 Story, Equity Jurisprudence (1919), page 369, para 305.
4 *Barrow* v. *Isacs & Sons.* (1891) 1 Q.B. 417.
5 *Barrow* v. *Isacs & Sons.* (1891) 1 Q.B. 417.
6 Section 146, Law of Property Act, 1925.
7 Story, Equity Jurisprudence (1919), para 1324, 1324a, 1324b.

licence, or to keep leasehold premises insured, or to renew a lease within a given, time no relief could until lately have been had; for they admit of no just compensation or clear estimate of damages.[1]

"1324a. The power of courts of equity to relieve lessees from forfeiture for breaches of covenants in leases was enlarged by the 22 & 23 Vict. c.35, s.4, which gives the courts power to relieve against forfeiture for breach of a covenant to insure, where no loss or damage has happened, and the breach has been committed through accident or mistake, and an insurance has been duly effected at the time of application. But this relief can only be given once, nor can it be given at all where a forfeiture shall have been already waived out of court in favour of the person seeking the relief.

"1324b. Further, by the Conveyancing Act, 1881, s. 14, the rights of re-entry or forfeiture for breaches of covenant are limited. For it is provided by that Act that previously to enforcing these rights by action or otherwise, the lessor must serve on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money. If the lessee either remedies the breach, or makes compensation in money, no right of re-entry or forfeiture will arise. Further, if the lesser proceeds to enforce his right of re-entry or forfeiture by action or otherwise, the lessee may apply to the court for relief, which the court may, having regard to all the circumstances, grant or refuse at its discretion. But the Act excludes from its operation : (1) Covenants or conditions against the assigning, underletting, parting with the possession or disposing of the land leased."

19.25. *Judicial attitude under section* 146, *L.P. Act*—Even so far as section 146 of the Law of Property Act is concerned, in England, it has been pointed out[2] by Harman J. that the power to grant relief to an assignee, where an assignee is in breach of a covenant not to assign, "remains a jurisdiction to be exercised sparingly, because it thrust upon the landlord a person whom he has never accepted as tenant".

19.26. *Need for change*—Reverting to the topic of validity in India, we do not see any reason why the assignment should be regarded as valid merely because the conveyancer has not inserted a clause for re-entry. The insistence of the law on such a clause may be understandable where the question is of forfeiture. There is, however, no reason for such an insistence where the question is as to the validity of the assignment in breach of a covenant. Ordinarily, a covenant is intended to have legal effect. In the absence of compelling considerations of policy, the covenant should be given effect to.

Modern condition—Indian social conditions also necessiate the approach suggested above.

Instead of insisting on a specific power of re-entry and then bringing into play the provision for forfeiture and then the provision for relief against forfeiture as a matter of discretion, it will be more consonant to Indian social

1 See *Barrow* v. *Isacs & Sons.* (1891) 1 Q.B. 417.

2 *Crocry* v. *Barmersell, etc. Co. Ltd.*, (1949) Chancery 751. Vol. 83, Solicitor Journal, 357.

conditions if the view is adopted that a covenant against assignment must always be regarded as a covenant "for the benefit of the landlord" so as to render the assignment void. We are using the expression "assignment" for brevity in this discussion. It will include cases of sub-letting and the like, also.

19.27. *Mulla's view*—At one place, Mulla[1] states that the words "for the benefit of the lessor" refer to a condition giving the lessor a right of re-entry. For this, he relies on the amendment made in 1929 in section 111(g). In his commentary on section 108(g), however,[2] he has stated that the covenant cannot be invalid, for such a covenant by itself will support a suit for injunction and damages.[3] He adds that the words of section 10 ("benefit of the lessor") seem to be words of explanation rather than of limitation.

19.28. *Reasons summed up*—In our view, while in the absence of a power of re-entry, forfeiture may not be ordered, the covenant should be enforceable at least to the extent of nullifying the assignment. To sum up the reasons in favour of such a view—

(a) such a construction has been favoured by the Madras High Court, though not by the Calcutta High Court;

(b) it is, in general, what the parties intend, since any other view would amount to thrusting an unwanted tenant on the landlord;

(c) it is, in consonance with justice;[4]

(d) it satisfies the wording of section 12.

Speaking realistically, one would think that when parties to a lease insert a stipulation against assignment, they intend that the stipulation is for the benefit of the lessor; it certainly is not for the lessee's benefit, and if it is for neither's benefit, there would hardly be any occasion for inserting it—save in the exceptional cases where the covenant is intended to assist a third party.

We may add that we consider it sufficient if the breach of condition is made to render the assignment or subleting *voidable at the instance* of the lessor. We recommend an amendment on these lines. This recommendation is subject to reservation by Shri Dhavan.[5]

19.29. The reason in support of this approach may be summarised again—

(i) textual—based on section 7, read with section 108(j);

(ii) textual again; but based on section 108(j); which makes a specific provision that the right to assign the lease is only conferred in the absence of a contract to the contrary. Section 108 does not deal only with the contractual aspect. It deals with the rights of property;

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1 Mulla (1973), page 107, commentary on section 12.
2 Mulla (1973), page 712, comment on section 108(g).
3 *Gurushantappa* v. *Mallaya*, A.I.R. 1921 Bom. 27.
4 Para 19.18, *supra*.
5 Reservation by Shri Dhavan as to section 12.

(iii) juristic—any other approach would make property which is non-transferable, transferable;

(iv) effect of the contrary view on section 10;

(v) sociological;

(vi) support afforded by the Madras view.

This recommendation is subject to reservation by Shri Dhavan.[1]

19.30. *Forfeiture*—As regards forfeiture, there is a distinction between cases where there is a covenant in the lease against alienation, *but no right of re-entry reserved in the landlord;* and cases where there is a covenant in the lease against alienation coupled with a clause for re-entry. In the first class of cases,[2] the remedy is of the landlord is either by way of injunction against an apprehended breach,[3-5] or by recovery of damages for a breach already committed.[6-9]

In the second class of cases, the lessor can[10] forfeit the lease. But this distinction is for purposes of forfeiture only. It need not be material in regard to the validity of an assignment made in breach of a covenant.

19.31. *Recommendation to amend section* 12, *and to insert section* 108A—In the light of the above discussion, we recommend[11] that to section 12, the following Explanation should be added :

> "*Explanation.*—For the purpose of section 10 and of this section, a condition prohibiting or restraining the assignment of a lease or subletting of the leased premises is a condition for the benefit of the lessor or those claiming under him."

A new section be inserted after section 108 to provide that the lease shall be voidable in such cases.[12]

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1 Reservation by Shri Dhavan.
2 *Doe* v. *Godwin,* (1815) 16 R.R. 463; 4 M & S 205.
3 *Bibi Sahodra* v. *Rai Jang Bahadur,* (1882) 8 Cal. 224; 8 I.A. 210 (P.C.).
4 *Governors of Bridewell Hospital* v. *Pawkner,* (1892) 8 T.L.R. 637.
5 *McRacharn* v. *Colton,* (1902) A.C. 104.
6 *Williams* v. *Earle,* (1863) 3 Q.B. 739; 9 B. & S. 740; 37 L.J.Q.B. 231.
7 *Paul* v. *Nurse,* (1828) 8 B & C 480; 2 Ma Ry. 525.
8 *Weatherall* v. *Geering,* (1860) 12 Vos Jun 504; 8 R.R. 369.
9 *Basarat Ali Khan* v. *Manirulla* (1909) 36 Cal. 745; 2 I.C. 416.
10 On the wording of section 108(j) can be followed—para 19.13.
11 This recommendation is subject to reservation by Member, Shri Dhavan.
12 See section 198A, *infra.*

CHAPTER 20

TRANSFERS TO UNBORN PERSONS

SECTION 13

20.1. *Introductory*—So far we were concerned with conditions or limitations restraining the assignment or enjoyment of the interest created by a transfer. The object of the provisions prohibiting or restricting the insertion of such conditions is to encourage the free circulation of property. In order to encourage the vesting of interests within a reasonable time, certain provisions could be thought of. Based on this broad principle, certain rules were evolved in England[1]—they are no longer in force in their original form. The rules were adopted in India—though in a different form, and perhaps with an unnecessary variation. The beneficiaries whose interests are the subject matter of the rules are unborn persons. The object of the law is to determine the point of vesting—in England, or to define the quantum of interest—in India.

20.2 *Section* 13—The freedom of disposition is, then, restricted by the provision in section 13, which concentrates on unborn persons, or rather persons "not in existence" at the date of the transfer. While ordinarily, it is open to the transferor to define the quantum of interest, yet if the beneficiary is unborn or non-existent, certain restrictions have been considered desirable.

Section 13 is in the following terms :—

> "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."

(There is an illustration which we are not quoting).

20.3. *Scheme of discussion*—This section is generally understood to codity what is known in England as the rule against double possibilities or the rule against remotences of limitation, though this is not strictly accurate. We propose to deal, in connection with this section, with a few important questions, namely, the rationale of the rule, the English law, the scope of the rule in relation to conditions which affect the certainty of vesting, and the position of a child in the womb. We shall also deal with the question whether the rule should be retained at all.

20.4. *Rationale*—It is generally thought that section 13 was an attempt to import into and adopt for use in India what was known in England as the rule against double possibilities. However, the product, as was observed by Blagden J.,[2] might have suffered in transit. The proposition in *Whitby* v. *Mitchell*—the English rule—was somewhat different, and as will be noted later,[3] has been abolished in England.

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1 Chapter 21, *infra*.
2 *Ardeshir*, A.I.R. 1945 Bom. 395.
3 Para 29.9, *infra*.

20.5. *Future intrests*—Section 13 assumes a grant to commence in interest at a future time, or in other words, it relates to future estates. We are now concerned with contingent remainders. A contingent remaider may be created by any mode of conveyance, but an executory interest can arise only by the instrumentality of a will, or under the Statute of Uses. The subject of contingent remainders has been dealt with in the Act. If a grant is made to A for his life, and after his death to B for life and after B's death to C for his life, and so on; the estates of B and C are intended to be as immediately and effectually vested as the estate of A, so that B could take on determination of the estate of A, and C would take on the determination of the two prior estates. The future estates created in favour of B and C are then spoken of as vested remainders, and their characteristic is that they are always ready to come into possession the moment the prior to estate is determined.[1] The gift is immediate, but its enjoyment may be postponed till the determination of the prior estate.

20.6. *Contingent remainder*—As contra-distinguishd from such an estate, the contingent remainder is not ready from its commencement to its end, to come into possession at any moment when the prior estate may happen to deermine.[2] As an example, suppose that a gift is made to A, *a bachelor,* for his life, and after determination of that estate by forfeiture or otherwise in his life time, to B and his heirs during the lifetime of A, and after the decease of A to the eldest son of A, and after the decease of A to the eldest son of A and the heirs of his body. Here B's estate is again a vested remainder, but the estate to A's eldest son is a contingent remainder, for, while B's estate is ready to come into possession whenever A's estate may happen to determine, the estate tail to the eldest son of A is contingent, since A being a bachelor may never marry, or may never have a son to take possession on determination of the estates of A and B. But if A should marry and have a son, the contingent estate would then immediately become vested, for then the estate is ready to come into possession on determination of the prior estate.

20.7. *Propositions in the background—Transfer to unborn person*—The rationale of the rule can be best understood if certain fundamental legal propositions—propositions not dealing with the policy of the rule but relevant to an understanding of the significance and operation of the rule—are borne in mind. In the scheme of the Act, a transfer of a property is a transfer made to a living person.[3] A transfer in favour of an unborn person—"a person not in existence" at the date of the transfer—cannot be made directly; this is true whether the intended transferee is an unborn human being or a corporation not yet in existence. Though this proposition is not expressly enacted in the Act—as in section 112 of the Indian Succession Act—it is assumed. If a transfer is to be made creating an interest for the benefit of an unborn person or a corporation not yet created, there must, under the terms of the transfer, be created a prior interest.

In this respect, the Act is more liberal than the Hindu law, which did not contemplate transfer of property for the benefit of a person *not yet in existence,*—if we leave aside those borderline cases where dedication was to be made in favour of a deity whose image has not yet been installed.

1 *Sundar Bibi* v. *Lal Rajendra Narain Singh,* I.L.R. 47 All. 496.
2 Section 20.
3 Section 4-5.

20.8. *Dedication to deity*—A Hindu deity is, in the contemplation of the Hindus, always in existence; the establishment and consecration of a visible image is merely a manifestation. Hence the principle of Hindu law which invalidates a gift other than to a sentient being capable of accepting it does not apply to bequests to trustees for the establishment of an image and a worship of a Hindu deity after the testator's death.[1]

The principle of remoteness is not unknown to Hindus. It is in fact one of the rules determined in the Tagore case.[2] Two Hindu brothers, subject to Dayabhaga Law, executed a deed by which they purported to provide for the permanent devolution of their respective properties *in the direct male line,* including adopted sons, with the condition, that, in case of failure of lineal male heirs in one branch, the properties belonging to that branch should go to other, subject to the same rule, and, only in the absence of male descendants in the direct line in either branch, the properties were to go to female heirs or their descendants. Throughout the deed *there was no intention to make a gift to any person.* The Privy Council held that the deed was void, because it was an attempt to alter the mode of succession prescribed by Hindu law, and that there was no gift over at all, since the devised estate was, in every case, defeasible in the event of his death without male issue. It happened that as the facts turned out, there was a gift over which could have taken effect, but that did not save the deed, since "that question is not whether the gift ever was good in the event which happened afterwards, but whether it was good in its creation".[3] A person cannot change the rule of succession under the colour of a fictitious endowment.[4]

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1 (a) *Bhupati* v. *Ramlal,* (1910) 14 C.W.N. 18; I.L.R. 37 Cal. 128 (F.B.);
(b) *Chaturbhuj* v. *Chatarjit,* I.L.R. 33 All. 253;
(c) *Parmanandas* v. *Vinayak,* I.L.R. 7 Bom. 19;
(d) *Gokool* v. *Issur,* I.L.R. 14 Cal. 22;
(e) *Monohar* v. *Lakshmi,* I.L.R. 12 Bom. 267;
(f) *Purna* v. *Kalipada,* A.I.R. 1942 Cal. 386; 46 C.W.N. 477.

2 *Tagore* v. *Tagore,* 9 B.L.R. 337 (P.C.).

3 *Purno Shashi* v. *Kalidhan Rai,* (1911) I.L.R., 38 Cal. 603 (P.C.).

4 *Sitaram* v. *Jadunath,* 10 L.J. 204; 26 I.C. 72.

CHAPTER 21

RESTRICTIONS AS TO INTERESTS FOR UNBORN PERSONS

SECTION 13—*Continued*

21.1. *Kind of interest created in favour of unborn person*—Now, assuming that after a prior interest is created in favour of an existing person, and subject to such prior interest, a transfer can be made conferring the interest for the benefit of the person not in existence, the next question to be considered is—what kind of interest may be created in favour of such a person? To deal with this problem, English law evolved what is known as the "rule against double possibilities. This was not a very expressive phrase. It sacrificed clarity for brevity;[1] but it came into vogue. Under this rule, it was requisite that on the birth of an unborn person the estate must vest in him within the proper period. The emphasis in England was on the date of commencement or first taking effect of the limitation. The estate must vest within the proper period. It was also requisite that if land is limited to an unborn person during his life, a remainder cannot be limited so as to convey an estate to that person's children. In legal literature, the matter is discussed conveniently under the head of the rule in *Whitby* v. *Mitchell*[2], but the propositions enunciated above were evolved long before the decision in *Whitby* v. *Mitchell.*

21.2. *English common law*—The scope and direction of English common law rules—whatever they were—was slightly different from the provisions of section 13.[3] To draw attention to a few major points of difference, in England, it was not necessary that the interest conferred on the unborn person must be the entire interest. It was permissible, for example, to give the unborn person a life interest, provided it vested within the requisite time and provided further that the later interest was not limited to the issue of the unborn person to whom the life interest was given.

21.3. The rule here, laid down was expressed in the old legal language, that you could not limit a possibility, (now abolished by statute).[4] It means, first, that there might never be such a person as an unborn person. That was a possibility, not a certainty. Besides, there was another possibility. There might *never be issue of that person.* Therefore, there was double contingency or a double possibility.[5]

214. *Rule in Whitby* v. *Mitchell*—The rule against double possibility, known as the rule in *Whitby* v. *Mitchell,*[6] is actually older than the case of *Whitby* v. *Mitchell,* as was pointed out by Farewell, J.[7] For some time both the rule in *Whitby* v. *Mitchell* and the rule against perpetuities operated together in England. But, in 1925, when the law of

1 See criticism in *Ardeshir A.I.R.* 1945 Bom. 395 (Biagden J.).
2 *Whitby* v. *Mitchell* (1890) 44 Ch. D. 85.
3 Gour.
4 Chapter 21, *infra.*
5 Gour.
6 *Whitby* v. *Mitchell,* (1890) 44 Ch. D. 85.
7 *Re Nash,* (1908) 1 Ch. 1.

property was revised, this rule was abolished in regard to instruments taking effect after 1925. The policy of the law of restricting the period of time during which an owner of property may control its future devolution was regarded as sufficiently implemented by the residue of the rule against perpetuities. Section 161 of the Law of Property Act, 1925, which was in these terms,[1] the altered position :

> "161. (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.
>
> (2) This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act."

21.5. *Perpetuities Act,* 1964—Section 4(1) of the Act of 1964 (which applies to gifts over, as well as to direct gifts), provides[2] that where there is a gift to an unborn person, which vests at an age greater than twenty-one, and the gift is not saved as a result of the procedure introduced by section 3 of the Perpetuities and Accumulations Act, 1964, then the specified age must be reduced, not to twenty-one but to the age nearest the specified age, which will permit the gift to take effect. Section 4(2) makes a similar provision for the saving of gifts where there are two or more specified ages (a case which was not provided for in section 163 of the Law of Property Act, 1925)."

21.6. *Section* 113, *Succession Act*—The provisions of section 13 of of the Transfer of Property Act broadly correspond to section 113 of the Indian Succession Act, 1925—with one difference which will be noted later. Section 113 created certain serious problems by virtue of the decision of the Privy Council in *Sopher's*[3] *case*. It was held in that case that if under a bequest in the circumstances mentioned in section 113, there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it, and therefore the bequest does not 'comprise the whole of the remaining interest' of the testator in the thing bequeathed, within the meaning of section 113.

21.7 *Difference with section* 113, *Succesion Act*—The wording of section 113 speaks of the later bequest 'comprising' the whole of the remaining interest of the testator, while section 13 of the Transfer of Property Act speaks of the later transfer 'extending' to the entire interest. Even so, it can be argued that section 13 should be similarly construed. If so, the Privy Council decision in *Sopher's case* would apply to the Transfer of Property Act also. In fact, in a Calcutta case,[4] the decision in *Sopher's case* was applied to a settlement, and the High Court held that trusts in favour of the grand-children, some of whom were unborn, were void as the trusts were subject to their attaining a certain age and surviving their parents.

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1 Section 161, Law of Property Act, 1925.

2 Section 4(1), Perpetuities and Acquisitions Act, 1964.

3 *Sopher* v. *Administrator General of Bengal,* A.I.R. 1944 P.C. 67.

4 *Isaac Nissim* v. *Official Trustee of Bengal,* A.I.R. 1957 Cal. 118 (Mallick, J.).

21.8. *Effect of Sopher's case*—As has been pointed out by a writer on the Law of Succession,[1] the decision in *Sopher's case* upset the view of the legal profession which upto then held that if to an unborn person the whole of the remaining interest was given, that would be sufficient compliance with the provisions of section 13 and section 113 respectively, and the contingency of attaining majority or surviving a certain person or the conditions attached to the gift or bequest or any provision reserving power to revoke the trust, did not violate the law. Since this view was held to be erroneous by the Privy Council in *Sopher's case,* there was public agitation and, in fact, a Bill was introduced in the Central Legislative Assembly[2] proposing to omit section 13 and section 113. The Bill did not become law, but the Bombay Legislature passed in 1947 an Act to validate dispositions made previously on the basis of previous understanding, of the law.

21.9. The application of section 113 of Succession Act to certain dispositions of property in the erstwhile State of Bombay is restricted by the Dispositions of Property (Bombay) Validation Act, 54 of 1947 (an Act to validate certain dipsositions of property in the Province of Bombay), which came into force on 16th January 1948, as under :—

Application of Act forty-five—"2. This Act shall apply to all trusts made and to all wills and other testamentary dispositions of persons who have died, before the first day of January one Thousand nine hundred and forty-five;

(a) Where such trusts, wills, or testamentary dispositions relate to immovable property situate within the Province of Bombay;

(b) Where such trusts, wills or testamentary dispositions relate to property of every description other than immovable property and are declared, executed or made by a settlor or testator, as the case may be, in the Province of Bombay, notwithstanding anything to the contrary contained in Part II of the Indian Succession Act, 1925.

3. (1). *Validation of certain dispositions*—The following provisions of law shall not apply and shall be deemed never to have applied to the dispositions of property contained in or made by the instruments mentioned in section 2, namely, (a) section 13 of the Transfer of Property Act, 1882, and (b) section 113 of the Indian Succession Act, 1925.

(2) the dispositions of property contained in or made by the instruments mentioned in section 2, the enactments mentioned in the first column of the Schedule to this Act shall apply, and be deemed to have always applied, with the omissions and modifications specified in the second column of the Schedule.

4. *Saving*—Nothing in this Act shall be deemed to affect or prejudice in any way any right, title or interest accrued to any person under a final decree "or order of a competent court or acquired by any person for valuable consideration before the coming into force of this Act.

(Schedule not reproduced)".

1 Paruck. Indian Succession Act (1966), page 238.
2 Transfer of Property and Successions (Amendment) Bill, 1946 (Gazette of India, Part V, page 92, dated 16-2-1946).

21.10. *Recommendation to repeal section* 13—We are of the view that having regard to the fact that there is also in force the rule against perpetuities, it is not necessary that the rule in section 13 should be continued on the statute book. This section seems to have been suggested by the corresponding section in the Succession Act, and the Report of the Law Commissioners relating to the Succession Act, 1865, merely states that it has been provided that the interest to be given to the unborn child must extend to the whole of the interest. Having regard to the fact that the object of the law to prevent provisions fettering the free circulation or postponing the vesting of property is sufficiently achieved by section 14, we think that section 13 should be deleted. Even if the unborn person is allowed to take a limited interest, the subsequent interest must vest within he period allowed by section 14 and this, in our view, is enough as a safeguard.

21.11. *Alternative recommendation*—However, if it is decided not to delete the section, it is, in our view, necessary to make it clear that conditions of the nature involved in *Sopher's case*[1] which, while not restricting the quantum of interest of the unborn person, make it defeasible or affect the certainty of its vesting,[2] are not to be construed as violating section 13.

21.12. *Child in the womb*—It is also necessary—if the section is retained—to add an Explanation to the effect that a child in the womb, if born alive, is not deemed to be an unborn person. Such an addition would be merely codifying the judicial construction.

21.13. *Recommendations summed up*—Our recommendation then is that—

(a) Section 13 should be deleted;

(b) in the alternative, that is to say, if section 13 is retained, clarification as suggested above[3] should be made on two points, namely—

(i) the scope of the expression "extends to the whole of the remaining interest" should be explained; and

(ii) the case of child in the womb should be dealt with expressly.

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1 *Sopher's* case, *supra*.

2 This is not a draft.

3 Para 21.10 and 21.11, *supra*.

CHAPTER 22

THE RULE AGAINST PERPETUITIES

SECTION 14

22.1. *Introductory*—The policy of the law of favouring the free circulation of property and its alienability within reasonable limits has led to the evolution of rules relating to the vesting of estates. Circulation is thwarted if vesting is delayed unreasonably, hampered unduly or made uncertain. The doctrine that property should not remain ownerless has given rise to several interesting rules of common law and equity. It explains, in part, the doctrine under which the State takes property as the ultimate heir. It supplies, indirectly, the justification for the appointment of 'curators' in the law of intestate succession. It is the principal basis of the English doctrine that on the death of a person, until the Administrators take charge under Letters of Administration, the estate vests in the President of the Probate, Divorce and Admiralty Division, Now Family Division. There are many other doctrines based wholly or in part upon a similar rationale. The rule against perpetuities, to which we shall now direct our attention, could be attributed to the anxiety of the law to ensure that vesting is not unreasonably delayed—with the ultimate objective that its free circulation may be facilitated.

22.2. *Tensions*—Since medieval times, English law has been subject to the tension between two conflicting influences. Land and other property owners have desired to tie up their property indefinitely, usually for the benefit of their family or for some institution or cause, while the courts and the legislature have always felt that it is in the interest of the nation as a whole that wealth should circulate freely and that property should not be made inalienable. The result has been a compromise. Property may be tied up indefinitely for a purpose which the law wishes to advance, namely, a charity.[1] Otherwise, property may be tied up, but only for a comparatively short period. The rule which governs this is known as the rule against perpetuity.

22.3. *Two aspects*—This rule has two aspects.[2] First, that relating to vesting. In its basic form, it provides that property must vest in the recipient within the period of a life or lives in being at the time when the gift is made, and twenty-one years thereafter (with allowance being made where appropriate for the period of gestation).[3] The second aspect is that property must not be limited in such a way that it is inalienable in the hands of the recipient.

22.4. *Section* 14.—Under section 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.

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1 Parker & Mellows, Modern Law of Trusts (1966), page 71.

2 (a) *Cadell* v. *Palmer*, (1833) 1 Cl. & Fin. 372;
(b) *Re Wilmer's Trusts*, (1903) 2 Ch. 411.

3 Parker & Mellows, Modern Law of Trusts (1966), page 71.

22.5. *Succession Act*—The corresponding section 114 of the Indian Succession Act, 1925 is as follows :—

Rule against perpetuity—"114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons, living at the testator's decease, and the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

There are a few illustrations to the section

"(i) A fund is bequeathed to A for his life; and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator." Here "the son of B who shall first attain the age of 25, may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life and after his death to B for his life and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18; but that if no child of B shall attain the age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her *children as shall attain the age of* 18. Any daughter of the testator to whom the direction applies must be in existence at his decease and any portion of the fund, which may eventually be settled as directed must vest not later than 18 years[1] from the death of the daughters whose share it was. All these provisions are valid."

22.6. *Genesis of the Rule*—The rule in section 14 is borrowed from the English law, where[2] it has been recognised from very early times.[3] After property in future estates had begun to be recognised, and the limitation of estates in remainder to unborn children, as well as the creation of future estates by way of shifting use and executory devise began to be permitted, it was felt that unless some rules restraining the creation of such

1 This is not accurate by giver as a reader.

2 Gour.

3 1 Rep. 84A, 88a. 131b.

estates were devised, property may, by a single transfer, be tied up in perpetuity. "In the case of future estates to arise by way of shifting use and executory devise, these due bounds were gradually settled by successive decisions. Such estates were allowed to take effect at first, within the compass of an existing life,[1] then within a reasonable time after.[2] This reasonable time after an existing life was next extended to the period of the minority of an infant actually entitled under the instrument, by which the executory estate was conferred.[3] It was then held that any number of existing lives might be taken.[4] Finally, it was settled that the time allowed after the duration of existing lives *should be a term of twenty-one years* independently of the minority of *any person,* whether entitled or not, with the possible addition of the period of gestation, but only where the gestation actually existed.[5]

22.7. *Applies to moveables*—The rule applies to all property. In England also, the rule extends to personal property as well, for, if it were otherwise, trusts of an indefinite duration might have engendered and same mischief which the rule is designed to guard against.[6]

The rule has been extended in India equally to moveable property.[7] But, its application to personal contracts,[8] such as a contract for the sale of land which creates no right *in rem,*[9] is a matter of doubt. A covenant to do any act, as for example, to pay money, cannot it seems, be avoided by reason that the time of performance may not arise within the period allowed by the rule.[10] It would, however, be otherwise if the contract created an equitable interest in property.[11] As a contract for the sale of lands or for pre-emption does not create such an interest, it would not be void as opposed to the rule, although there may be cases in which it may be void for remoteness.[12]

22.8. *Charities*—As regards the application of the rule against perpetuities to charities, there seems to be some misconception. It is commonly stated that the property must vest within the specified period and that the only relaxation is that a gift over to charity is valid even if the previous gift to charity is contingent and is invalid under the rule against perpetuities. Whatever may be the position in English law, this is not true in India. As Mulla has pointed out,[13] section 18 of the Transfer of Property Act relaxes the rule against perpetuities embodied in section 14 in respect

1. *Howard* v. *Duke of Norfolk,* 2 Swanst, 454.
2. *Marks* v. *Marks,* 10 Mod. 419.
3. *Stephens* v. *Stephens,* 1 De. G. & J. 62.
4 *Thelluson* v. *Woodford,* 4 Ves. 227; 11 Ves. 112.
5. Will's R. P. (18th Ed.), 379, 380; citing *Cadell* v. *Palmer,* 7 Bingh. (N.S.), 202.
6. Gour.
Cf. Accumulations Act, 1892 (55 & 56 Vict., c. 58).
7. *Cowasji* v. *Rustomjis* I.L.R. Bom. 511.
8. *London and South Western Ry. Co.* v. *Comm.* 20 Ch. D. 562.
Borlands v. *Steel Bros. & Co.* (1901) 1 Ch. 279.
9. *Southern Eastern Ry.* v. *Associated Portland etc. Ltd.* (1910) 1 C. 12, 33; *Charamudi* v. *Raghuvulu,* 39 Mad. 462, 469; *Ali Hossain* v. *Rajkumar,* A.I.R. 1943 Cal. 417.
10 *Walsh* v. *Secretary of State for India* 10 H.L.C. 367.
11. *London & South Western Ry. Co.* v. *Comm.* 20 Ch. D. 562.
12. *Ramaswamy* v. *Chinnan,* I.L.R. 24 Mad. 449, 457, 469.
13. Mulla (1973), page 179.

of the transfer for purposes mentioned in section 18. Therefore, the vesting of such transfers may be delayed beyond the period mentioned in section 14 in the case of charities. In contrast, in English law, charitable trusts *in futuro* are no exception to the modern English rule against perpetuities which deal with estates *in futuro*. While charitable trusts, in England, can be valid even though the property is tied up for an indefinite period, a gift to charity *upon a remote event* is void in England except in the case of a gift over from one charity to another. Whatever may be the position under the Indian Succession Act; section 114,[1] the Transfer of property Act has relaxed the rule against remoteness of vesting in the case of charities in clear and positive terms in section 18.

22.9. This does not, of course, involve any amendment of section 14, but the matter is mentioned here by way of anticipating the provisions of section 18 which (*inter alia*) specifically provides that the restriction in section 14 shall not apply in the case of a transfer of property for the benefit of the public for the specified purpose.

22.10. *Two senses*—We have referred above to the two senses of 'Perpetuity'—inalienability and remoteness of vesting of future interest. The first sense is concerned with present interest and the second sense is concerned with future interest. Section 14 is concerned with the second sense which pertains to the period upto which vesting of an interest can be legitimately delayed.

22.11. *Inalienability*—Perpetuity in the sense of inalienability is outside the provisions of section 14, of course, as already stated, the policy of making illegal, the undue postponement of vesting has, as its ultimate objective, the end of promoting free alienation. But there is no direct prohibition against alienation in section 14. That topic is, to some extent, dealt with in sections 10 to 12, concerned with conditions or limitations prohibiting or restricting alienations. Apart from those sections, the policy of the law to promote alienability is reflected in its attitude towards restraints imposed in grants and gifts even where not governed by the Act.

Irrespective of the provisions of the Act, it was held in Calcutta that perpetuity is repugnant to Hindu law except in the case of religious and charitable endowments.[2] This position was reaffirmed in a Bombay case.[3]

22.12. *Move for Reform*—During the last forty years or so, the Rule against Perpetuities has come under fire in many parts of the world. While the rule expresses a perfectly reasonably policy—a fair balance between the desires of members of the present generation, and similar desires of succeeding generations to do what they wish with the property which they enjoy[4]—yet it has inevitably become 'encrusted with barnacles'. The law will be improved, and the Rule itself simplified and strenghtened, it has been though, by removing these barnacles.

22.13. *Causes of dissatisfaction and some representative examples of reform*—The main causes of dissatisfaction with the Rule are two : first, the requirement of absolute certainty that the interest will vest within the

1. *Jones* v. *Adm. General*, I.L.R. (1946) Cal. 485.
2. *Sukhmai* v. *Monohari*, (1885), I.L.R. 11 Cal 684.
3. *Vallabh* v. *Goverdhan Das* (1880) I.L.R. 14 Bom. 360.
4. Simes, Public Policy and the Dead Hand (1955), page 58.

perpetuity period, and its consequent invalidity if any possible combination of events, however, improbable or fantastic, could cause it to vest outside the period; and, secondly, the harsh consequences of violating the Rule, whereby the interest fails completely instead of being 'cut down to size'. There is widespread agreement today that some statutory reform of the Rule is necessary. There is much less general agreement as to the form which is such amending legislation ought to take. The various proposals and experiments can be reduced to three main types :

(1) The first is legislation specifically directed against the well-known 'trade' which so often cause a violation of the rule when the age limit is exceeded. In England, section 163 of the Law of Property Act, 1925, reduced age contingencies to twentyone—when this is necessary to save the gift; similar statutes were enacted in many other jurisdictions.[1] Difficulties arising from 'the unborn widow trap' were sought to be remedied in New York, Western Australia and California. Administrative powers of trustees were excepted from the Rule, in Western Australia, Victoria and New South Wales.

(2) A second type of reform is to introduce a 'wait and see' rule, whereby the validity of interests depends *on actual,* and not on possible, events. Legislation to this effect was first introduced in Pennsylvania in 1947, and, though in a somewhat different from, later in Massachusetts, connecticut, Maine, Maryland, Vermont, Kentucky, Washington and Western Australia.

(3) A third method is to give the courts a general discretionary power to reform limitations which would otherwise be void so as to make them approximate most closely to the testator's or settlor's intention within the limits of the Rule. This 'cy-pres method', as it is called, has been enacted in varying forms in Vermont, Kentucky, Washington, Idaho and California.[2]

In England, an elaborate measure was passed by way of reform in 1964, which we shall deal with later.

22.14. No account of the reform of the rule against perpetuities in England would be complete without a tribute to professor Leach of Harvard. It was his article published in 1952[3] which first attracted the attention of high authorities in England to the need for reform, and caused the

1. E.g., Victoria (1918), New South Wales (1919), Western Australia (1941), New Zealand (1944). Massachusetts (1954). Maine (1955), Connecticut (1955), Maryland (1956) and New York (1960). (The dates are those in which the reform was first enacted).
2. Information is compiled from various articles by Professor W. Barton Leach of Harvard in the Law Quarterly Review, the Harvard Law Review and by a few others in the Yale Law Journal.
3. Leach, 'Perpetuities : Staying the Slaughter of the Innocents' (1952) 68 L.Q.R. 35.
4. Leach, 'Perpetuities in Perspective : Ending the Rules Reign of Terror' (1952) 65 Harv. L. Rev. 721 : Leach, 'Perpetuities Reform by Legislation' (1954) 70 L.Q.R. 478; Leach, 'Perpetuities Legislation, Massachussetts Style' (1954) 67 Harv. L. Rev. 1349; Leach, 'Perpetuities Reform by Legislation, England' (1957) 70 Harv. L.Rev. 1411; Leach, "Perpetuities Legislation : Hail Pennsylvania" (1960) 108 U. of Penn. L. Rev. 1124; Leach, 'Perpetuities Reform : London Proposes, Perth Disposes' (1963) 6 U. of W.A.L. Rev. 11.

Rule against Perpetuities to be referred to the Law Reform Committee. It was his tireless advocacy of the 'wait and see' doctrine that made it seem the obvious method of reform, despite some vigorous dissent.

In the second reading of the debate on the English Bill in the House of Lords, Lord Evershed paid a graceful tribute both to Professor Leach's reforming zeal and to the draftsman's skill.[1]

22.15. *Need for reform in India*—Lest this should sound pedantic and lest it should be thought that there is no need for reform in India and that all is well with our statutory provisions, we would like to refer at this stage to situations wherein difficulties could be experienced in India also. A slight disregard of the stringent statutory provisions, or a misconception about the age of majority, may lead to defeating the intention of the transferor. In one of his famous articles published in the Harvard Law Review, Professor Leach had this criticism to make of the rule—

> "The Rule against Perpetuities is a technicality-ridden legal nightmare, designed to meet problems of past centuries that are almost nonexistent today. Most of the time it defeats reasonable dispositions of reasonable property owners, and often it defeats itself. It is a dangerous instrumentality in the hands of most members of the bar. It ought to be substantially, "changed by statute, and the lawyers ought to see that this is done."[2]

Every word of it may not apply to Indian Codified law. But difficulties could arise. In fact, difficulties have arisen. Let us take a reported case.

22.16. *Case of Soundararajan*—The case of *Soundarajan*[3] illustrates the anomaly resulting from the fact that a slight excess over the legally permissible age may defeat the transfer. That case was, no doubt, a case relating to succession on death, but the position would be the same in respect of a transfer during lifetime. In that case, an estate was given to the testator's daughters for their lives with the remainder for the children on attaining the age of 21*years*. The age of majority in India is 18 years, unless guardians are appointed or a court of Wards takes charge. It was held, that, as at the testator's death, it could not be certain that in the case of every child a guardian would *necessarily be appointed* so as to postpone the minority of the child till 21 years, there *was a possibility* that the bequest would be held beyond the lifetime of the daughters and *the minority* of some of the children of the daughters. Hence by virtue of section 102 of the Indian Succession Act, 1965, broadly corresponding to section 114 of the Indian Succession Act, 1925 and section 14 of the Transfer of Property Act, the whole bequest in favour of the children was illegal.

Of course, this case involved also another complication, namely, that of a bequest in favour of a class and the law on the subject has now been altered in amended section 15 of the Transfer of Property Act. We are not, however, concerned with that complication, but with the difficulty created by the fact that an excess of 3 years (21 minus 18) destroyed the vesting of the estate.

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1. Hansard, Vol. 256, Col. 246.
2. Leach, in (1954) 67 H.L.R. 1349.
3. *Soundararajan* v. *Natarajan*, A.I.R. 1925 P.C. 244, 147.

22.17. There are several Indian decision under the Succession Act which illustrate the problems that could arise under the present formulation of the rule.

Other decisions—In *Putlibai* v. *Sorabjee,*[1] the testator devised his house upon trust to allow his daughter until her death or marriage and all his sons and their respective families *including widows* to reside therein until the youngest of his grandsons should attain the age of 18 years and then for sale and conversion. It was held that during the sons' lives their wives took no independent gift, but the gift to the son entitled him to reside there with his wife. As all the sons were alive, no question arose as to the title to reside that could be claimed for the widows of the sons and their Lordships refrained from expressing an opinion on the title of the claim of such a widow to reside if any son died. They, however, pointed out that sections 99, 100, 101 (i.e., sections 112, 113 and 114 of the present Succession Act) might give rise to difficulty in the claim of a widow if she survived the son, as it was not clear that the whole of the testator's interest was bequeathed.

22.18. *Reform by judicial decisions*—It is because of such difficulties which defeat the intentions of the testator or the transferor that need for reforming the law arises. We have briefly mentioned statutory reforms effected elsewhere, and shall deal with them in detail later. It may, however, be mentioned incidentally that in some countries, some of the anomalies have been sought to be mitigated by judicial approach in respect of the ingredients of the rule in common law.

22.19. *Example from U.S.A.*—To borrow one example from the U.S.A., in 1953, the New Hampshire Supreme Court in *Merchants Nat. Bank* v. *Curtis,*[2] determined the validity of future interests on the basis of facts *existing at the end of preceding* estates. The Florida court has given evidence of similar views.[3]

22.20. *English rule as to possible events*—This is a modification of the Enlgish rule. At common law, if an interest is to satisfy the Rule against Perpetuities, it must be absolutely certain to vest (if it even vests at all) within the perpetuity period; and this certainty must exist at the time when the perpetuity period starts to run or (in the case of appointments under special powers) at the time when the appointment is made. Extreme probability of vesting within the period is not enough. Nor is it enough that the interest does, in fact vests within the period as events actually occur. The result is that many perfectly reasonable dispositions are held void because, on some outside chance (not foreseen by the testator or his draftsman) it is mathematically possible that the vesting might occur at too remote a time. No reason for this strange rule has ever been given, except the statement that it is undesirable in property law that the validity of interests should be allowed to remain in suspense too long. This certainty is undoubtedly desirable; but it can bought at too high a price.

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1 *Putlibai* v. *Sorabjee,* 25 Bom. L.R. 1099 (P.C.)

2 *Merchants Nat. Bank* v. *Curtis,* 98 N.H. 225; 97 A, 2d 207, 67 Harv. L. Rev. 355. 1352. The court relied principally upon 6 American Law of Property, s. 24.10 (1952).

3 *Story* v. *First Nat. Bank & Trust Co.,* (1934) 115 Fla. 436, 156 So. 101; 67 Harvard Law Rev. 1352.

Statutory reform made in England now ensures that the validity of a limitation under the rule should depend not on the facts which may occur, but on the facts which do in, fact occur; the principle should be 'wait and see'. Section 3(1), (2) and (3) of the 1964 Act gives effect to this recommendation. Section 3(1) provides as follows :

> "3(1). Where, apart from the provisions of this section and sections 4 and 5 of this Act, a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the Rule against Perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise."

We are mentioning at this stage how courts in one country have anticipated, by judicial law-making reforms which in another country had to await legislation.

22.21. *Comparison*—In order that the points to be made hereafter may be properly appreciated, it may be convenient to give, in a brief, a comparison of the English common law rule and the Indian statutory law.

According to the English law, the vesting of property might be postponed for any number of lives in being and an additional term of 21 years, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist (*Jee* v. *Audley*);[1] and the additional term of 21 years might be independent of the minority of any person to be entitled (i.e. irrespective of the fact whether such person is a minor or not). Indian law, however, allows the vesting to be delayed beyond the life-time of persons in being, for the period only of the minority of some person born in their life-time; the addition of an *absolute period* of 21 years has not been adopted by this section. So, whereas under the English law the additional period allowed after lives in being is a term of twenty-one years *in gross*, without reference to the infancy of any person, under the Indian Statute the term is the *period of minority* of the person to whom, if he attains full age, the thing bequeathed is to belong—at 21, if he has a guardian appointed by the Court; at 18 in other cases.[2]

In short, at common law, property must best within the period of a life or lives in being, or within twenty-one years after the end of that life.

22.22. *Life interest*—This is perhaps a convenient point for dealing with life interest. When some portion of the rights of full ownership is given to a person other than the owner to be exercised by such person to the exclusion of the owner, such detached rights were called in Roman law *jura in re aliena*. "Servitudes" were a familiar example. If the rights of ownership are limited in duration—an estate for life in land is one example—then there emerges a class that is differently described in different systems of law.[3] In England, life interest is generally spoken of a limited

1. *Jee* v. *Audley*, 1 Cox. 324.
2. Mukhopadhyaya's Law of Perpetuities, page 29.
3. Hunter, Introduction to Roman Law (1921), page 74.

interest. In Rome, a life interest was regarded not as a form of ownership, but as the "antithesis" of ownership, a subtraction from the ownership or a burden upon it—in a word, a servitude.[1]

Technically, then, this term was also applied to the indefinite use of land—for example, the Roman usufruct or estate for life.

The usufruct in Roman law is the right of using something belonging to another, coupled with the right of taking the fruits of that thing. Unless a shorter period was expressed, it was understood to be given for the life of the receiver.[2]

22.23. *Reform by legislation in England*—Need for reform of the rule against perpetuities—in the sense employed in the present discussion, as dealing with the aspect of remoteness of vesting—was felt in England for a long time but in general, such reforms have to wait until the legislature intervenes. The only noteworthy "amelioration" of the rule by judicial action is the judgment in the famous *Thelusson case* wherein it was specifically held that the 'lives in being' for the purposes of the common law formulation of the rule, need not be lives of persons who take interest under the will or transfer, nor need they be lives of persons related to the testator or transferor or his acquaintances. They must be persons in existence at the date when the transfer takes effect. On this view, theoretically, property could be tied up for a period specified with reference to any number of lives in being at the date when the transfer takes effect. It is not necessary to discuss in detail the repercussions of this doctrine in the contemporary legal world. It is enough to state that major reforms in the field had to await legislative action.

22.24. *Act of* 1925—The Law of property Act, 1925 represents the first major step. Section 163(1) provided that[3] where the vesting of property is made to depend on the attainment by the beneficiary of an age greater than twenty-one and that by virtue of that condition the gift would be void for remoteness, the age of twenty-one is to be substituted for the age stated in the instrument. The section applies only when the gift would have been void for remoteness.

It may be noted that so far as regards instruments coming into operation after July 15, 1964, section 163, Law of Property Act, 1925, has been replaced by section 4 of the Act of 1964. By this section, there is not substituted the age of twenty-one, but the age nearest to the age which would have prevented the disposition from being void. Under the Act of 1964, therefore, the instrument is altered only to the extent necessary to save the disposition from offending against the rule. This is because the Act of 1964 reformulates the main rule in different terms. We shall deal with that Act later.

22.25. *Developments leading to Act of* 1964—While, thus, reform of the rule in regard to the condition of age was effected in 1925, there still remained a need for rectifying other anomalies, including, in particular, the anomally that even possible events might defeat an interest violating the rule though actual events showed that the property did not actually come to be tied up for an unduly long period. This point received the attention of

1. Hunter, Introduction to Roman Law (1921), page 74.
2. Hunter, Introduction to Roman Law (1921), page 75.
3. Section 163(1), Law of Property Act, 1925.

courts and legislatures in other countries, and was the subject matter of articles in learned journals in England as well as elsewhere. As we have already stated,[1] legislative measures on the subject were first enacted in some parts of the Commonwealth and in some States of the U.S.A. In England, it was in 1964 that the major legislative reform was effected by the Perpetuities and Accumulations Act.

22.26. *The Act of* 1964—*The principal rule*—The Act of 1964 came into force on July 16, 1964, but, in general, applies only to instruments taking effect after July 15, 1964. The common law rule is thus state—

> "No interest is good unless it must vest, if at all, not more than twenty-one years after some lift in being at the creation of the interest"[2] A gift by deed is created on delivery of the deed; a gift by will is created on the testator's death.

In contrast, if the interest is created by an instrument taking effect after July 15, 1964, the interest is good if, *in fact*, it vests within twenty-one years after some life in being at the creation of the interest.[3]

In both cases, an interest is not vested until : (a) an ascertained beneficiary stands ready to take on the *determination of a prior interest,* and (b) the size of the beneficiary's interest is ascertained. This later requirement is in addition to the normal rules as to vesting, and has important consequences in the field of class gifts.

22.27. *The Act of* 1964—*The period*—Let us deal in greater detail with the permissible time limit. At common law, the perpetuity period is the duration of any relevant life or lives in being *plus twenty-one years,* or, if no life in being is applicable, a period in gross of twenty-one years. A life in being is any person expressly chosen as a measuring life, or any person impliedly mentioned in the gift and who is alive at the date of the gift; for example, a living ancestor of a beneficiary.

Under the Act of 1964, a period in gross not exceeding eighty years may (but need not) be chosen as the perpetuity period instead of the common law period.

Section 1 of the Act reads—

> 1. (1) Subject to section 9(2)[4] of this Act and sub-section (2) below, where the instrument by which *any disposition is made so provides,* the perpetuity period applicable to the disposition under the rule against perpetuities, instead of being of any other duration, shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument.
>
> (2) Sub-section (1) above shall not have effect where the disposition is made in exercise of a special power of appointment, but where a period is specified under that Sub-section in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.

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1 Para 22.13 *supra.*

2. Gray, Rule Against Perpetuities, 4th ed., section 201.

3. Section 3, Perpetuities and Accumulations Act, 1964.

4. Section 9(2) relates to options in gross to purchase land.

This section creates an entirely new power to specify a perpetuity period as a term not exceeding eighty years.

22.28. *Act of* 1964—*Fertility*—Another matter in respect of which the English Act has made a change relates to what may be conveniently called the presumption of fertility. The position at common law and apart from the Act is illustrated by the leading English case on the subject which went upto the House of Lords.[1] A testator by his will left property in trust for his wife for life and then for his children, but if he should have no children then for the children of his brothers and sisters. By a codicil, the testator revoked the gift in the will and provided that after the death of his wife, the property should be held on trust for the children of his brothers and sisters, who being a son attained the age of twenty-one or being a daughter attained that age of married. At the date of the will (1915), the testator's father and mother, both of whom survived him were both aged sixty-six. The testator died without issue in 1916 and his father died in 1921. All the testator's brothers and sisters were over thirty years of age at the date of the testator's will and all had children. The question arose whether the gift in the codicil was void for perpetuity. If it was void, the original gift took effect.

It was held that the fact that the testator's mother was past the age of child-bearing when the will took effect was inadmissible to prove that after the date of the will (1915) and certainly after the date of death, no brother or sister could be born subsequently so that every brother and sister who could take under the will would necessarily constitute a life in being at the date when the will took effect. The argument that the testator must have intended to refer to his brothers and sisters *already born* and to no others, was also rejected, since the phrase in the will described a class "general in its extent and clear in its description". This was the principal conclusion, Lord Blanesburgh, while reluctantly agreeing with this conclusion in view of the past precedents observed that "it is the legislature alone which, maintaining the salutary purpose of the rule in its proper application, can, if it pleases, remove from it those incidents or excrescenses which, without assisting to achieve its legitimate object, have done must mischief in other directions."

22.29. *Section* 2(1)—Lord Blanesburgh's prophetic observations[2] came true in 1964 when section 2(1) of the Act[3]—to state its terms in non-technical language—provided, in paragraph (a), that, subject to paragraph (b) below, it shall be presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over but not under that age, or over the age of fifty-five years.

According to paragraph (b) of section 2(1) of the Act of 1964, in the case of a living person, evidence may be given to show that he or she will, or will not, be able to have a child at the time in question.

It may be stated that the provision for admitting other evidence—this will be mostly medical evidence—to prove infertility, inserted in the 1964 Act, is in conformity with the judicial view taken for *other purposes* in the

1 *Ward* v. *Van Der Loeff*, (1924) A.C. 653 (H.L.).
2. *Wards case, supra.*
3. Section 2 is quoted in para 22.30, *infra.*

law of property. In a case reported in 1963[1], for example, a life tenant under a protective trust, with discretionary trusts over to herself, her husband and children, applied for an order under the Variation of Trusts Act, 1958 on the basis that she was past the age of child-bearing. That Act, *inter alia*, empowers the court to vary the terms of the trust deed in certain circumstances, even in the case of a private trust. Medical evidence was admitted in proof of infertility in this case. The solution adopted by the 1964 Act became necessary because in the field of law of perpetuity, past judicial decisions[2] had laid down a rigid rule that it is conclusively presumed that any person however old, is capable of having children.

Conversely, there have been rare cases of girls below the age of 12 years becoming mothers. A case[3] recorded in medical journals in 1939 would seem to furnish an instance of an extraordinary character—fertility at the age of six years. These very rare situations would, in any case, be taken care of by section 2(1)(b) of the Act of 1964.

22.30. *Section* 2—The following is the text of section 2 of the English Act of 1964—

"2. (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the ability of a person to have a child at some future time, then—

"(a) subject to paragraph (b) below, it shall be presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but

(b) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child at the time in question.

(2) Where any such question is decided by treating a person as unable to have a child at a particular time, and he or she does so, the High Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided.

(3) Subject to sub-section (2) above, where any such question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child, but those provisions [except subsection (1)(b)] shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her ability at that time to beget or give birth to a child."

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1 *Re Westminster Bank Ltd.'s Declaration of Trust*, (1963) 1 Weekly Law Reports 820.

2 *Jee* v. *Audley*, (1787) 1 Cox 324.

3 Discussed in 65 Harvard Law Review 725.

22.31. By way of further comment, it may be stated that section 2 reverses, as to the future, the decision in *Ward* v. *Van der Loeff*[1] by means of rebuttable presumptions as to the minimum age of childbearing, and also, in the case of a female, as to the maximum age. Evidence may, therefore, be given for the purpose of rebutting these presumptions, or for the purpose of showing that a person within the ages of childbearing is nevertheless incapable of having a child; for example, evidence of impotence.

Section 2 also applies to the right of a beneficiary to terminate accumulations of income under the rule in *Saunders* v. *Vautier*.[2-3]

Section 2(2) empowers the court to grant a tracing order against a beneficiary who, as events turn out, has been wrongly paid on the statutory presumptions, subject to the overriding requirement that such an order is just in all the circumstances.[4] In practice, distriution on the statutory presumptions will probably be effected only after insuring against the risk of the presumptions being rebutted by later even.

22.32. *Act of* 1964—*Actual and possible events*—The next important reform effected by the Act of 1964 relates to actual and possible events.

22.33. *Common law*—At common law, the rule is concerned with possible, not with actual, events. The slightest possibility of the period being exceeded invalidates the interest.

Under the Act of 1964, one may await the outcome of actual events within the period.

The standard perpetuities doctrine (as unmodified by legislation) does not permit consideration of facts which occurred after the death of the testator or the date on which the transfer takes effect. Nevertheless, in practice, it is often seen that the contingencies on which the testator or the transferor insisted have happened well within the lives in being plus twenty-one years (in England) or attainment of age of majority (in India).

In the U.S.A., this situation was dealt with by the Supreme Court of Florida[5] by holding that it will not invalidate an interest on the basis of contingencies which never happened. In England, in order to modify the common law position that the application of the rule has regard not only to actual events but to the possible events, the English Act of 1964 has made several provisions, of which the principal one dealing with this point appears to be section 3(1). Under that sub-section,—to state the matter in non-technical terms[6]—if a disposition is void by reason of the rule against perpetuities, even then, it is to be treated as valid until events have shown that the interest must vest (if at all) after the end of the perpetuity period. For example, the transferor or testator—T—gives property to the first daughter of A who gets married. At common law, if A survived the testator and no daughter of A was at that time married, then the gift is too remote, because it is possible that a daughter who was born after the death of T might be the first to marry and she might not do so until more than twenty-one years

1 *Ward* v. *Van der Leoff*, (1924) A.C. 653, *supra*.

2 *Saunders* v. *Vautier*, (1841) 4 Beav. 115.

3 Section 13, Act of 1964.

4. *Re Diplock*, (1951) A.C. 251; (1948) Ch. 465.

5 *Story* v. *First National Bank & Trust Company*, (1934) 115 Florida 436; Leach. "Perpetuities in Perspective" 65 Harvard Law Review 725, 730.

6. Section 3 is quoted later—para 22.34.

after the death of A, A being the only available life in being. Under the Act of 1964, section 3(1), the gift will be valid if a daughter marries before the expiration of twenty-one years from the death of A. If necessary, we must wait and see for that length of time.[1] As to the situation where ultimately the gift is found to be invalid by reason of perpetuity, a provision—though a cryptic one—is to be found in section 3(1).

22.34. *Section* 3.—This is the text of section 3—

"3. (1) Where, apart from the provisions of this section and sections 4 and 5 of this Act, a disposition would be void on the ground that the interest might not become vested until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed by way of advancement, application of intermediate income or otherwise.

(2) Where, apart from the said provisions, a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, as if the disposition were not subject to the rule against perpetuities.

(3) Where, apart from the said provisions, a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and, subject to the said provisions, shall be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period.

(4) Where this section applies to a disposition and the duration of the perpetuity period is not determined by virtue of section 1 or 9(2) of this Act, it shall be determined as follows :—

(a) where any person falling within sub-section (3) below are individual in being (or on ventre sa mere) and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) or (c) of that subsection shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor.

(b) where there are no lives under paragraph (a) above, the period shall be twenty-one years.

(5) The said persons are as follows :—

(a) the person by whom the disposition was made;

1 Text of section 3(1) of the Act of 1964 will be quoted later. Para 22.34.

(b) a person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person, or where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(c) a person having a child or grandchild within sub-paragraphs (i) to (iv) of paragraph (b) above, or any of whose children or grand children, if subsequently born, would by virtue of his or her descent fall within those sub-paragraphs;

(d) any person on the failure or determination of whose prior interest the disposition is limited to take effect."

22.35. *Effect*—Sub-section (1) has the revolutionary effect of introducing the principle of "wait and see" into the rule against perpetuities, and sub-sections (2) and (3) extend the rule to general and special powers of appointments, options and similar rights. "Wait and see" was impossible under the old law which as a general rule concerned itself with possible, not actual, events. Thus, in *Re Wood,*[1] the testator devised certain gravel pits to his trustees on trust to work them until the pits should be exhausted, and then on trust for sale and to divide the proceeds equally among the testator's issue then living. The pits were exhausted six years after the testator's death and before the litigation commenced, but the gift to the issue was held void, since at the date of the gift and pits might not have been exhausted for more than twenty-one years. A *fortiori,* if the contingency is unsatisfied at the commencement of litigation, and might not be satisfied until after the perpetuity period.

Such absurdities will not arise under the Act of 1964, for the validity of a gift is now determined by the outcome of actual events; if the contingency is, in fact, satisfied within the perpetuity period, the gift is valid; if the event has still not happened when that period ends, the gift will then fail.

The question arises as to the destination of the intermediate income during the wait and see period. This appears to have been dealt with by the last sentence of sub-section (1), which provides that the ultimate invalidity of the contingency shall not affect the validity of an intermediate dealing "by way of advancement application of income or otherwise" on the footing that the interest is valid. This seems to imply that if the interest in question carries the intermediate income, that income is payable to the contingent beneficiary under section 31(1)(ii) of the Trustee Act, 1925,

1 *Re Wood,* (1894) 3 Ch. 381.

and that the statutory powers of maintenance and advancement under sections 31 and 32 of the Trustee Act, 1925, will also be available. The powers were not available before the Act of 1964, since an interest which infringed the rule was void *ab initio*. But now, by virtue of the wait and see rule, one awaits the outcome of the events, and until the end of the perpetuity period or earlier happening of the relevant event, the interest is merely contingent and is presumptively valid.

22.36. *Act of* 1964 *and maximum age.*—The common law rule was that the interest must vest within 21 years of the death of the last of the lives in being mentioned in the deed or will. This rule created difficulties where the testator or settlor made the vesting conditional on an age higher than 21 years, because then there is a possibility that the interval between the termination of the life and the vesting in the ultimate unborn beneficiary may exceed twenty-one years. Reform was, by legislation, affected on the subject in England first in 1925.[1]

Sections 4(1) and 4(2) of the Act of 1964 now read—

"4. (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—

(a) that the disposition would, apart from this section, be void for remoteness, but

(b) that it would not be so void if the specified age had been twenty-one years,

the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age nearest to that age which would, if specified instead have prevented the disposition from being so void.[2]

(2) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons—

(a) the reference in paragraph (b) of sub-section (1) above to the specified age shall be construed as a reference to all the specified ages, and

(b) that sub-section shall operate to reduce each such age so far as it is necessary to save the disposition from being void for remoteness."

22.37. It is important to notice that under section 4 the age can be reduced only if the disposition would otherwise be void. For example, a devise. "To such of *my children as* shall reach the age of twenty-gxe," is valid as it stands, since all the beneficiaries are *lives in being*. It is expressly provided in section 4(1) that the age may be reduced to the age which is necessary in order to save the gift; this implies that the "wait and see" rule enacted by section 3 must be applied first, since otherwise the only relevant age would be twenty-one.

1 Section 163, Law of Property Act, 1925.

2. These replaced section 163, L.P. Act, 1925.

22.38. *Bombay case on age.*—Incidentally, it may be mentioned that the provisions in India—section 14, Transfer of Property Act and section 114, Succession Act—are linked up with the *attainment of majority* by the unborn beneficiary, and not with the length of the interval. However, problems of the nature that have arisen in England can arise in India also. A Bombay case[1] furnishes illustration of the difficulty raised by the age-limit. The will ran as follows :—

> "I give the property to my son and for life and I give the property after his death to his sons in equal shares. In case he leaves no son behind him, my mukhtiar shall get a son adopted by his wife and thus perpetuate his name and they shall give the property to him (adopted son) on his attaining the age of twenty-one."

It was held that the bequest in favour of the adopted son who might be adopted at any time after the date of the son's death, was void under the rule against perpetuities. No argument was considered as to whether theoretically adoption could have been regarded as having retrospective effect.

22.39. *Act of* 1964—*Time of death The unborn widow*—Then there is the question of limitations dependent on the time of death of the survivor of two persons—

(i) a person in being at the commencement of the transfer, and
(ii) his spouse.

Difficulty may arise because the spouse may not necessarily be a person in existence when the transfer takes effect.

22.40. *Unborn widow.*—What has come to be known as the trap of the "unborn widow" (or unborn widower) may be referred to at this stage. Property is given to A for life, then to A's widow who may survive him for life and then to the children of a living at the death of the survivor of A and his widow. Since A may marry a woman who was unborn at the time of death of the testator, and since the woman so married may survive A by more than 21 years, the gift *to be children* vest *too remotely and* such gifts were held to be void in a number of cases decided at common law. Even if, at the time of the death of the testator, A was married and his wife died earlier while A remained alive and did not marry again, yet the gift to the children as framed in the will would not be saved, because of the common law rule that possible and not actual events had to be considered.

In *Re frost,*[2] the testator,, Frost, devised land on trust for his daughter, Emma, for life, and then on trust for any husband whom she may hereafter marry for life; and after the death of the survivor of Emma and her husband, on trust for such of her children as she should appoint, and in default of appointment on trust for all the children of Emma who should be living at the death of the survivor of *her and her husband,* or should have previously died leaving issue then living.

Kay J. held : "The question is, whether the limitation in favour of the children of Emma Frost ..... is good .... Emma Frost was unmarried at the date of this will. She *might have married after the death* of the testator a person who was not born in his lifetime, and it might therefore

1 *Kashinath* v. *Chinnaji,* I.L.R. 30 Bom. 437.
2. *Re Frost,* (1889) 43 Ch. D. 246.

have been a limitation to Emma Frost for life, *remainder to an unborn person for his life,* with a contingent remainder over to the children of Emma Frost living at the death of that unborn person or such of them as should be then dead leaving issue then living ..... That clearly would be a limitation which would offend against the rule of perpetuity, because it would tie up the estate, not merely during the life of Emma Frost, who was in existence at the death of the testator, but during the life of Emma Frost's husband, who might possibly not be living at the death of the testator. So that it would not merely by tied up for a life in being and twenty-one years after, but for a life in being, with remainder for a life not in being, with a contingent given over ..... I think, therefore, ... that this limitation .... is void, because it offends against the rule of perpetuity."

22.41. In the case of *Re Frost*[1] it was clear from the fact that Emma Frost was unmarried at the date of the will, and from the use of the phrase "any husband she may hereafter marry," that a possibly unborn husband was included. If, however, Emma had been already married at the date of the will, and the gift had been simply "to her husband for life," that gift would, it seems, have been construed as a gift *to her existing husband* alone, and the gift to their children would have been valid.

If the gift is to A for life, remainder to any husband whom she may marry for life, and who shall survive her, remainder to such of the children of A as shall attain the age of twenty-one, the gift over to the children is valid, since all A's children are ascertained at her death, and they must reach the age of twenty-one, if at all, within twenty-one years of that date.[2]

22.42. *Section* 5.—For cases of the nature involved in *Re Frost,* section 5 of the Act of 1964 now provides—

> "5. Where a disposition is limited by reference to the time of death of the survivor of a person in being at the commencement of the perpetuity period and *any spouse of that person,* and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes, where to do so would save it from being void for remoteness, as if it had instead been limited by reference to the time immediately before the end of that period."

22.43. Sctone 5 of the Act of 1964 reverses the effect of *Re Frost*[3]. Take the case of a bequest to A for life, remainder to any widow A may leave for a widow's life, remainder to such of the children of A as survive A and the widow. The gifts to A and his widow are valid at common law. So far as the rule against remoteness is concerned, this position will continue. Gift to children is not presumption valid under the "wait and see" rule, if the question of survivorship is not settled within the perpetuity period. The perpetuity period will normally be the life of A plus twenty-one years.

22.44. If the widow dies within that period, the gift is valid under section 3 of the Act of 1964 (which substitutes the rule of actual events in place of the rule which has regard to possibilities). If the widow is still

1 Para 22.40, *supra.*
2 *Re Hancock,* (1896) 2 Ch. 173.
3. *Re Garnham,* (1916) 2 Ch. 413.
4. *Re Frost.* (1889) 43 Ch. D. 246.

living twenty-one years from the death of A, the gift—which would be void under common law and not saved by section 3—will vest in the children then living. The ameliorative provision in section 3 would not suffice to cure the invalidity which require some other help. That help is furnished by section 5.

22.45. *Options.*—Coming to the question of options to purchase land, it is to be noted that in England it was held in 1882 in the case of *London & South Western Railway Co.*,[1] that the rule was applicable to options to purchase land—in that case, a perpetual option. On this proposition being established, specific performance was denied. In a suit in equity against a transferee of the person who gave the original option, an action for damages is also denied, on the theory that the threat of money loss would have the indirect effect of inducing compliance with the option which (according to the hypothesis) is against public policy. Similar course has not been denied in America, however, in regard to options to purchase which are held by a lessee.

22.46. In England, the rules were, at common law, applied even to options to purchase in a lease. One criticism of such an approach is that it seeks to apply to commercial transactions a rule which was evolved in the context of property in the limited sense—excessively long family settlements. It was to meet the needs of public policy in regard to gifts in the family that the period of perpetuities was tailored. The requirement of "lives in being" has no significance in commercial transactions, nor has the period of majority or similar period. Secondly, specific enforcement against a transferee was denied in England against assigns of the lessor,[2] but it was granted against the original person who gave the option if he still retained the land.[3]

Thirdly, even where specific performance was refused, damages were permitted.[4] A corrective provision would be a provision exempting from the rule real commercial options to purchase and placing upon such options, if necessary, any time limitations which a study of the commercial dealings in land may show to be desirable.

22.47. *Not a rule of thumb.*—Finally, it may be stated that the rule against perpetuities, whose origins are usually traced to the opinion of Lord Nottingham,[5] is intended to express a policy and not to operate as a rule of thumb. The test, in the opinion of Chancellor Nottingham, was whether the challenged limitation produce a visible inconvenience. Hency any aberrations that produce more inconvenience must require consideration, since such an aberration would defeat rather than promote the objective of the rule.

22.47A. *Options in India.*—So far as Indian law is concerned, previously there was a conflict in Madras on this point.[6-7]

1 *London & South Western Railway Co.* v. *Gomm.* (1882) 22 Chancery Division 562.

2. *Woodall* v. *Clifton*, (1905) 2 Chancery 257, 265, 179.

3. *Hutton* v. *Watling* (1948) 1 Chancery 26, 36 (Jenkins J.) (Review cases).

4. *Worthing Corporation* v. *Heather*, (1906) 2 Chancery 532.

5. *Duke of Norfolk's case*, (1682) 22 English Reports 931, 960.

6. *Avala Charanudi* v. *Marriboyina Raghavalu*, (1915) 28 M.L.J. 471.

7. *Kolathu Ayyar* v. *Ranga Yadhyar*, I.L.R. 38 Mad. 114.

22.48. *Possible arguments.*—All the arguments pro and con (except one which we shall presently notice) have been considered in these two cases. The question is one of election between what look like two equally tenable contentions. It can also be argued that a contract which aims at the creation of a future interest contrary to section 14 of the Transfer of Property Act is "of such a nature" that if permitted, it would defeat the provisions of that law.

An argument like this appears to have caught in *Jagannatha Raju* v. *Balasurya Prasada Rao,*[1] where the High Court held, relying on section 23 of the Contract Act, that a contract which provided for the conveyance of a property when the defendant inherited it, was bad.

22.49. *Supreme Court decisions—Test of interest in property.*—It has now been settled by the Supreme Court[2] that the rule against perpetuity does not apply to agreements which do no *create an interest in property.* Thus, an agreement by a permanent lessee to surrender the lease whenever the land should be required by the landlord is a personal agreement, not void for remoteness.[3] An agreement in a lease granting a perpetual *option to renew* from time to time is not hit by the rule, as it does not create an interest in property.[4]

22.50. *Pre-emption.*—As to a covenant for pre-emption, it has been held[5] that reading section 14 along with section 54 of the Transfer of Property Act, it is manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it, therefore, follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit within which the option has to be exercised. It is true that the second paragraph of section 40 makes a substantial departure from the English law, for, an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who take from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract of sale described under section 40 of the Act which arises out of the contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English law, in that both these rights are liable to be defeated by a purchaser for value without notice. But the analogy cannot be carried further, and the rule against perpetuity, which applied to equitable estates in English law, cannot be applied to a covenant of pre-emption, because section 40 does not make the covenant enforceable against the assignee on the footing that it creates an *interest in the land.*

22.51. *Need for reform in India*—We have so far drawn attention to the problems that have arisen in the application of the rule against perpetuity in India and elsewhere and opportunity has been taken of referring to some

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1 *Jagannatha Raju* v. *Balasurya Prasada Rao,* (1915) 28 M.L.J. 630.

2 *Rambaran* v. *Ram Mohit,* (1967) 1 S.C.R. 293; A.I.R. 1967 S.C. 744.

3 *Rama Rao* v. *Thimmappa,* (1925) 48 Mad. L.J. 463; A.I.R. 1925 Mad. 732; *Ganesh Sonar* v. *Parendu Narayan,* A.I.R. 1962 A.P. 201.

4 *Kempraj* v. *Barton Son & Co.,* (1970) 2 S.C.R. 140; A.I.R. 1970 S.C. 1872; (1970) 1 S.C.J. 905.

5 *Ram Baran* v. *Ram Mohit,* A.I.R. 1967 S.C. 744.

of the judicial developments on the subject elsewhere as well as to the reforms introduced by legislation. In the light of this material, the next question to be considered is—how far and in what manner and to what extent the statutory provisions in India on the subject should be amended? That there is need for amendment is obvious, not because other countries have taken such a need for granted or experience difficulties, but because difficulties can be experienced and have, in fact, been experienced in India, though, perhaps, not on the same scale as elsewhere.

22.52. Apart from the fact that the present sketchy provision is capable of causing injustice, there is an—ethical aspect to it. Usually in the legal system, when A violates a rule, only A suffers—unless, of course, the question is of a defect in the title of A. But, under the rule against perpetuities, when A violates the rule, property is taken away from B and given to C. This is another reason for adopting the approach of "cutting it down to size".

The need for amendment requires no further elaboration. The question then is, in what directions should the law be amended.

22.53. *Aspect of unperfecting conveyancing to be taken into account*—In formulating the proposals for amendments we must take into account the fact that deeds in India are not always drawn by expert conveyancers and those who are consulted may not necessarily be experts in that art. We may say so without meaning any disrespect to the members of the learned profession. This position is not attributable to any deficiency in the intellectual sphere or to any reluctance to learn the art or any inherent incompetence. It is due to the fact that many practitioners in the mofussil do not have an opportunity of dealing with complicated transactions and, to some extent, it is also due to the social reality that people who execute documents of transfer or wills either are not in a position to consult legal practitioners for financial reasons, or are unwilling to do so from a desire to keep their affairs private, or have an insufficient appreciation of the fact that if they can afford to do so, it would be better to consult a lawyer. The point to be made is that in the interest of those who will be called upon in future to understand and comply with the law either for the purposes of their own property or as legal advisers to private parties, it is desirable that the amendments should not be so cumbersome as to be practically unintelligible. It is because of this important consideration that a method of selection has necessarily to be employed.

Adopting this approach, it seems to us that not all the amendments made in England could be adopted *verbatim* in India. Attention must be confined to some of the important propositions which seem to be in need of being introduced into our law, having regard to the problems that have arisen or are likely to arise with some frequency in India.

It seems to us that two reforms could be usefully made in our law. We are concerned only with transfers *inter vivos*, though, of course, section 114 of the Succession Act stands on the same footing. The two reforms which we have in mind are—

(i) regard be had to actual events;

(ii) mischief arising from conditions as to age should be remedied.

22.54. *Gist*—We would set out the gist of the amendments needed in regard to section 14 in the form of propositions which indicate the substance. The drafting device to be adopted to implement them could vary. One possible drafting device would be to re-number present section 14 as sub-section (1) and then to insert the new propositions as new sub-sections. Another possible drafting device would be to insert the new propositions as Explanations to section 14. Yet another possible device would be to insert these propositions as section 14A. This last mentioned device would be useful in the sense that the readability of section 14 will then not be burdened or encumbered.

22.55. Here, then, is a statement of the propositions. We give only the gist thereof and not the exact legislative language. Also, as to the precise legislative device, we leave it to the draftsman.

22.56. *Proposition* 1.—Our first proposition deals with the date for fixing the application of the rule.

Proposition 1

In applying section 14 to an interest in property limited to take effect at or after the termination of one or more life interest of persons in being when the period mentioned in section 14 commences to run or on or after the termination of lives of persons in being when such period commences to run, the validity of the interest shall be determined on the basis of the facts existing at the termination of such one or more life estates or lives.

Explanation.—For the purposes of this proposition, an interest which must terminate not later than the death of one or more persons is a life interest, even though it may terminate at an earlier time.[1]

22.57. *Effect.*—If such a provision is enacted, the court will determine the validity of the gift by examining the actual facts as they appear at the end of the life interest. To take a simple case, if a fund is given in trust to pay the income to A for life and then to pay the principal on various contingencies to A's son, not being attainment of majority, the amended section requires that the validity be determined, as far as the son is concerned, on the basis of the facts existing at the *end of A's life interest.*

If, at that point of time, the contingencies have happened—even contingencies which possibly may be postponed beyond majority, the gift is valid.

As to the Explanation, its utility lies in covering the following types of provisions in deeds :

"(1) To my widow so long as she shall remain unmarried.
(2) To A until his age of 30.
(3) To B for 100 years terminable upon his death."

In these cases, the facts upon which the *future interest* is adjudged under the Explanation to proposition 1, are those existing when, (1) the widow remarries or dies unmarried, (2) A reaches the age of 30 or dies under 30, (3) 100 years pass or B dies, respectively.

22.58. *Life in being.*—It may be noted that the first proposition does not project itself beyond the end of the life estates of living persons or the lives of living persons, because there may be practical difficulties in waiting indefinitely to find out what events ultimately happen.

1 The significance of the Explanation is indicated later.

22.59. *Proposition* 2.—To deal with conditions as to age, we recommend the following proposition.

***Proposition* 2**

If an interest in property would be void under section 14 because it is contingent upon *any person* attaining or failing to attain an age in excess of majority, the contingency shall be reduced to the age of majority, as regards all persons subject to the same age contingency.

22.60. ***Illustrative cases.*—We have already** [1]referred to some Indian rulings as to age which show the desirability of such a reform.

The difficulty arising by reason of the present law which prescribes an age-limit and which looks at the possibilities is furnished by a case which went upto the Privy Council.[2] That was, of course, a case of will, but the position would be the same under the Transfer of Property Act. The testator bequeathed his property to his sons for life and further directed that the share of each son if he left a son or issue of such son living at the death of the last survivor of the testator's son, is to be held for the sons of such son and the issue of his pre-deceased son *per stripes* for their life and if the son of the testator left no such son or issue, then for his widow and daughters. It was held that as the title of the sons of the testator was only for their lives and the bequest to the unborn beneficiaries did not cover the whole of the remaining interest, section 113 of the Succession Act was violated. But the Privy Council also pointed out that since it was not clear as to whether all the widows *would be living at the date of the death of the testator, section* 114 *of the Succession Act might also come in the way.*

22.61. Then, there is a Calcutta case[3] dealing with the validity of some of the restrictions. In a Calcutta case,[4] the bequest was as follows :—

> "When my grandsons may attain their age into five shares and give away the same to their respective sons, that is to say, my grandsons."

It was held that the distribution was to take place only after all these sons who might be born to the sons of the testator should have attained their majority and that it was invalid having regard to sections 101 and 102 of the Succession Act (sections 114-115 of the Act of 1925).

The amendments recommended will meet such cases.

22.62. *Precedents.*—This is not a new concept, since, in England, section 163 of the law of Property Act, 1925 made a similar provision.[5] The present law in England is more complicated and differently worded, but it will not be feasible to adopt it. The proposed provision is not likely to cause litigation. Of course, the contingency of age is not reduced if, under the amendment already recommended,[6] the gift is saved even with the age given in the document. The first proposition is applied first, and then the second proposition is applied if necessary.

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1 See para 22.63.

2 *Pultibai* v. *Sorabji,* A.I.R. 1923 P.C. 122, 126.

3 *Rameshwar P. Singh* v. *Lachman P. Singh,* I.L.R. 31 Cal. 111.

4 *P. V. S. Pillai* v. *R. V. M. Pillai,* 17 Calcutta Weekly Notes 488.

5 See *In re Gilpin,* (1953) 2 W.L.R. 746, 749 (Chancery).

6 Proposition 1, *supra.*

22.63. *Textual comment, on Proposition* 2.—A few explanatory comments on proposition 2 are appropriate. The words referring to *any person* attaining or failing to attain majority may be explained. A common type of gift is the following : A trust to pay the income to A for life, and then to pay the principal to such children of A as reach 25, but if none reach 25, then to B. Under the amendment, the age contingency is cut down as regards both the remainder to A's children and as regards the alternative remainder to B. In other words, the use of the expression "any person" in proposition 2 will ensure that whether the interest is of the person who has to reach the age *limit or interest of any other persons,* the new provision operates.

The words "as to all persons subject to the same age contingency" may be explained. Where there is a gift to those members of a class who reach 25, and this is reduced to majority under the amendment, the reduction applies to all other members of the class, even though some of them were living at the testator's death.

However, this part of the amendment must be applied in the light of the other amendment[1] which declares that no gift shall be *invalidated or modified* if it would have been valid before enactment of this amendment. There can be cases in which an age contingency in excess of majority would be valid as to some parts of a disposition and invalid as to other parts; in such cases the age contingency is reduced only as to those parts of the disposition which would otherwise be void.

22.64. *Proposition* 3.—The next proposition to be inserted will save the validity of, and operation of, limitations which are valid under the present law. The third proposition, then, is :

Proposition 3 :

Propositions 1 and 2 shall not be construed as invalidating or modifying the terms of any limitation which would have been valid under section 14 apart from those propositions.

Propositions 1 and 2 are intended to validate certain gifts that would be invalid by reason of certain hardships arising from the present law. If, however, a gift is valid under the present law, then propositions 1 and 2 are not called into operation.

As regards the mention of the word "modify", it may be stated that Proposition 2, if it becomes operative, "modifies" a gift by altering the age contingency to the age of majority. This modification is, however, not intended to take effect as to any interest which would have been valid in the absence of this proposition. This is desirable by way of abundunt caution.

22.65. *Proposition* 4.—To avoid retrospective effect being given to the changes suggested in propositions 1 and 2,—which are the principal substantive amendments—the following proposition is suggested :

Proposition 4

Propositions 1 to 3 shall apply to—

(a) transfers taking effect on or after the date on which those propositions become operative.

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1 Proposition 3, *infra.*

(b) appointments made after that date in exercise of a power of appointment, including appointments made by an instrument under a power created before that date.

By way of explanation of paragraph (b), it may be stated that when a power has been created *before* the amended law becomes operative, and the appointment is made *after* that date, the new law is intended to apply to the interests created by the exercise of that power.

22.66. *Summary.*—It may be convenient to draw attention to some salient features of the law.

(1) *The Test.*—Under the common law Rule the validity of an interest depends upon whether it vests in time. Under some laws in the U.S.A., the basic test of validity depends upon whether the absolute power of alienation is suspended for too long.[1-2] "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than" the specified time which varies from state to state).

(2) *The Period.*—Under the common law rule, the period of perpetuities is "lives in being plus twenty-one years". At present in India, it is lives in being plus minority. Under the New York statute, it is "two lives in being". States in the U.S.A. that have followed the general form of the New York statute have, more often than not, adopted a more ample statutory period. But the two-life period is onerously restrictive.

The type of corrective legislation that is now being recommended leaves the present provision unchanged as to (1) the test, which continues to be "vesting", and (2) the period, which, in its basic form, continues to be "lives in being plus minority". It seeks, however, to apply the Rule more rationally and to eliminate certain exceptions and extensions.

22.67. *Presumption of fertility*—A few words about the aspect of fertility are required to explain why no amendment is suggested on that point. Proposition 1 will, to a large extent, take care of those cases where the argument is made that *at the time of the transfer taking effect* the question arises whether there is a chance, however small, that an event could *occur in future* which may tie up the property for a time longer than the period of perpetuities. The amendment in proposition 1 will enable the Court to have regard to facts as they exist at the date of termination of the life estate or life in being. If, therefore, the question is whether a woman can have a child and the answer sought is in the affirmative in order to vest a gift and that event (birth) *has happened* by the time of termination of the life interest, the question of fertility or infertility becomes academic. Where, however, the question is whether looking from the point of view even of the date of termination of the life interest, a woman may be regarded as potentially fertile, there are two competing alternatives :—

(i) Will the question be determined on the basis of the rigid English rule of common law ?, or

1 E.g. N.Y. Real Property Law, section 42.

2. There are other statutory sections that prescribe other restrictions; but section 42 can be considered basic.

(ii) will the question be determined, like any question of fact, on the normal rules of presumption and other evidentiary rules ?

Alternative (i) is the approach adopted in England where, at common law, there was a rigid position taken whereunder a woman was regarded as fertile at any age. The position had to be modified by statute,—The Perpetuities and Accumulations Act, 1964—to which we have already referred.

According to the second alternative, the matter is not determined by any unrealistic rule as at common law. It is legitimate to have regard to the common course of natural events—in fact, section 114 of the Evidence Act expressly so provides. If that is the correct legal position, no statutory reform is needed on this point.

The further provision in England creating a presumption of fertility and a presumption of infertility (sterility) is not inserted in the propositions which we are recommending, partly because it would unnecessarily complicate the text of the amendments and partly because of our assumption that the common law presumption applicable only in the field of law of perpetuities, (that a woman can have a child at any age), is not likely to be followed in India, particularly because our codified law of evidence, in section 114 of the Evidence Act, empowers the court to draw inferences that are permissible having regard to the common course of natural events, human conduct and the like. There being no conclusive presumption in the codified law, the matter is likely to be determined on common sense principles.

22.68. *Options and re-entry.*—Elsewhere, we find (a) a provision exempting from the Rule commercial options to purchase and placing upon such options any time limitations which a study of the realities of commercial dealings in land may show to be desirable;

(b) a provision from the Rule rights of entry for condition broken and possibilites of reverter but declaring that such interests shall become void after a specified period of years or at such earlier date as the condition ceases to have any utility.

These are not considered necessary having regard to the judicial decisions confining the rule of interests proper in property.

22.69. *Clarification.*—By way of clarification, it may be stated that the proposed amendments are confined to the provision in secion 14, and are not intended to affect rules of law other than those concerned with remoteness of vesting as enacted in section 14.

22.70. *Gifts to unborn persons.*—For example, the proposition that a gift in Hindu Law cannot be made to an unborn person is, as we have stated above, well established.[1] In a Bombay case,[2] the will contained a provision for the future children of the testator's daughter. She had no children at her death. The provision was void. This rule of Hindu law,—and indeed, of general Indian law[3]—is not intended to be disturbed by section 14. In fact, it postulates the existence of that rule, and provides or

1 *Rai Bishan Chand* v. *Asmodia Koer,* I.L.R. 6 All. 560 (P.C.).

2 *Bai Manu Bai* v. *Dossa Morarji,* I.L.R. 21 Bom. 709 (P.C.), on appear from I.L.R. 15 Bom. 443.

3. Compare section 112, Indian Succession Act, 1925.

rather assumes that the ultimate beneficiary may not be in existence at the time of the transfer. But is the demand of the section that besides the requirement imposed by section 13 to the effect that the whole of the remaining interest of the transferor in the thing transferred should be covered,[1] it is also necessary that the ultimate beneficiary should be in existence at the expiration of the period earlier mentioned and it is also necessary that the thing transferred must belong to him not later than the attainment of majority. There are then three postulates and one prohibition in the section as follows :—

(i) Vesting may be delayed;

(ii) The first stage of permissible delay is represented by the lifetime of one or more persons in existence at the time of the transfer— it is not necessary that they must themselves be beneficiaries under the transfer;

(iii) The second permissible stage of delay is the minority of some person to whom if he attains full age the thing trasferred is to belong;

(iv) That person must, however, be in existence at the expiration of the earlier periods.

22.71. Thus, there are two types of periods which may be conveniently described as the right time period and the minority period. Between the two, there must not be any interval, and in any case the vesting should not be delayed beyond the end of minority period. Thus, while section 14 is not concerned with commencement initially and allows an interval between the transfer and the vesting, the intervals are represented by two periods which must be continous and which must be at the specified time. In this sense, the journey of the interest and its ultimate destination are both regulated in point of time.

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1 Section 13 will however be deleted.

CHAPTER 23

TRANSFER TO A CLASS

SECTION 15

23.1. *Section* 15.—When a gift is made to only one person the simple provisions in secions 13-14 apply. When the beneficiaries are a class, more elaborate provisions are required. Section 15 provides as follows on the subject :

> "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 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class."

23.2. *Class gifts.*—The section deals with class gifts. A class gift is a gift of property to all who come within same description, the property being devisible in shares according to the number of persons in the class.

At common law, a class gift fails *in toto* if any beneficiary may enter the class outside the perpetuity period, for the size of the shares is not then ascertained in time.

Under the English Act of 1964, persons entering the class within the perpetuity period will take to the exclusion of persons who enter outside the period.

23.3. *Amendment of* 1929.—In the great majority of cases where the rule against perpetuities is successfully invoked, the offending provisions is a gift to a class. In such a case at common law, gifts to A1, A2, A3, valid in themselves, are rendered invalid by the fact that gift to A4, is invalid. Leach has criticised this doctrine as "guilt by association". Realising that a gift which threatened to tie up a property for too long a period should not be invalidated *in toto,* the legislature in India in 1929 amended section 15 by substituting a rule which was thus the reverse of the rule as contained in the old section. Before the Amendment of 1929, section 15 incorporated the rule of English law as enunciated in the leading case of *Leake* v *Robinson*[1] holding that in the case of a gift to a class, any members of which may have to be ascertained beyond the limits of perpetuity,—for example, a gift to the unborn children of a living person who shall attain the age of twenty five—the whole gift is void. In cases not governed by the Act at a time when the Act did not apply to Hindus, there was judicial reluctance to apply the English doctrine.[2] Notwithstanding the provisions in section 102 of the Succession Act, 1865, and section 15 of the Transfer of Property Act as it then stood—provisions which were cited for invalidating the gift by way of an analogy—it was held that even though a gift to unborn grand-sons was invalid under Hindu law, that did not necessarily make the gift void so far as it was in favour of a grand-son *in existence.* It was pointed out that the English rule usually defeats the intention of the testator and that in any case the English rule was not a safe guide for the construction of Indian gifts.

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1 *Leake* v. *Robinson* (1817) 2 Mer. 633.

2 *Rai Bishan Chand* v. *Mst. Asvardia Koer,* I.L.R. 6 All. 560 (P.C.)

23.4. *Hindus.*—When, however, the Transfer of Property Act was made applicable to Hindus, naturally the position was reversed and, by virtue of the unamended section, such gifts totally failed. It was in 1929 that the section was amended to read as it now stands. The principle under the amended section is that if there is a gift to a class and the interest fails with regard to *some of the members of the class* by virtue of the rules contained in sections 13 and 14, such interest fails only in regard to those persons, and not in regard to the whole class. If, therefore, the whole plan of a donor of property cannot be carried into effect, the court will yet give effect to a part of it rather than hold that it shall fail entirely. After the gift has vested in all or some members, they will hold it as tenants in common, so long as they take as members of the class unless a joint tenancy is created by express words.

23.5. *English Act.*—It may, as a matter of interest, be noted that the English Act of 1964 has also now adopted the same approach by proving,[1] in effect, that person who entered the class within the perpetuities period will take, while those who entered the class too late will be excluded. Writers on English law usually describe this reforming provision as an amendment providing a "class-splitting" rule.

Of course, before applying this "class-splitting" beneficial rule, one has to apply the other beneficial rules enacted in the 1964 Act, namely, the "wait and see rule" and "rule for reduction of age". Thus, take "a gift to my grand-children on their attaining the age of twenty-five," which may be void under the common law rule if the grandchildren are unborn at the date of the gift. It may, in the first place, be valid if all the grand-children have reached the age of four on the death of the donor who made the will or on the death of the previous holder of the life interest. This is by virtue of the wait and see rule. Next, the age could be reduced under the statutory provision for reduction. The gift may still be void (even if the age is reduced to twenty-one) in the case of a grand-child *born after the termination of the previous life interest.* Now the class-splitting rule must be applied, with the result that any grand-child who satisfies the contingency in time—the contingency of attaining the age of twenty-five years—will take to the exclusion of grand-children who do not so satisfy the contingency.

23.6. *Recommendation.*—Since the substance of section 15, as amended in 1929, is sound, the only amendment which we recommend is the deletion of the reference to section 13. This is consequential on the recommended deletion[2] of section 13.

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1 Sections 4(3), 4(4), and 4(5), Perpetuities and Accumulations Act, 1964.

2. See recommendation as to section 13.

CHAPTER 24

DEPENDENT TRANSFERS

SECTION 16

24.1. *Dependent transfers.*—Section 15 having dealt with one situation concerned with the effect of interests which become void—gifts to a class—another situation concerned with an infectious vice is dealt with in section 16, which is concerned with what are known as dependent transfers.

Where, by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

24.2. *Principle.*—The rule in the section is primarily based upon the presumed intention of the transferor. The transaction being indivisible, once a person transfers property and his whole interest is transferred, the failure of the period interest leads to the failure of the whole transaction.[1] As observed by Lord St. Leonards[2] in respect of a gift over, which was void :

> "It was void, not because it was not within the line of perpetuity, but on the ground that the limitation over was never intended by the testator to take effect unless the persons whom he intended to take under the previous limitation would, if they had been alive, have been capable of enjoying the estate; and that he did not intend that the estate should wait for persons to take in a given event where the person to take was in actual existence, but could not take."

The rule in section 16 applies only when the two events cannot be separated; if they can be separated, then the transfer is not void, only the invalid limitation is disregarded.[3]

24.3. *Scope of dependent transfer.*—The scope of "dependent transfer" may be illustrated from a case under the Hindu Wills Act. Though section 16 is now made independent of the Hindu law, still there does not appear to have been any conflict between the rule of that law, at any rate the rule applicable to those to whom the Hindu Wills Act[4] applied and the rule enacted in the section. In a Calcutta case[5], a bequest of the trust-fund was made in these terms : "My great-grandsons shall, when they attain majority, receive the whole to their satisfaction, and they will divide and take the same in accordance with the Hindu law. God forbid, it, but should I have no great-grandsons in the male line, then my daughters' sons, when they are of age, shall take the said property from the trust-fund and divide it according to the Hindu Shastras in vogue."

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1. Gour.
2. *Moneypenning* v. *Derring*, 2 De G.M. & G. 182.
3. (a) *Evers* v. *Challis*, 7 H.L.C. 531, 534.
   (b) *Watson* v. *Young*, 28 Ch. D. 436, 443;
   (c) *Jones* v. *Westcomb*, 1 Eq. Ca. Ab. 245;
   (d) *In re Bence, Smith* v. *Bence*, (1891) 3 Ch. 242.
4. Now sections 255—260, Indian Succession Act, 1925.
5. *Brajanath* v. *Anandamayi*, 8 B.L.R. 208.

Here the bequest to the daughters' son was dependent on, and not alternative to, the gift to the great-grandsons and was therefore void.

24.4. *Alternative gifts.*—But, if, on the other hand, the bequest is in these terms : "If, at the time when my daughters' sons come of age, the gift to *my great-grandsons has not taken effect for* any reason; then my daughters' sons shall take the property". Then, the gift, being in the alternative, would take effect, since it can be presumed that the grantor intended the subsequent gift to take effect *in any event.* The section being based on the presumed intention of the grantor, there is scope for applying a different rule where the deed shows that the intention of the testator was different. This aspect will be further illustrated later.[1]

24.5. *Analysis of section* 16.—Let us now analyse the important requirements of the section. The first requisite is that the gift over must have been created *in the same transaction.* The gift over, being based upon a contingency which is bad, becomes itself invalid, the reason being that the persons entitled under the subsequent limitation were not *intended to take*[2] unless and until the prior limitation *is exhausted;* and, as the prior limitation is void, the subsequent gift can never come into operation. It is impossible to give effect to the intentions of the settlor in favour of the beneficiaries under the subsequent limitation.[3] But this limitation does not necessarily apply to limitation *in default of appointment,* in which usually the intention is that they should take effect unless displaced by a valid exercise of the preceding power of appointment. Thus, where the donees of a limited power of appointment purported to exercise it by appointing trustees upon such trusts as A, one of the objects of the power should, with certain consent, appoint, and in default of, and subject to, any such appointment, upon certain trusts which were within the power, it was held that, although the power of appointment purported to be conferred on A was void, the trusts in default of appointment were valid.[4]

24.6. *Section restricted to dependent transfer.*—The second requisite of the section is that it is restricted to dependent transfers. If the gift over is dependent upon the happening of either of two events, of which one is valid as a condition and the other is void, and the former event happens, the succeeding interest will take effect even though the latter event may be void as a condition. If the conditions are divisible, the valid disposition would take effect without reference to the invalid contingency. Thus take a deed in which a gift over of property is made in the event of there never being any child of A or in the event of no child attaining twenty-one.

24.7. *One of two events.*—Again, if the gift over is dependent upon the happening of either of two events, one of which is legal and the other void, the succeeding interest will take effect if the former event in fact happens, although the second event may offend against the rule. In such cases, the whole question depends upon whether the clause for carrying the estate over

1 Para. 24.6, *infra.*

2. Para, 24.2, *supra.*

3. (a) *Robinson* v. *Haricastle,* 2 R.R. 241. 151;
(b) *Routledge* v. *Dorrie,* 2 Ves. 357;
(c) *Beard* v. *Westcott,* 5 B. & A. 801;
(d) *Moneypenny* v. *Derring* 2 De G.M. & G. 145, 181, 182.
(e) *In re Abbott Peacock* v. *Frigout,* (1893) 1 Ch. 54, 57.

4. *Webb.* v. *Sadier, L.R.* 8 Ch. 419.

is divisible or not. If it is, the valid disposition would take effect without reference to the invalid contingency. Thus, take a deed in which a gift over is made of property in the event of there never being any child of A or in the event of no child attaining, etc., twenty-one. Now, here the first contingency is valid, but the second is too remote, but the gift over would nonetheless take effect on the happening of the former event.[1] The question in such cases is, whether the gift can be split into two alternatives, in which case, if the alternative, which is within the legal limits, happens, the gift over would take effect.[2]

24.8. *English Act of* 1964.—We now turn to the English law. At common law, if a subsequent gift is limited on the same contingency as a void gift, that subsequent gift also fails. At common law, any gift which is dependent or expectant upon a prior void gift is invalid.

Under the Act of 1964, section 6, a subsequent gift must be viewed on its own merits, and will not fail merely because of dependency. Section 6 of that Act reads—

> "6. A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness."

This provision would seem to place the burden of proving that the subsequent gift is void on the person who so affirms. It reverses the common law rule based on[3] the presumed intention of the grantor in favour of the opposite rule based on the policy of the law to validate gifts.

24.9. *Need for revising section* 16.—We have given some thought to the matter and have come to the conclusion that there is need for revising section 16 on the same lines as section 6 of the English Act of 1964. Although it can be said in favour of the existing section that it is based upon the presumed intention of the transferor, the same argument can be addressed in support of the opposite view, namely, that the transferor intended a benefit for the ultimate beneficiary also, and that he himself would have desired that if the first gift is legally not recognisable, the subsequent gift should take effect.

24.10. *Recommendation to revise section* 16.—In the light of the above discussion, we recommend that section 16 should be revised as follows :

> "16. Where, by reason of *the rule* contained in[5] . . . . . Section 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest shall *not fail by reason only of failure of the first mentioned interest.*"

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1. *Watson* v. *Young*, 28 Ch. D. 436, 443; *Evers* v. *Challis*, 7 H.L.C. 531.
2. *Evers* v. *Challis*, 7 H.L.C. 531, 547.
3. Para 24.2, *supra*.
4. Para. 24.8, *supra*.
5. Mention of section 12 has to be omitted in any case, as that section is being defeted.

CHAPTER 25

DIRECTION FOR ACCUMULATION

SECTION 17

25.1. *Gist of section* 17—Restrictions on the alienation or a vesting of the corpus have so far been dealt with. In order to encourage the free circulation of property, the law also considers it necessary to provide restrictions on the accumulation of income. Income cannot unreasonably be accumulated for a long period. Though opinions may vary as to what is and what is not an unreasonably long period, yet the principle, broadly stated, has been accepted in the common law and also in our statutory provisions. That the opinion may vary from time to time and place to place is obvious from the fact that the law on the subject has undergone a lengthy process of evolution in England. It may be noted that in Hindu law, the rule was more general than as stated in section 17. In Hindu law, a direction for accumulation is not void unless it is found to be so unreasonable as to be against public policy, or if it is given for the purpose of carrying out an illegal object or is, in its effect, inconsistent with Hindu law.[1]

We shall revert to this aspect later. The section is in these terms :

> "17. (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—
>
> (a) the life of the transfer, or
>
> (b) a period of eighteen years from the date of the transfer,
>
> such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period, the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed."

There are exceptions to this general provision contained in sub-section (2). It provides that this section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

25.2. *The right to terminate accumulation.*—A beneficiary of full age who has an absolute vested and indefeasible right to the capital and income may terminate the accumulation by directing the trustees to pay the fund to him.[1]

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1 *Rajendra* v. *Raj Kumari,* (1907) I.L.R. 34 Cal. 5.

In the case of *Saunders*,[1] the testator bequeathed his stock to trustees on trust to accumulate the dividends until Vautier should attain the age of twenty-five, and then to transfer the capital and the accumulated dividends to Vautier. Vautier, having attained the age of twenty-one, contended that he was entitled to stop the accumulations and to have the fund transferred to him immediately. Counsel for Vautier argued that he now had a vested interest in the stock, and that since accumulation was for his sole benefit, he was entitled to waive, it and demand an immediate transfer.

Lord Langdale M.R. held :

> "I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period but may require payment the moment he is competent to give a valid discharge."

25.3. *History*. Before 1929, the section was numbered as section 18, and present section 18 was numbered as section 17. Also, the provision was differently worded.[2]

25.4. *History of English law*. The English rule as to accumulations has undergone a process of evolution for about two centuries. It was the outcome of the decision in the case of *Thelluson*.[3] That case arose out of the will of Peter Thelluson, who, in 1796 A.D., disposed of his vast property by will and excluded his issue from enjoyment, directing accumulation of income for the period of nine lives—all in being—at the date of his death. At that time, there was no statute, prohibiting accumulation and the bequest had to be upheld, but the will led to the passing of the Accumulation Act, 1800 (39—40 Geo. 3, s. 98), which was replaced by the Conveyancing Act. 1881, and which, in its turn, was replaced by sections 164—166 of the Law of Property Act, 1925, slightly amended in 1964.

25.5. *Pre*-1929 *Law in India*—Before its amendment in 1929, the law in India allowed accumulation for a period of one year only. But, in cases decided independently of the statutory provision, it was held that if there was nothing *per se* illegal in a direction to accumulate, and if such a direction was not unreasonable or for carrying out an illegal object, it should be upheld. However, the cases did not lay down any definite rule which the lower courts could easily follow. In 1929, the law was amended as it now stands.

25.6. *English law*.—The English rule prescribes several periods during which accumulation can validity be directed,[4] viz.,—

(a) the life of the grantor or settlor; or

(b) a term of 21 years from the death of the grantor, settlor or testator; or

(c) the duration of the minority or respective minorities only of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator; or

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1. *Saunders* v. *Vautier*, (1841) 4 Beav. 115.
2. Para 25.5, *infra*.
3. *Thelluson* v. *Woodford*, 4 R.R. 205, affirmed (1805) 8 R.R. 104.
4. Section 164, Law of Property Act, 1925, as amended in 1964.

(d) the duration of the minority or respective minorities only of any person or persons, who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated; or

(e) a term of twenty-one years from the date of making of the disposition; or

(f) duration of the minority or respective minorities of any person or persons in being or *en ventre sa mere* at that date.

Section 165 of the Law of Property Act, 1925 provides—

"165. Where accumulations of surplus income are made during a minority under any *statutory power or under the general law*, the period for which such accumulations are made is not to be taken into account in determining the periods for which accmulations are permitted to be made by the last preceding sections, and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulations also having been made as aforesaid during such minority."

Section 166 of the Law of Property Act, 1925 provides—

"166. (1) No person may settle or dispose of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the instrument directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.

"(2) This section does not, nor do the enactments which it replaces, apply to accumulations to be held as capital money for the purpose of the Settled Land Act, 1925, or the enactments replaced by that Act, whether or not the accumulations are primarily liable to be laid out in the purchase of land."

Section 12 (2) of the Perpetuities and Accumulations Act, 1964, provides—

"12. (2) It is hereby declared that the restrictions imposed by ....section 164 (of the Law of Property Act, 1925) apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and that they apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated."

Sub-section (2) deals with two previously uncertain points: (i) whether a power, as opposed to a trust, to accumulate was caught by section 164. It was held in *Re Robb*[1] that the section applied to mere powers, and that decision is now confirmed; (ii) whether section 164 applied to an accumulation at simple interest, as opposed to compound interest. There were decisions either way, but the Act now provides that section 164 shall apply to such a case. Section 12(2), however, is not retrospective.

25.7. *Comparison with the English law.*—It may be noted that the provision in England is more liberal than section 17, and permits accumulation for the longer of several alternative periods mentioned in section 164

1 *Re Robb*, (1953) Ch. 459.

of the Law of Property Act, 1925, slightly amended in 1964. In contrast, under section 17 of the Transfer of Property Act, the period is reduced to 18 years or life of the transferor. In England, on the other hand, the period is more elastic. The question then arises whether there is need to revise our law, or whether it should be kept as it is. It appears to us that some of the provisions made in English law are worth adopting in our section inasmuch as such liberalisation is not likely to create any practical difficulties and, speaking theoretically also, the law should not object, as a matter of policy, so long as income is not tied up for an unduly long time. After all, the period of life of the transferor or the period of 18 years from the date of the death of the transferor is not the only reasonable period, and there could be cases where a direction expressed differently may yet be reasonable. For example, a period of 18 years from the date of the death of the transferor or a period expressed as expiring with the minority of a living person or a person living at the date of the death of the transferor would, *prima facie,* appear to be reasonable.

25.8. We have taken note of the fact that the English law is more liberal than section 17, inasmuch as a term of twenty-one years from the death of the grantor, settlor or testator is allowed in England as one of the permissible periods—in addition to any other alternative periods mentioned in the law.[1] It also permits the alternative of expiry of minority. There is also the fact that the English law has regard to persons in the womb. With suitable adaptations, these alternative periods are worth adding to the section.

25.9. *Hindu law.*—We may note that the Hindu law was not right. As far back as 1855, no less an authority than Colville C.J., delivering the judgment of the Supreme Court of Calcutta,[2] expressed the opinion that it was competent to Hindu testator expressly to provide for the accumulations of the surplus income of his estate within the limit allowed by law and to make those accumulations subject to a limitation order as there described.

Thus, a direction to accumulate is not fundamentally bad; it is bad only if it offends some independent rule of Hindu law. Thus, it may infringe the rule against perpetuities or be repugnant and void as an attempt to deprive a person of the enjoyment of that which has become his property. In *Watins* v. *Administrator-General,*[3] Jenkins C.J., observed that, on principle, an accumulation can be validly directed, for so long as at a time as the absolute vesting of the entire interest can be withheld, or for so long a time as that during which the corpus of the property can be rendered inalienable, or its course or is devolution can be directed and controlled by a testator.

This is an additional consideration for making the law liberal within due limits.

25.10. *Recommendation as to section* 17(1).—Accordingly, we recommend that section 17(1), clauses (a) and (b), should be revised to read as under :

"(a) the life of the transferor, or

1. Section 164, Law of Property Act, 1925, as amended in 1964.
2. *Smt. Sooryumoney Dossee* v. *Dinoobandoo Mullick,* (1855) 1 Boulnois 223, cited by Jenkins C.J. in *Watkins* v. *Administrator-General,* (1914) I.L.R. 407 Cal. 88, 91, 92.
3. *Watkins* v. *Administrator-General,* (1914) I.L.R. 47 Cal. 88, 93.

(b) a period of eighteen years from the date of the transfer, or

(c) *a period of eighteen years from the date of the death of the transferor, or*

(d) *the minority of any person living or in the womb at the date of the transfer or at the date of death of the transferor.*"

25.11. *Amendment of section* 17(2).—As to sub-section (2) of section 17, we recommend the addition of a further exception in these terms—

"(iv) *the accumulation of the produce of timber or wood.*"

This has been suggested by the corresponding exception in England,[1] which reads—

"'(iii) respecting the accumulation of the produce of timber or wood."

We believe that this amendment should not raise any controversy.

1. Section 164(2)(iii), Law of Property Act, 1925.

CHAPTER 26

TRANSFERS FOR BENEFIT OF PUBLIC

SECTION 18

26.1. *Gist*—Transfers for the benefit of the public have been excluded by section 18 from certain restrictions. The section is in these terms :—

> "18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind."

Although the section does not use the word "charity" or "charitable purposes", there is hardly any doubt that it is meant for transfers in favour of charities. The words "benefit of the public" and "object beneficial to mankind" make this clear.

26.2. *Gifts for charity—special position*—Both in India and elsewhere, gifts for charity have received social approval. They have also received certain special privileges in a law, though the abuse—suspected or real—of some of those privileges has sometimes led to a fluctuation of views as to the propriety of conferring special benefits on charities. This has been particularly so in the field of fiscal privileges. Confining ourselves, however, to non-fiscal matters, and leaving aside the peculiar historical developments in England which led to the Statutes of Mortmain, we may state that the law has been tender towards transfers for charitable purposes in general and it would be true to say that several types of provisions which would not be normally permissible, become so where a charitable purpose is shown. The section under discussion, to put the matter broadly, exempts charities from the rule against perpetuities (section 14) and from two other provisions—dependent transfers (section 16) and accumulation (section 17).

26.3. *Charity in Vedic and post-Vedic texts*—From the earliest times, the merit of charity has been recognised in India. The Rig Veda contains passages extolling the merits of charity. One of them is thus translated by Max Mueller :[1] "He who gives alms goes to the highest place in heaven."

The Hindu concept of charity is not confined to religious purposes, even though the two often co-exist. Purely secular objects were equally praiseworthy. The Vedic notions of hospitality are interesting, and it is well-known that in the Hindu household the guest is treated as a divinity hence the social recognition of "guest houses" as a kind of charitable institution.

26.4. *Impartible property*—Property dedicated for pious uses has been made impartible under Hindu law, as much from the fundamental idea of its not being private property, as from a desire to maintain uninterrupted use of the same for pious purposes.[2] This is one example of the special treatment afforded to charities.

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1 Rig Veda 1, 125, 5-6, cited in Max Mueller's Chips from a German Workshop, Vol. I, page 46; Hemadri, Danakhanda, Bib. Ind., page 6.

2. P N. Saraswati, Hindu Law of Endowments (1897 Ed.), Chapter 7.

We need not, for the present purpose, detain ourselves with a detailed discussion of the expressions used in the texts to indicate what are now described as "religious and charitable" purposes;—expressions such as Ishta and Purtta, Yoga Kshema. Nor are we concerned with the meaning of the latter. But, at least according to the one construction of the passage in the Mitakshara,[1] dealing with property not liable to partition, where it speaks of "Yoga Kshema", the expression is taken in this sense—Yoga means a fund for the performance of *religious* ceremonies and Kshemam signifies a reservoir of water or the like ***constructed for public benefit.***[2]

Of course, the mention of "reservoir of water" is merely to be taken as an illustration. The dominant element is public benefit—which, it may be of interest to note, is also the most important element in the modern concept of charities. The construction of reservoirs is unanimously classified by the Hindu ages amongst purtta (roughly, charitable works). The commonest enumeration of these reservoirs is "Vapi-Kupa-tarnagini", an enumeration occurring not only in later texts,[3] (Yama, Atri and Varsha Purana), but also in Ashwalayana. But these were not the only instances of purtta works. Gifts for learning and gifts for hospitals form an equally important category of "purtta" works.[4]

26.5. *Meaning of Ishta and Purtta*—Ishta, in ancient texts, includes Agnihotra, Vedic gifts, sacrifices, Pashubandh, Chaturmashya, Agnistoma, offered to priests at sacrifies, religious austerity, truth, studying in the Vedas, Vaisvedeva sacrifice and Atithya.

Purtta works are gifts and charity, according to the Smarta and not Vedic rites. A text of a Smriti cited by Hemadri says,—they are gifts made outside the sacrificial ground. Purtta works include the following—gifts made during eclipses, and other days auspicious for such acts, tanks, groves, processions for the gods, wells, temples, rest-houses, giving of food and relief to the diseased. Gifts for educational purposes, though strictly not coming within the definition of Purtta, have been extolled in the Smrities and Puranas as of high merit. Imparting learning and gifts of land and cows are declared to be gifts of surpassing merit, in a text of an Upanishada cited by Hemadri. Hemadri also declares, by citing many texts, that assistance to stdudents in any shape in prosecuting their studies is of great merit.

26.6. *History of charities in the West*—So far as the West is concerned, it is highly probable that the rudiments of the law of charities were derived from the Roman or Civil law.[5] In Lord Chief Justice Wilmot's notes of his opinions (pp. 53, 54), it is said : "Donations for public purposes were sustained in the civil law, and applied, when illegal, *cy pres* to other purposes, one hundred years before christianity was the religion of the Empire." And for this cited Dig. Lib. tit. 2, De Usuet usufruc. Legatorum, 16, 17.

1 Mitakshara. Chapter 1, section 4, clause 3, reproduced in Vira Mitrodaya, Chapter VII, Section 2.

2 See Golap Chandra Sarkar's Translation, quoted by P. N. Saraswati, Hindu Law of Endowments (1897 Ed.) Chapter 7.

3 Ashwalayana, Grihya Parishishta. IV. 9. Bib. Ind., page 342. P. N. Saraswati, Hindu Law of Endowments (1897 Ed.), Chapter 8.

4 P N Saraswati, Hindu Law of Endowments (1897 Ed.), page 27, para 24.

5 Story, Equity Jurisprudence (1919), page 475, 1137.

One of the earliest fruits of the Emperor Constantine's real or pretended zeal for Christianity was a permission to his subjects to bequeath their property to the Church.[1] Of course, the Church was originally regarded as the "bride" of God—whence the word "endowment" which has its association with dower.

The permission given by Constantine was soon abused to so great a degree as to induce the Emperor Valentinian to enact a "mortmain law", by which it was restrained.[2]

But this restraint was gradually relaxed; and in the time of Justinian it became a fixed maxim of Roman jurisprudence, that legacies to pious uses (which included all legacies destined for works of piety or charity, whether they related to spiritual or to temporal concerns), were entitled to peculiar favour, and to be deemed privileged testaments.[3]

Thus, for example, a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, were esteemed legacies to pious and charitable uses.[4]

26.7. *Public benefit in regard to religion*—In general, a charitable endowment is one which has for its object the benefit of the public or of mankind. A religious endowment is one which has for its object the establishment, maintenance or worship of an idol, deity or other object or purpose subservient to religion. Every religious endowment, in the sense explained above, is not charitable. The following definition of "charitable purpose" occurs in the Charitable Endowments Act :[1]

> "2. In this Act, 'charitable purpose' includes relief of the poor, education, medical relief—and the advancement of any other object of general public utility but does not include a purpose which relates exclusively to religious teaching or worship."

An endowment may be charitable without being religious, and it may be religious without being charitable—particularly where the element of public benefit is missing. This is true where an endowment is private in the sense that the dedication is limited to a family god, meant for a family or families or a small and certain body of individuals and the public has no access to the idol. In general, any property, movable and immovable, that a person can dispose of by gift or will may form the subject of endowment by gift or will, as the case may be.

26.8. *Hindu endowments*—Hindu endowments are mostly intended for the benefit of the public, but, by way of exception, private ownership may be found. In general, the distinction between a public and private endowment depends upon its extensiveness.[6] The essential characteristic of a charitable gift is that is must be for the benefit of the public or mankind.

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1 Cod. Theodos, Lib. 16 Tit. 2, 1.4.
2 Cod. Theodos, Lib. 16, title 2, 1.20.
3 Domat, Civil Law, Vol. 2, B. 4, tit. 2, 6.
4 Domat, Vol. 2, B. 4, tit. 2, 6.
5 Section 2, Charitable Endowments Act, 1890.
6 *Prakash Chandra* v. *Subhash Chandra,* I.L.R. 37 Cal. 67, 79.

Wholesale bequests of the estate to religious charity are not unknown.[1] In fact, where a gift is made not a living person but to an idol—a dedication—one cannot engraft upon it the English law of perpetuities.[2]

26.9. *Statutory precedents*—Indian statute law contains a number of provisions wherein the aspect of charity becomes important. While section 18 confers a benefit on charity, section 118 of the Succession Act contains a restrictive provision for death-bed gifts to charity.

Section 118 of the Indian Succession Act[3] is based on the Statute of Mortmain (9 Geo. II c. 36). Although it was held in *Mayor of Lyons* v. *Eats India Co.*,[4] that this statute has no application in India, the words used in this section are "religious uses or charitable uses" and the illustrations are adopted from the enumerations of objects mentioned in the Statute of Elizabeth, and the provisions as to the execution of wills for a period of six months in the registry are also borrowed from the English law mentioned above.

26.10. *Income-tax Act*—In section 4(3) of the Indian Income Tax Act 1922, *charitable purposes* included relief of the poor education, medical relief and advancement of any other object of general public utility. The word "include indicates that the definition is merely enumerative.[5]

In the Charitable Endowments Act VI of 1890, charitable purposes "include relief of the poor, education, medical relief and the advancement of any other objects of general public utility but does not include a purpose which relates exclusively to religious teaching or worship." In section 92 of the Code of Civil Procedure, 1908, the words used are "public purposes of a charitable or religious nature."

In the Bombay Public Trusts Act,[6] a 'public trust' is defined as meaning as express or constructive trust for either a public religious or charitable purpose or both; there is an inclusive portion which is not material for the present purpose. In the same Act,[7] it is provided that for the purposes of that Act, a charitable purpose includes—

(1) Relief of poverty *or distress;*

(2) Education;

(3) Medical relief;

(4) Provision for facilities for recreation or leisure-time occupations (certain conditions are added which are not reproduced here); and

(5) The advancement of any other object of general public utility, but not including a purpose which relates exclusively to religious teaching for worship.

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1 Gour, Hindu Code (1938), page 804.

2 *Markby J. Esamy* v. *Krishna,* 2 Bengal Law Reports Original Cases 47; *Jamshedji* v. *Sona,* I.L.R. 33 Bom. 122.

3 Paruck, Succession Act (1965).

4 *Mayor of Lyons* v. *East India Co.,* I. M.I.A. 175.

5 *Commissioner I. T.* v. *National Mutual Association,* I.L.R. 57 Bom. 519.

6 Section 2(13), Bombay Public Trusts Act, 1950.

7 Section 9, Bombay Public Trusts Act, 1950.

In the Income-tax Act, 1961,[1] 'charitable purposes' are defined in an inclusive manner. They are defined as including "relief of the poor, education, medical relief and advancement of any other object of general public utility not involving the carrying on of any activity for profit."

26.11. *Modern decisions*—It is now time to refer to the modern doctrines as to charity found in judicial decisions. Without necessarily implying that every rule of English law in this field will be valid in India also, we would like to draw upon the rich material presenting a variety of fact situations available in English decisions.

In order that a trust may be legally charitable, its purposes must, in England, fall within the spirit and intendment of the preamble to the Statute 43 Elizabeth I Chapter 4, often referred to as the Charitable Uses Act, 1601. Though that statute was repealed by the Mortmain and Charitable Uses Act, 1881, its preamble was preserved by section 13(2) of that Act. Later, by the Charities Act, 1960, the preamble was also repealed, but section 38(4) of the Act of 1960 provides that any reference in any enactment or document to a charity within the meaning, purview and interpretation of the Charitable Uses Act, 1601, or of the preamble to it shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales. The general understanding is[2] that even now, in order for a trust to be legally charitable, its purposes must fall within the spirit and intendment of the aforesaid preamble—a proposition which has been re-affirmed by the House of Lords.[3] The same opinion has been expressed in one of the annual reports of the Charity Commissioners in England.[4]

26.12. *Statute of Elizabeth I*—Every reported English case has been[5] decided, or ought to have been decided, with the preamble to the Statute of Elizabeth I in mind. The objects enumerated in the preamble to the Statute were :

> "The relief of aged, important, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives, and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."

26.13. *Case-law based on the statute (Romilly)*—Looking to the preamble, and not behind it, the courts have built up a great body of case law. "Often it may appear illogical and even capricious. It could hardly be otherwise when its guiding principle is so vaguely stated and is liable to be so differently interpreted in different ages.[6]" For more than 200 years after the enactment of the Statute of Elizabeth I, no attempt was made to

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1 Section 2(15), Income-tax Act, 1961.

2 O. R. Marshall (1961), 24 Modern Law Review 444; Spencer Maurice in (1960) 24 Conveyancer 390.

3 *Scottish Br. etc. Society* v. *Glasgow City Corporation.* (1967) 3 All. E.A. 215.

4 Report of the Charity Commissioners in 1966, paragraph 31.

5 Tudor on Charities.

6 See *Gilmour* v. *Coats*, (1949) A.C. 426, 443, (per Viscount Simonds).

classify the objects or purposes which had been held to be charitable as being within the letter or the spirit and intendment of the preamble. However, in 1805, Sir Samuel Romilly (then Mr. Romilly), arguing in *Morice* v. *Bishop of Durham*,[1] put forward a classification under four heads. These heads were—first, relief of indigent, second, advancement of learning, third, the advancement of religion, fourth, "which is the most difficult", the advancement of objects of general public utility.

26.14. *Pemsel's case*—Lord Macnaghten, in *Income Tax Commissioners* v. *Pemsel*,[2] substantially accepted Sir Samuel Romilly's classification with two significant variations. He classified charitable purposes under four heads :

(1) The relief of poverty;

(2) The advancement of education;

(3) The advancement of religion;

(4) Other purposes beneficial to the community not falling under any of the preceding heads.

A significant variation in contrast with Romally's classification is the substitution of the advancement of "education" for the advancement of "learning". In this respect, Lord Macnaghten's language was more accurate than the language used by Sir Samuel Romilly.

26.15. *Genesis of section* 18—It is well known that the enunciation in *Pemsel's case* was based on the classification put forward by Sir Samuel Romilly as counsel in the case of *Morice*.[3] Section 18 was inserted at a time when the decision in *Pemsel's case* had not been rendered, although the arguments of Sir Samuel Romilly in the case of *Morice* were perhaps known to the draftsman of our Act. It is not very clear whether the enumeration in section 18 deliberately adds certain objects,—such as "commerce"—which were not usually mentioned in the judicial formulations of charity in England. It is, however, possible that the mention of "commerce" was suggested by the enumeration, in the preamble to the Statute of Elizabeth, of certain objects, such as the "repair of bridges, ports, havens, causeways.....sea banks and highways and the supportation, aid and help of young tradesmen, handicraftsmen...." Specific mention of "commerce", in any case, creates no anomaly, since the dominant requirement of the public object is very much there.

26.16. *Question of law*—It is to be noted that whether or not a trust is charitable is a question of law, and the same principle would apply to the construction of words referable to public benefit even in a statutory formulation. The question has to be decided by the judge in the light of the circumstances in which the institution or trust came into existence and the sphere in which it operates.[4] In arriving at his conclusion on this point, the judge is completely unaffected by the opinion of the settlor or testator as to whether the purpose which he has chosen is charitable or not. This has

1 *Morice* v. *Bishop of Durham*, (1805) 10 Ves 583.
2 *Income Tax Commissioners* v. *Pemsel*, (1891) A.C. 531, 583.
3 *Morice* v. *Bishop of Durham*, (1805) 10 Ves. 522.
4 *Incorporated Council of Law Reporting* v. *Attorney-General*, (1971) 3 All. E.R. 1029, 1033.

been settled long ago in England, and is the law in India. It is equally well settled that the opinion of the trustees in this respect is not binding.[1] It was on this principle that in the oft-cited case of *Hummeltenberg,*[2] Russel J. observed that trusts might be established in perpetuity for the promotion of "all kinds of fantastic (though not unlawful) object, of which the training of poodles to dance might be a mild "example.". Conversely, even if the motive of the stipulation is not necessarily that of generosity, the purpose may still be regarded as charitable if it is charitable in the eye of the law. In another case decided in the same year as *Hummeltenberg,* it was held[3] that a bequest to provide for the erection of a stained glass window in a church was charitable even though the motive of the testatrix was to perpetuate her memory and not to beautify the church or to benefit the parishianers.

26.17. *Vagueness*—The spirit and intendment of the Statute of Elizabeth has received considerable attention in recent times. In a case which arose in West Indies[4], a tax payer had covenanted to make an annual payment to a "Citizens Advice and Aid Service", and the issue before the court was whether this was a charitable purpose. Lord Wilberforce observed that the object of the service did not reveal any single dominant purpose of a manifestly charitable character and held that the trust was not charitable. This was primarily for the reason that the trust was expressed in language that was vague as to permit the property to be used for non-charitable purposes. In order that a trust may be valid under the fourth head of the enumeration in *C.I.T.* v. *Pemsel,* it must be for the purpose *sufficiently definite and specific* to enable the court to control and, if necessary, administer its application in a manner recognised as charitable.

26.18. *Public purpose*—The aspect of benefit of the community was given a wide construction in a fairly recent English case relating to Law Reports,[5] where it was held that the role which the Law Reports play in the development and administration of judge made law was a purpose beneficial to the community, since without them the administration and development of the law would be difficult, if not impossible.

26.19. *Recent cases*—As to the word "charitable" or "charity" appearing in a statute, after some vacillation, there has emerged a judicial opinion that a strong presumption exists in favour of their interpretation in a legal sense. In England, by this is meant the interpretation given by the House of Lords in *Income Tax Special Purposes Commissioners* v. *Pemsel*[6]. It was there laid down that the words "for charitable purposes" and "charity" have a clearly defined legal meaning in English (and, since that case, United Kingdom) laws, i.e., a meaning which is to be derived from that which the courts, including particularly the House of Lords in *Pemsel,* placed upon that expression by reference to the "index or chart" provided by the preamble to the Statute of Eliz. 1 (Charitable Uses Act, 1601).

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1 *Re Wooten's Will Trust* (1968) 2 All. E.R. 618.

2 *Hammeltenberg,* (1923) 1 Chancery 237, 242.

3 *Re King,* (1923) 1 Chancery 243.

4 *D'Aguiar* v. *Commissioner of National Inland Revenue,* (1970) 15 West Indies Reports 198; (1970) Tax Reports 31; (1970) Current Law 178 (P.C.); see 85 Taxation 286.

5 *Incorporated Council of Law Reporting etc.* v. *Attorney-General,* (1971) 3 All. E.R. 436.

6 *Income Tax Special Purposes Commissioners* v. *Pemsel.* (1891) A.C. 531.

We may now deal with a few important points concerning some of the heads of charity.

26.20. *Poverty*—"Poverty" has been dealt with in some of the judicial decisions : To quote Lord Evershed M.R.[1]

> "Poverty, of course, does not mean destitution. It is a word of wide and some what indefinite import, and, perhaps, it is not unfairly paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life and so forth."

As Lord Smonds observed,[2] "there may be a good charity for the relief of persons who are not in grinding need or utter destitution.... (but relief connotes need of some sort, either need for a home, or for the means to provide for some necessity or quasi-necessity, and not merely an amusement however healthy."

26.21. *Poverty and public benefit*—Poverty is the major anomalous head of charity for which the requirement of public benefit is not essential, or is, at least, greatly modified. The law of charity in relation to poverty has followed its own line, and a series of cases beginning with *Isaac* v. *Defriez*,[3-4] has established the validity of trusts for "poor relations", or other groups of persons who are not normally regarded as forming for this purpose a section of the community. Thus, a trust for the relief of poverty was held to be charitable in *Gibson* v. *South American Stores*, (Gath and Chayes, Ltd.)[5] where the beneficiaries were selected by the tie of common employment, and *in Re Young's Will Trusts*,[6] where there was a gift to the trustees of the Savage Club "upon trust to be used by them as they shall in their absolute discretion think fit for the assistance of may fellow members by way of persons or grants who may fall on evil days." The existing cases on this matter were considered by the Court of Appeal in *Re Scarisbrick*,[7] where, following life interests to her children, a testatrix gave half her residue to such relations, i.e., relations in any degree, of her children as should be in needy circumstances. It was held that the exceptional rule in relation to trusts for the relief of poverty applied just as much to a trust for immediate distribution as to a perpetual trust. It was pointed out, however, that it would be different where the trust was not for the relief of poverty, albeit among a class not normally regarded as forming a section of the public, but an ordinary gift to some particular individual or individuals, even though limited to the amount required to relieve his or their necessities if in necessitous circumstances—such as gifts to *named persons* in needy circumstances, or to a

1 I*n Re Coulthurst's Will Trusts,* (1951) 1 All. E.R. 774, 776 (1951) Ch. 661, 666 (C.A.) (Evershed M.R.).

2 *I. R. Commrs.* v. *Saddeley,* (1955) 1 All. E.R. 525, 529; (1955) A.C. 572, 585 H. L. (Lord Simonds).

3 Petit, Equity and Trusts.

4 a. *Isaac* v. *Defriez* (1754) 2 Amb. 595;
A.-G. v. *Price* (1810) 17 Ves. 571.

5 *Gibson* v. *South American Stores (Gath and Chaves, Ltd.)* (1949) 2 All. E.R. 985; (1950) Ch 177, C.A.; *Re Coulthurst's Will Trusts,* (1951) 1 All. E.R. 774; (1951) Ch. 661, C.A.

6 *Re Young's Will Trusts,* (1955) 3 All. E.R. 689.

7 *Re Scarisbrick,* (1951) 1 All. E.R. 822; (1951) Ch. 622.
Re Cohen, (1973) 1 All E.R. 889.

narrow class of near relatives, for example, such of a testator's statutory next of kin as at his death should be in needy circumstances. Most of the cases were reviewed by the House of Lords in *Dingle* v. *Turner*,[1] where the validity of the property exception was confirmed. Their Lordship agreed that it was a natural development of the "poor relations" decisions to hold as charitable trusts, for "poor employees" of an indvidual or company (the case before the House), or poor members of a club or society, and they held that it would be illogical to draw a distinction between different kinds of poverty trusts.

26.22. *Education*—"Education" has furnished a useful ground for controversy—we are dealing with the cases relating to education though the expression used in section 18 is "knowledge".

Schools of learning, free schools and scholars in universities are specifically mentioned in the Statute of Elizabeth, and many other educational purposes have been held to come within its spirit and intendment.

Education is not restricted to the narrow sense of a master teaching a class, but includes the education of artistic taste,[2] the promotion or encouragement of those arts and graces of life which are, perhaps, the finest and best part of the human character".[3]

Education includes the improvement of a useful branch of human knowledge and its public dissemination.[4] As Farewell, J. observed—"a ride on an elephant may be educational. At any rate it brings the reality of the elephant and its uses to the "child's mind, in lieu of leaving him to mere book learning. It widens his mind, and in that broad sense is educatonal."

26.23. *Knowledge*—It has since been explained[5] that education was used here in a wide sense "certainly extending beyond teaching, and that the requirement is that, in order to be charitable, research must either be of educational value to the researcher or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge, in an area which education may cover—education in this last context extending to the formation of literary taste and appreciation." It is not enough, however, that the object should be educational in the sort of loose sense in which all experience may be said to be educative.[6]

26.24. *Religion*—Advancement of religion is a separate head of charity, and this obviously is not confined to any particular religion. Even in England, it was not so confined. Romilly, M.R. observed in Thornton's case :[7]

"It is generally accepted that the Court of Chancery makes no distinction between on religion and another..... (or one sect and

1 *Dingle* v. *Turner* (1972) 1 All. E.R. 876; (1972) A.C. 610, H.L.
2 *Royal Choral Society* v. *I. R. Commrs.*, (1943) 2 All. E.R. 101, C.A.
3 Per Vaisey J. *in Re Shaw's Will Trusts*, (1952) 1 All. E.R. 49, 55; (1952) Ch. 163, 172 (the wife of G. Bernard Shaw).
4 *Incorporated Council of Law Reporting for England and Wales* v. *A.G.*, (1971) 3 All. E.R. 1929, 1046; (1972) Ch. 73, 102 (C.A.) (per Bucklay. L.J.).
5 *Re Hopkins' Will Trusts*, (1964) 3 All. E.R. 46. 52; (1965) Ch. 669, 680, per Wilberforce J. See (1965) 29 Con. 368 (M. Newark and A. Samuels).
6 *I. R. Commrs.* v. *Beddelep*, (1955) 1 All. E.R. 525, 529; (1955) A.C. 572, 585 (H. L. per Lord Simonds).
7 *Thornton* v. *Howe*, (1862) 31, Bear, 14, 19 (Romilly, M.R.) *Gilmour* v. *Coats*, (1949) 1 All. E.R. 848;
(1949) A.C. 427 (H.L.); *Re Watson, Hobbs* v. *Smith*, (1973) 3 All E.R. 678.

> another.... (unless) the tenets of a particular sect inculcate doctrines adverse to the very foundations of all "religion and .... subversive of all morality.... If the tendency were not immoral and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, the trust would nevertheless be charitable."

Of course, though *prima facie,* there is a presumption that religious purposes are charitable, in English law they are not regarded as so if they lack the vital element of public benefit. Apart from the probably anomalous case of relief of poverty, it is well settled in England that a trust will not be legally charitable unless it is for the benefit of the community or public or an appreciably important section of the community or public.

26.25. *Other objects*—Besides the objects specifically enumerated, other objects of public benefit fall within charity. These cannot be exhaustively enumerated, but the most important ingredient is of public benefit.

26.26 and 26.27. *Public benefit*—The question that usually presents some difficulty is one relating to the aspect of "public benefit". As Lord Gross pointed out in *Dingle* v. *Turner*[1]

> "After all, either a part of the public is composed of individuals and is susceptible of increase or decrease. No doubt, some classes will be more naturally described as sections of the 'public' than as private classes, while other classes are more naturally described as private classes rather than a section of the public. For example, the blind can naturally be described as a section of the public and not as a private class. On the other hand, the descendants of Mr. Gladstone might more reasonably be described as a private class. It is when one turns to large companies employing thousands of men and women, that difficulty arises. In Truth, then the question whether or not the potential beneficiary of a rust can fairly be said to constitute a section of the public is a question of degree."

> "Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, *prima facie* charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also *prima facie* charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public. In answering the question whether any given trust is a chartiable trust, the courts—as I see it—cannot avoid having regard to the fiscal privileges accorded to charities. As Counsel for the Attorney-General remarked in the course of the argument, the law of charity is bedevilled by the fact that charitable trust enjoy two quite different sorts of privilege. On the one hand, they enjoy immunity from the rules against perpetuity and uncertainty and though "individual potential beneficiaries cannot sue to enforce them the public interest arising under them is protected by the Attorney-General. If this was all, there would be no reason for the courts not to look favourably on the claim of any "purpose" trust

1 *Dingle* v. *Turner,* (1972) 2 Weekly Law Reports, 523, 535.

to be considered as a charity if it seemed calculated to confer some real benefit on those intended to benefit by it whoever they might be and if it would fail if not held to be a charity. But that is not all. Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer. Indeed, claims of trusts to rank as charities are just as often challenged by the revenue as by those who would take the fund if the trust was invaild. It is, of course, unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for the question whether a trust to further some purpose is so little likely to beenfit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions. The logical solution would be to separate them and to say—as the Radcliffe Commission proposed—that only some charities should enjoy fiscal privileges. But, as things are, validity and fiscal immunity march hand in hand and the decisions in the *Compton* (1945) Ch. 123 and *Oppenheim* (1951) A.C. 297 cases were pretty "obviously influenced by the consideration that if such trusts as were there in question were held valid, they would enjoy an undeserved fiscal immunity."

26.28. *Public benefit*—Benefit to the community is a very wide category. Law reporting has been held to possess public benefit in the context of charity.[1]

It must be agreed that law reporting could fall into the residual head of charity. Barwick, C.J.'s broad ground for so holding is—".... in modern times without the availability of law reports in book form the law could not be adequately administered ....The production of law reports is beneficial to the whole community because of the universal importance of maintaining the socially sustaining fabric of the law."

26.29. *Dharma*—There has been considerable discussion about the precise meaning of the word "dharma" which unfortunately, was misconstrued by the Privy Council.[2] Classical Sanskrit texts would seem to use this word—so far as proprietary disposition for *dharma* are concerned—as comprising both the types of charity—*ishta* and *poorta*.. There are, in fact, two verses of Manu[3] in support of this statement. One of these verses[4] has been thus translated by Dr. Buhler :

> "Let him always practise, according to his ability, with cheerful heart, the duty to liberality (*dandharma*) both by sacrifice (ishta) and by charitable works (*poorta*) if he finds a worthy recipient (of the gift)."

Then, it was pointed out by Subramania Iyer, J. in his dissenting judgement in a Madras case[5] that the principle of the injunction as to *poorta* works is service to fellow-beings, though some of the forms in which each

1 *Incorporated Council of Law Reporting Queensland* v. *Commissioner of Taxation* (1971) 45 A.L.J.R. 552, 555C.

2 *Ranchoddas* v. *Parvati Bai*, 26 Indian Appeals 71 (P.C.).

3 Manu, Chapter 4, Verses 226 and 227.

4 Buhler, Sacred Books of the East, Vol. XXV, page 164, verse 227.

5 I.L.R. 30 Mad 340.

service is rendered are peculiar to this country—"charity, like water, taking its colouring from the soil through which it flows."

26.30, *Amendments needed*—This brief survey was intended to bring out certain aspects of the law. While no changes of substance are needed in section 18, a few additions and modifications and amendments are required. In the first place, it is appropriate that the subject of "relief of poverty" should find a specific mention in the section. Relief of poverty has, not only in England but also in India, always been regarded as one of the paramount heads of charity and even though there may be no controversy on the subject, yet, having regard to the fact that all other heads are specifically mentioned in section 18, it is, in our view, necessary that this object should find mention in section 18.

26.31. *Recommendation to substitute "education for knowledge"*—As to the word "knowledge" which occurs in section 18, the word currently in use in judicial parlance is "education".[1] The statutory precedents have already been cited.[2] Education is obviously a much wider term than "knowledge"; and instead of leaving it to be covered by the residuary words in section 18 which embraces other objects beneficial to mankind, it is appropriate that the expression currently in use should be inserted. It could hardly be the intention of the legislature that education which is not "knowledge" should be excluded from the ambit of the beneficial provision in section 18. We recommend that "knowledge" should be replaced by "actionable claim".

Reasons restated—This recommendation[3] is subject to reservation by Shri Dhavan and Shri Sen-Verma. The recommendation is based on several considerations based on the fact that (i) Indian legislative precedents all use "education"; (ii) judcial decisions generally in the field of the law of charity employ, or confirm the use of, the expression "education"; (iii) "education" is not construed narrowly in the judicial decisions; (iv) to use both the expressions "education" and "knowledge" would be inappropriate, because it would cast a doubt on the other statutory precedents; (v) still, if any case is left out, the residuary words in section 18 will cover it.

26.32. *Recommendation to revise section* 18—In the light of the above discussion, we recommend that section 18 should be revised as follows :

Revised Section 18

> The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public *in the relief of poverty,* the advancement of religion, *education,* commerce, health, safety, or any other object beneficial to mankind.

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1 Para 26.22 and 26.23, *supra.*

2 Paras 26.7 and 26.10, *supra.*

3 Reservation of Shri Dhavan and Shri Sen-Varma, as to section 18.

CHAPTER 27

VESTED INTEREST

SECTIONS 19 AND 20

27.1. *Vested interest*—The provisions so far contained in the Act dealt with certain fundamental matters concerning the question and commencement of interests in property. Assuming that a valid interest is created, it becomes necessary to consider the nature of the interest that is, by the terms of the transfer, created. The most important question to be considered is whether the interest is a present one, or whether it is future one. In this connection, it may be recalled that in the scheme of the Act, a transfer of property can be made in present or in future. Since two alternatives as to the time of taking effect of the transfer are expressly permitted, suitable terminology had to be devised for dealing with the two situations and it was also necessary that appropriate rules be available for determining whether in a particular case the interest created is to be regarded as a present interest or as a future interest.

As regards the terminology, the Act employs the expressions "vested" and "contingent". Vested interests themselves are divided into two classes, which will be dealt with later.

First, as to vested interests, section 19 provides as follows :

> "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 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."

27.2. *Other provisions*—This is a definition of "vested interest". Section 21 defines the correlative "contingent interest". The term is used in the same sense in the Indian Succession Act, where a legacy is said to be vested in the interest when its payment or possession is postponed;[1] but when its vesting depends upon a specified uncertain event, the interest of the legatee is, until the condition has been fulfilled, "contingent".[2] It would equally serve as a definition of the term as used in the Indian Registration Act.[3]

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1 Section 119, Succession Act.
2 Section 120 Succession Act.
3 Section 17, Registration Act;
Abdool v. *Goolam*, I.L.R. 30 Bom. 304, 315, 316.

27.3 *Principle*—The difference between the two interests is that while a vested interest takes effect from the date of transfer and does not depend on a period or event that is uncertain, a contingent interest is contingent upon the happening of a *contingency which may or may not take place*—Whilst the one is unconditional, the other is solely dependent upon the fulfilment of the condition which may or may not be fulfilled. In the one, the transfer itself is immediate, but, in the other, there is no immediate transfer. The latter may develop into the former, but until it does so, it is uncertain.

The word "vested" is sometimes used as payable, as where the charges of members of a class or directed to be vested at a particular time[1], there being a gift over to the other members of a class of the shares of those dying before that time without issue. Thus, where A bequeaths to B 100 rupees, "to be paid" to him at the death of C, on A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.[2] But where an estate is bequeathed to A until he shall marry, and after that event, to B, B's interest in the bequest is contingent until the condition shall be fulfilled by A's marrying.[3] The law is said to favour the vesting of estates,[4] the effect of which principle seems to be that property, which is the subject of any disposition, whether testamentary or otherwise, will beolng to the object of the gift immediately on the instrument taking effect, or afterwards as such an object comes into being or the terms thereof will permit.[5]

27.4. *Two kinds of vesting*—Estates and interests may be (a) vested in possession—as where there is a present right to the immediate possession or enjoyment; (b) vested in interest—where there is a present indefeasible right to the future possession or enjoyment. Therefore, an interest may be vested, although there may not be a right to present possession, and it may be that the transferee may never enjoy possession or the vested right may subsequently be divested. Thus, where there is a gift to an infant with remainder over in the event of his dying under twenty-one, the infant has a vested interest subject to be divested on his death under age.[6] A subscriber who relinguishes his right of complete control, has still a vested interest in the money.[7]

27.5. *Explanation to section* 19—The Explanation to section 19 guards against an inference that may be made against the interest being vested from—(i) a provision whereby the enjoyment is postponed,[8] (iii) or whereby a prior interest in the same property is given or preserved to some other person,[9] (iii) or whereby income arising from the property is

1. *Williams* v. *Haythrone*, L.R. 6 Ch. 782.
2. Section 119, iii, (i) Succession Act, 1925.
3. Section 120, iii, (vi) Succession Act, 1925.
4. *Charlton* v. *Thompson* L.R. I.Sc. Ap. 232;
   Taylor v. *Graham*, 3 App. Cas. 1287.
5. *Maseyk* v. *Fergusson*, I.L.R. 4 Cal. 304.
6. *O'Mahoney* v. *Burdett*, L.R. 7 H.L. 388;
   Masevk v. *Fergusson*, I.L.R. 4 Col. 304;
   Branstrom v. *Wilkinson*, 7 Ves, 421.
7. *Das* v. *Secretary of Burma Oil, etc. etc.*, A.I.R. 1941 Rangoon 239.
8. *Kally Nath* v. *Chuder Nath*, I.L.R. 8 Cal. 878.
9. *Kaly Nath* v. *Chunder Nath*, *I.L.R.* 8 Cal 878.

directed to be accumulated,[1] or (iv) from a provision that on the happening of a particular event the interest shall pass to the another person.[2]

It will be seen that in no case mentioned above is the vesting contingent upon the happening of an uncertain future event.[3]

27.6. *Question of death*—Since death is a certain event though the time is not certain, it follows that an interest created in favour of a person on the death of another is one created "in terms specifying that it is to take effect on the happening of an event which must happen". Accordingly, such interest is to be regarded as vested, unless a contrary intention appears from the terms of the transfer.

In contrast, the words in the section dealing with vested contingent interest —section 21—are "a specified uncertain event." Where interest is given to A for life and after his death to B if B shall be *then living*, the interest given to B is not vested, but only contingent.[4]

27.7. *Obscurity as to cases of contingency of death*—This general criterion appears to be simple enough, but it would appear that there is some obscurity as to the precise position where the contingency is the death of the holder of the prior life estate. The ordinary rule would be that a gift to A on the death of B after termination of the life interest of B creates a vested interest in A even during the life time of B, because there is nothing more certain than death.[5] It is not always easy to decide whether a particular transfer discloses a contrary intention within the terms of section 19. The judgement of the Supreme Court in the case of Rajes Kanta Roy[6] in a case which illustrate *no contrary intention.* On the other hand, a Patna case[7] illustrates a contrary intention.

In the Patna case, a husband, by a taksimnama, provided as follows : "The property shall devolve upon B or *his legal heir* shall become the absolute owner of my property on the death of my wife." During the widow's lifetime, B sold the widow's property and B died during the life-time of the widow. The reversioner of the widow brought a suit for possession of the property. It was held that the case really came within the principle of section 24 (interest conditional on survivorship) and not section 19. and that the interest in favour of B was contingent and not vested, and *came to an end on his death during the life-time of the widow.* The sale made by him during the widow's life time therefore would not affect the reversioner's right over the property after the death of the widow. In coming to this conclusion the High Court relied primarily on the words "B or his heirs", holding that survivorship of B was a condition precedent *for vesting in B.*

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1. *Cossain* v. *Gossain*, I.L.R. 13 Bom. 463.
2. *Barnes* v. *Allen*, 1 Bro. C. C. 18; *Basant Kumar* v. *Ramsankar Ray*, I.L.R. 59. Cal. 859; *Lal Bahadur Singh* v. *Rajinder*, A.I.R. 1934 Oudh 161.
3. Gour.
4. Compare section 120, Indian Succession Act, 1925, illustration (iii).
5. Mulla (1973), page 133.
6. *Rajes Kanta Roy* v. *Shanti Devi*, (1957) S.C.R. 77; A.I.R. 1957 S.C. 255.
7. *Ram Chandra* v. *Jagadeshwara Prasad*, A.I.R. 1937 Patna 147 (Dhavle & Varma. JJ).

27.8. *Recommendation to amend section* 19—The correctness of this judgement of the Patna High Court is, with respect open to doubt. We think that it takes a view which might, in most cases, defeat the real intention of the transferor. When the transferor uses the words "B or his heirs" or words to that effect, the intention of the transferor, at least from the point of view of the layman, would ordinarily be that the interest should immediately vest in B— as a matter of "vesting of interest" as distinct from vesting in possession. The mention of the heirs does not indicate an intention that the survivorship is a condition precedent to the vesting of the interest in the abstract. It merely states the obvious situation as regards possession if B does not survive. This is precisely what happens at law in the case of vested interest—a gift vested in interest, though not in possession. To reach a contrary conclusion on the basis of an *assumed* different intention is hardly justifiable, since the assumption does not appear to be correct. It may be that the layman is not familiar with the distinction between vested and contigent interests, but once the distinction is introduced by the law, and the test of intention is made the crucial one, then it is better to take the view that if the refined scheme of the law had been before the transferor, he would, in cases of the nature under consideration, rather have preferred that the interest should be regarded as vested during the lifetime of the life estate holder. It is only when such a view is taken that the heirs of the beneficiary would be able to take the interest if the beneficiary dies during the continuance of the life interest.

We, therefore, recommend that the law should be laid down in terms contrary to what was held by the Patna High Court. It is, therefore, desirable to add a suitable Explanation to section 10,[1] providing that where the transferor uses the word ".....or his heirs" or words substantially to that effect, a contrary intention shall not be presumed, for the purposes of the section, merely from these words.

27.9. *Section* 20—The subject of vesting of interests in relation to persons *not living* at the date of the transfer is dealt with in section 20, in these terms :

> "20. Where, on a transfer of property, an interest therein is created for the benefit of a person *not then living*,[2] he acquires upon his birth, unless a contrary intention appears from the term of the transfer, a vested interest, although he may not be entitled to enjoyment thereof immediately on his birth."

The section is in harmony with the English law.[3] There is no section corresponding to this in the Indian Succession Act. So far as the Transfer of Property Act is concerned, an alternative placing of the section would have been after section 13 and 14, which deal with an interest created in favour of unborn persons. However, the present placing is also appropriate.[4]

27.10. *Principle*—Generally speaking, property cannot be transferred nor an interest therein created in favour of a person not in existence; but there are certain exceptions which the law allows in favour of unborn persons. These are stated or assumed in sections 13 and 14 and 20. The

1 This is not a draft.
2. Contrast the formula "in existence" employed in some other sections.
3. *Lewis* v. *Walters*, 6 East 336; *Goodright* v. *Jones*, 4 M. & Sel. 88; *Doe* v. *Dacre*, 8 T.R. 112.
4. See below.

effect of these sections, then, is that an interest created in favour of an unborn person will take effect upon his birth, in the absence of a contrary intention, provided that it does not *offend against* the rule as to perpetuities, and—as the law now stands—the interest extends to the whole of the remaining interest of the grantor.[1]

The only proposition this section is intended to enact, is that an interest created in favour of an unborn person will take effect, as a vested interests, even though the transferee may not have become entitled to an immediate enjoyment.[2]

27.11. *Need and significance*—It is to be noted that section 20 is subject to a contrary intention appearing from the terms of the transfer. This section is, in substance, based on the same principle as is the basis of section 19, namely, the policy of the law of favouring the vesting of interests. The general position as to transfers in favour of living persons is the subject-matter of section 19, which obviously could not apply to unborn person since, if that section is taken literarlly, the vesting takes place on the execution of the transfer. Obviously, this would not be appropriate in the case of an unborn person; hence the need for a specific provision as in section 20.

Of course, section 20 applies only where there is a "transfer". Relinquishment of an interest in a joint Hindu family in favour of unborn persons is not a "transfer of property", as it is only an extinction of the interest of the person releasing it.[3]

27.12. *Rights of unborn persons*—The fact that a person is unborn at the date of a transaction dealing with proprietary affairs which gives him no interest in the property dealt with by that transaction does not, of course, necessarily imply that the unborn person can claim no rights in the property. The position depends on the system of law by which the parties are governed. Consider, for example, the position regarding rights of sons born after partition in Hindu law. The favoured position[4] which a child in embryo thus occupies under the Hindu law in respect of partition and succession is by no means singular, for whatever may have been the law in early times, it is a rule generally adopted in mature systems of jurisprudence that a child in embryo is to be considered as born when it will be for its benefit so to be considered, although the question is not free from metaphysical difficulties whatever view we may adopt on the subject. In the Roman Law, existence was, for certain purposes, assumed to begin before birth. Thus, although upon the authority of Ulpian[5] : "The fruit of the body before it is born is part of the mother or the womb," and natural capacity for rights begins with the birth of men—that is, the complete separation of a living human being from the mother—yet Paul points out the ways in which the embryo in the mother's womb is recognised by law : "Attention is bestowed upon that which is in the womb, just the same *as if it had come to life*, whenever a question arises as to the embryo's own privileges, although in no way benefiting another before it is born."[6] "Our speaking of him whose birth is

1. *Cadell* v. *Palmer*, 1 Cl. & Fin. 372.
2. Gour.
3. *Anjaneyulu* v. *Ramayya*, A.I.R. 1965 A.P. 177, 183, para 17.
4. *Kusum Kumari* v. *Dasarathi*, A.I.R. 1921 Cal. 487, 488.
5 Dig 15, 4, 1, 1.
6 Dig. 1, 5, 7.

anticipated as though he were in existence, is correct when the question is as to his own right."[1] "The ancients paid regard to the child in the womb in such way that they maintained all rights in its favour intact until the time of birth, as may be seen in the law of inheritance."[2-3]

27.13. *Unborn persons*—In section 20 and subsequent sections, the expressions referring to the person not in existence should, of course, be so construed as to take into account of the legal doctrines relating to the position of a child in embryo. While the general rule that the vsteing will take place on birth certainly applies, an important consequence of the legal doctrine is that, as Blackstone put it[4]—

"An infant in *ventre semere* is supposed to be born for many purposes; it is capable of having a legacy or a surrender of a copyhold estate made to it; it may have an estate assigned to it and it is enabled to have an estate limited to its use and to take afterwards by such limitation as if it were then actually born."

27.14. *Impact of section* 13—Reverting to section 20, a Mysore case under section 20 illustrates how some misunderstanding exists as to the precise meaning of section 13[5] and its impact on section 20. In that case the donor, by a gift deed, transferred his property in favour of A, the then living son of the donor's daughter. In the same deed he directed that the property was to be enjoyed not only by A, but also by other sons who might be born by the donor's daughter, before A attained majority. B, another son, was born before A attained majority. A, however, alienated the entire property by a sale deed, and B sued for recovery of the half share of the property and mesne profits. The lower court rejected his claim on the ground that section 13 was infringed. Under section 13, so far as is material, where, on a transfer of property, an interest is created for the benefit of an unborn person "subject to a prior interest created by the same transfer", the interest in the unborn person must extend to the whole of the remaining interest in the property. The judgment was reversed on appeal. The High Court had to point out that section 13 had no application to the facts of the case. There was not a limited interest *followed by* the creation of an interest in favour of an unborn person. The grantor in this case had transferred property in favour of two persons in the first instance, one of whom was unborn. Since, under section 20, an unborn person on birth acquires a vested interest, he had a right to challenge the transfer. If our recommendation to delete section 13 is accepted,[6] such controversies will not arise.

27.15. *No change*—The above discussion does not involve any amendment in the section.

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1. Dig. 50. 16. 231.
2. Dig. 5. 4. 3.
3. See Markby's Jurisprudence 132; Holland's Jurisprudence, page 83; Sohm's Institutes (ledlie). Art. 20; Savigny System, Art. 62; Mackeldy's Roman Law (Dropsic) Art. 669; Salkowaki Roman Law (Whitefield), Art. 32; Goudemit Pandects (Could) Art. 21.
4. Blackstone, Commentaries, Vol. 1, page 130, cited by Mookerjee, J., in *Kusum Kumari* v. *Dasarathi*, A.I.R. 1921 Cal. 486, 490.
5. *Yasanthappa* v. *Channappa*, A.I.R. 1962 Mys. 98, 99, 100.
6. See our recommendation as to section 13.

CHAPTER 28

CONTINGENT INTERESTS

SECTIONS 21 TO 27

28.1. *Introductory*—In contrast with vested interests, which are disposed of in two sections only, the subject of contingent interests and allied subjects occupy seven sections. Most of these sections contain rules for determining in what cases an interest is to be regarded as contingent. They are mostly—but not exclusively—based upon the intention imputed by the law to the transferor.

28.2. *Rationale*—These rules for the construction of contingent interests, contained in sections 21 to 27, are mostly based on the underlying rationale that the law favours the *vesting* of estates and also that the law favours the *early vesting* of estates.

28.3. *Section* 21—*Analysis*—Under section 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 contigent interest in the property. This is the first proposition enacted in the section and the contingent interest described in the section is to be contrasted with the vested interest dealt with in section 19. The essence of a contingent interest is a contingency which may or may not happen—this is indicated by the word "uncertain" which occurs in section 21.

The second proposition enacted in section 21 is to the effect that such (contingent) interest becomes a vested interest when the specified uncertain event happens or when the specified uncertain event becomes impossible, as the case may be.

28.4. *Exception*—However, on the principle that the law always favours the vesting of estates, the section makes an exception concerned with interests contingent on age. 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, then under the Exception to section 19, such interest is not contingent. The Exception is based on an English decision[1] where Page Wood V.C. held that where the principal is given at a distant epoch and the income is given in the meantime, the court, leaning in favour of vesting, has said that the whole thing is given.

28.5. *Rule in England*—In England, the rule is well established by several decisions, of which we may mention only two,[2-3] that a gift apparently contingent must be held to be vested in interest where it is accompanied by a gift of the intermediate income or a direction for application of

1 *Pearson* v. *Dolmont,* Law Reports 3 Equity 321, discussed in *Cosavi* v. *Rivett Carnac,* I.L.R. 13 Bom. 463.

2 (1801) 6 Ves. 239.

3 (1839) 5 My and Cr. 125.

weighted with Ramesam J. in a Madras case[1] in holding that a bequest, by a testator leaving the estate to the grandson or grandsons who might be born within 10 years after the testator's death would be void under Hindu law, as there would be an interval of 10 years after the testator's death during which the estate is not vested in any person.

So far as Hindu law, apart from statutory provisions, is concerned, it is Mulla's view, relying on the judgement of the Privy Council in Gadadhar's case,[2] that after the decision of the Privy Council, the Madras view cannot be accepted as correct.

28.13. *Section* 23-*consider*—Let us now consider the text of section 23. On the one hand, the mandate in the last 22 words of the section to the effect that the interest fails unless such event happens before or at the same time as "the intermediate or precedent interest ceases to exist", has to be applied. On the other hand, it is not clear whether the expression "intermediate or precedent" covers the transferor's interest also. As a matter of construing the intention of the transferor, however, a contrary view would appear to be arbitrary, since one can assert that "every settler or testator intends the contingent remainder to take effect"—as was observed by Jessel M. R.[3]

There is, therefore, something to be said for taking the same view as Mulla has expressed.

28.14. *Property without owner*—If the difficulty of the property remaining without owner could be surmounted, there is much to be said for Mulla's view. It would appear that the difficulty could be surmounted by holding that until the contingency happens, the property remains in the ownership of the transferor,—we are taking a case where the very first gift is contingent one. On this view, the text of the section is also satisfied, because the "precedent" interest of the transferor has not yet come to an end.

28.15. *No change needed*—On the whole, we think that the language of the section could, and should, be construed as not ruling out a contingent interest dependent on an uncertain event not proceeded (by a "supporting" gift) and the technical rule of English law does not necessarily apply. Of course, the relevant contingency like the contingency attached to any other interest must fall within the perpetuity period and must comply with such other provisions as may be applicable. But no amendment is needed.

SECTION 22

28.16. *Gist*—Contingent interests in favour of members of a class are covered by section 22. Under section 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.

This sections corresponds to section 121 of the Succession Act,[4] which reads—

1. *Official Assignee of Madras* v. *Ved Vali*, A.I.R. 1926 Mad. 966 (Ramesam, J.).
2. *Gadadhar* v. *Official Trustee of Bengal*, A.I.R. 1940 P.C. 45.
3. *Qualiffe* v. *Brancker*, 3 Ch. D. 393, 399.
4. Section 121, Indian Succession Act, 925.

"121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy."

Illustration

A fund is bequeathed to such of the children of A as shall attain the age of 18, with a direction that, while any child of A shall be under the age of 18, the income of the share to which it may be presumed he will be eventually entitled, shall be applied for his maintenance and education. No child of A under the age of 18 has a vested interest in the bequest.

28.17. *Rationale*—Section 22 deals with gifts to a contingent class, and, therefore, it follows that, unless the condition of the transfer is fulfilled, the wishes of the transferor cannot be carried out. As observed by Rest, C.J.[1] unless the requisite age is attained, no child completely answers the description of those who are to be transferees. So, in England, a gift to children who shall have attained 21, or to such children as shall have attained that age is contingent, and no child before attaining that age can have a vested interest.[2]

28.17A. The rule in section 22 seems, in substance, to be an exception to the Exception[3] to section 21. Under the Exception to section 21, at least where there is a direction to apply the income for the benefit of a particular person until he attains a particular age on which the interest is to belong to him, the interest *is not contingent,* while, under section 22, in such a situation the interest is contingent. In a similar manner, section 121 of the Indian Succession Act, 1925 overrides the Indian Succession Act, section 120.

28.19. *No Change*—The section seems to need no change.

28.20. *Section* 23—This takes us to section 23, which reads—

"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".

28.21. *Section* 23—Section 23 pre-supposes that there is a terminable antecedent interest and a subsequent contingent interest.[4] The object of the rule enacted in the section is to prevent an estate from remaining without an owner. It is on this principle that an artificial rule—artificial in the sense to be explained presently—is laid down in the section. It has often been thought[5] that the rule is a relic of the ancient rule relating to the creation of a contingent remainder.

The ancient rule was usually expressed in the maxim that every contingent remainder must have a particular estate of freehold to supoprt it.[6]

1. *Duffield* v. *Duffield,* 3 Bli, (U.S.) 216, 333.
2. *Bull* v. *Pritchard,* 1 Russ. 213.
   Leake v. *Robinson,* 2 Mer. 363.
   Thomas v. *Wilberforce,* 31 Beav. 299.
   Williams v. *Hawthorne,* L.R. 6 Ch. 782.
3. Para 28.4, *supra.*
4. Gour
5. *Abbis* v. *Burney,* 17 Chancery Div. 211, 229.
6. Gour.

When there was a tenant for life with several contingent remainders, the tenant for life might have, not only by death but by surrender or other methods, determined or terminated his own life interest before the remainder vested. In such cases, it became necessary to have trustees appointed to preserve the contingent remainder. If, therefore, the estate for life determined otherwise than by death, then for the residue of his natural life, the trustees would take possession. To avoid such consequences, the rule seems to have been evolved. This rule, however, produced arbitrary consequences, and was not much favoured in England even at the time when the rule was inforce.

28.22. *No need for supporting interest*—We have already[1] stated that the assumption that a contingent remainder cannot be created without a supporting precedent interest does not appear to be true of India. One must, therefore, read the words "if any" after the words "intermediate or precedent", in regard to cases where the very first gift is contingent. Where no precedent interest is crated, and the case is one of the first gift, these words do not come in the way. Nor does the section apply where a time is fixed.

No change, of course, is recommended in section 23.

28.23. *Section* 24—Section 24 reads—

> "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 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 the surviver of them. C dies during the life of B. D survives B. *At B's death* the property passes to D".

28.24. *Analogous Law*—This section corresponds to section 125 of—the Indian Succession Act,[2] which runs as follows :—

> "125. Where a bequest is made to such of certain persons as shall be surviving at same period but the exact period is not specified, the legacy shall go to such of them as shall be alive at the time of payment or distribution, unless a contrary intention appears by the will.
>
> *"Illustrations*
>
> (i) Property is bequeathed to A and B, to be equally divided between them, or to the survivor of them. If A dies before the testator, and B survives the testator, it goes to B.
>
> (ii) Property is bequeathed to A for life, and after his death to B and C, to be equally divided between them, or to the survivor of them. B dies during the life of A; C survives A. At A's death the legacy goes to C.
>
> (iii) Property is bequeathed to A for life and after his death to B and C, or the survivor with a direction that of B should not survive the testator,

1. See discussion as to section 21, para 28.13 to 28.15 *supra*.
2. Section 125, Indian Succession Act, 1925.

his children are to stand in his place, C dies during the life of the testator; B survives the testator, but dies in the lifetime of A. The legacy goes to the representative of B.

(iv) Property is bequeathed to A for life, and after his death to B and C, with a direction that, in case either of them dies in the lifetime of A, the whole shall go to the survivor. B dies in the lifetime of A. The legacy goes to the representative of C."

28.25. *Principle*—Section 24 enacts a rule of construction and as Mulla observes, in best explained by the following passage from the judgment of Turner, L. J., in *White* v. *Baker* :[1] "Where there is a bequest to A for life and after his death to B and C or the survivor of them, some meaning must, of course, be attached to the words "the survivor". They may refer to any one of three events—to one of the persons named surviving *the other,* or to one of them only surviving *the testator,* or to one of them only surviving the *tenant for life,* and in the absence of any indication to the contrary, they are taken to refer to the latter event as being the more probable one to have been referred to".

28.26. *English law*—The rule enacted in section 24 is generally in accordance with the English law, but it may be noted that the words "unless a contrary intention appears from the terms of the transfer" allow a wider latitude for construction. It may also be noted that such an interest does not vest before the occurrence of the event and therefore, the provision in section 19 relating to a vested interest will not apply. The interest to which section 24 refers is interest created to a contingent class which is to be ascertained at the time when the intermediate or precedent interest ceases to exist—the time which is described in the corresponding section in the Succession Act[2] as the time of payment or distribution.

28.27. *Rule of construction*—Section 24 is, to a large extent, a rule which construes the expression relating to survivorship as used in the *instrument of transfer.* Thus, under the illustration to the section, property is given to B for life and after his death to C and D equally to be divided between them or the survivor of them. Here the instrument does not mention the *period with reference* to which survivorship is to be ascertained. The law creates the test of survivorship *at the termination of the precedent interest* of B. Therefore, if D survives B, the property passes to D. There is, of course, greater need for such a rule of construction in the case of wills, since one of the competing events in the case of a will is the date of death of the testator. The significance of section 24 lies in filling up the date for ascertaining survivorship, when it is not mentioned in the transfer. If the date is mentioned, the case falls within the last 11 words of the section which take notice of a contrary intention.

We have no further comments on the section.

28.28. *Section* 25—*Principle*—The importance attached by the law to the intention of the transferor as expressed in the deed, granted the legality of the terms expressing that intention, *basic.* As far as possible the law will not make a new transfer, for if he has expressed his intention not in an unconditional transfer but in the creation of an interest subject to a condition, the condition must be respected. There may sometimes be other considerations—such as, that an estate once *vested is not easily divested*—

1. *White* v. *Baker,* (1860) 2 De G. F. & I 55, 64.
2. Section 125, Indian Succession Act, 1925; *supra.*

which operate to balance the importance attached to the transfer. But, the interest must first vest on the terms stipulated by the transferor. If therefore the condition cannot be upheld, the transfer subject to that condition cannot be upheld.

28.29. *Section* 25—*Gist*—This is the principle underlying section 25. Under section 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. There are four illustrations to the section, which take familiar and not difficult cases of impossibility or illegality of conditions. The section carries out the policy incorporated in section 6(h)(ii) under which no transfer can be made for an object or consideration which is unlawful within the meaning of section 23 of the Indian Contract Act, 1872. It has been pointed out in the commentaries that the conditions referred to in the section are conditions which, as agreements, would be void under sections 23, 26, 27 and 56 of the Indian Contract Act.[1]

28.30. *Effect of impossible condition*—The section refers to conditions precedent, in contrast with section 32 which makes a provision for conditions subsequent which are void. The distinction is important, because where a condition precedent is void, the transfer does not take effect, while where a condition subsequent is void, the transfer takes effect and the condition subsequent is to be disregarded.[2] A surprisingly unusual instance of an impossible condition is furnished by a Calcutta case,[3] in which the testator left a legacy on condition that the legatee should excavate a tank. The testator, however, himself excavated the tank before his death. The bequest, it was held, failed. In this case, performance of the condition was regarded as the "motive" of the bequest, so that impossibility barred the claim of the legatee. The English law as to illegal conditions also appears to be substantially the same. If the condition precedent to a transfer is illegal, then the transfer is void.

28.31. *Verbal change needed*—Only a verbal change seems to be required in section 25, to make it clear that it deals with a *condition precedent*. The general topic of contingent interest is dealt with in section 21 which, so far as is material, provides that "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". That condition is not confined to events independent of the will of the party—compare the illustrations to section 120 of the Indian Succession Act, illustrations (vi), (vii), (viii) and (ix). Accordingly, section 25 should also be taken as a species of contingent interest. We recommend that in section 25, for the words "and dependent upon a condition", the words "*and intended to take effect on a condition*" should be substituted

1. Mulla, (1973), page 148.
2. *Ram Sarup* v. *Bala*, (1884) I.L.R. 6 All. 313 (P.C.).
3. *Rajinder Lal* v. *Marnalinidasi*, A.I.R. 1922 Cal. 116.

28.32. *Civil law*—It would apepar that the position in civil law is different with respect to legacies of a personal estate. The rule of civil law[1] is, where a condition precedent is originally impossible or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest or its impossibility was unknown to the testator or the condition has become impossible by the act of God or where it is illegal as involving *malum in se*, the civil law agrees with the common law in holding both the gift and the condition void.

This rule of the civil law was applied in England in the case of Re Elliott,[2] where the condition was not *malum in se*. The condition was avoided and the gift took effect free from the condition.

28.33. *Impossibility as known to the transferor*—So far as impossibility is concerned, it is quite likely that if the transferor had known of the impossibility, he would still have maintained the transfer. Since, however, all such questions are difficult to determine on facts, the law seems to have treated all cases of impossibility on the same footing. In this connection, attention may be drawn to the more restrictive language in the first paragraph of section 56 of the Indian Contract Act, under which an agreement to do an act impossible *in itself* is void. As regards supervening impossibility or illegality, that section (in its second paragraph) provides that the contract becomes void when the act becomes impossible or unlawful. The leading case on the subject is still the case of *Satyabrata*.[3] a judgment of B. K. Mukherjea J., as he then was. The law on the subject would appear to be still "in the process of evolution"—a statement made by A. L. Corbin long ago, but still substantially true.[4]

28.34. *Recommendation*—In the result, the only change needed is a verbal one already mentioned.[5]

28.35. *Section* 26—That the law has regard to the substance of the matter and not to its minutiae, is a principle often met with in judicial decisions construing statutory provisions. This principle, in its application to the vesting of property, finds express recognition in section 26. Accordingly, that section, in regard to conditions precedent, has regard to the substance and not to the form.

This is what the section provides—

> "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."

There are two illustrations to the section—

"(a) A transfers Rs. 5000 to B on condition that he shall marry with the corsent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.[6]

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1. Jarman on Wills, 4th Edition, Volume 2, page 12, cited in *Moors*, (1888) 39 Chancery Division 116, 128.
2. *Re Elliott*, (1952) 1 All. E.R. 145, 148.
3. *Satyabrata* v. *Mugnee Ram*, A.I.R. 1954 S.C. 44.
4. A. L. Corbin, "Recent Development in Contracts", (1937) 50 Harvard Law Review 459, 465 466.
5. Para 28.31, *supra*.
6. This also illustrates partial supervening impossibility. Contrast section 25.

(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."

28.36. *Analogous law*—This section closely corresponds to section 128 of the Succession Act, which runs as follows :—

"128. Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with."

"Illustrations

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C, D and E. A marries with the written consent of B, C is present at the marriage. D sends a present to A, *previous to the marriage.* E has been personally informed by A of his intentions, and has made no objections. A has fulfilled the condition.

(ii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. D dies. A marries with the consent of B and C. A has fulfilled the condition.

(iii) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries in the lifetime of B, C and D, with the consent of B and C only. A has not fulfilled the condition.

(iv) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A obtains the unconditional assent of B, C and D to his marriage with E. Afterwards B, C and D capriciously retract their consent. A marries E. A has fulfilled the condition.

(v) A legacy is bequeathed to A on condition that he shall marry with the consent of B, C and D. A marries without the consent of B, C and D, but obtains their consent after the marriage. A has not fulfilled the condition.

(vi) A makes his will, whereby he bequeathes a sum of money to B, if B shall marry with the consent of A's executors. B marries during the lifetime of A, and A afterwards expresses his approbation of the marriage. A dies. The bequest to B takes effect.

(vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time, but not within the time specified in the will. A has not performed the condition, and is not entitled to receive the legacy."

28.37. *No change*—Both the sections are based on the principle that vesting is favoured. The above discussion discloses no need for amending section 26.

28.38. *Section* 27—Section 27 provides as follows :—

"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.

But 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.[1] 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."[2]

28.39. *Premises*—In the case of *Jones* v. *Westcombe,*[3] the testator had bequeathed a term of years to his wife for life, reminder to the child with whom she was believed to be pregnant *and if the child died under twentyone,* a third part of the term was to belong to his wife and the remaining two-thirds to certain others. Although the wife was not pregnant when the will was made, it was held that the devise to her was good. *Prima facie,* the testator is deemed to have intended that the second gift should take effect upon failure *in any manner* of the prior gift, though this can be displaced by proof of a contrary intention.

28.39A. *Comment on illustration*—Illustration (a) to section 27 is the English case of Avelyn.[4] In the case put in the illustration, failure of the interest sought to be created in favour of B is due to the death of B before time had arrived for performance of the condition laid down to avoid failure.

With this, one should contract the stricter approach adopted[5] in regard to conditions precedent whose performance is impossible—in section 25. If the condition in section 27, illustration (a), is a condition precedent, then the question arises whether section 25 is confined to initial impossibility.

If section 27, illustration (a), is regarded as contemplating a condition subsequent, then the section does not appropriately cover them; see the word 'failure'. Conditions subsequent are dealt with in later sections. It would then appear that while performance of a condition inherently impossible is governed by section 25, performance of a condition which subsequently becomes impossible is covered by section 27.

Section 27, illustration (b) also is taken from an English case.[6] It raises the interesting question of *commorientes* (persons dying in a natural

1. This is also a situation of supervening impossibility. It illustrates the first paragraph.
2. Illustration (b) illustrates the second paragraph.
3. *Jones* v. *Westcombe,* (1711) Precedents 316.
4. *Avelyn* v. *Ward,* (1750) 1 Ves. 420.
5. Section 25
6. *Underwood* v. *Wing* (1885) 4 De. G.M. & Y 633.

calamity or other disaster, making proof of survivorship impossible). This topic has been the subject-matter of interesting debate and legislative reform in the law of evidence, and has also been considered in our Report on the Evidence Act.[1]

28.40. *Valid gift*—Section 27 of the Act (and section 129, Succession Act) seem to contemplate failure of a valid gift,[2] otherwise the matter would be governed by section 16 of the Act (section 116, Succession Act).

28.41. *Intention*—The rule laid down in this section will not apply if the testator has expressed a contrary intention.[3] Section 130, Succession Act, indicates an exception to this rule. In the Transfer of Property Act, the rule and the exception are both embodied in one section.

28.42. *Section* 27—Roper on Legacies,[4] contains the following statement :

> "It is a general rule of the common law, *applicable to real estates,* that where an interest is so devised "as only to arise upon a preceding condition, it cannot vest until that condition be performed, or the event happen, upon which it is given. This rule has been acknowledged and acted upon ever since the time of LORD COKE. The principle is, that there is no devise until the happening of the event, of performance of the terms upon which the disposition is made; a principle which applies to every case, so that although the condition require the performance of an impossible act, as for the devises to go to paris in half an hour, or it require the devises to do an illegal act, as to kill B, or to burn his house (conditions *male in se*); or whether it require a woman to separate from her husband (a condition against the policy of law); or whether the devise be made on condition that the legatee have criminal connection with a particular person (a condition *contra bonos mores*); the before stated principle authorises the conclusion, that, as all such conditions are void, the dispositions to arise only upon their performance are also void. But the rule of the civil law is different. . . .".

28.43. *Principle*—Where the intention of the parties can be clearly ascertained, effect is given to it, but otherwise, to prevent lapse, it is sufficient if their intention is substantially carried out. If the transferor provides against failure, the ulterior disposition will take effect in case of failure, although it may not have occurred in the manner contemplated by the parties. But where [as in illustration (b)] the intention is that the ulterior disposition will take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposiiton does not take effect unless the prior disposition fails in that manner. In such a case the failure of the prior interest in a particular manner is a condition precedent to the transfer, and must be fulfilled.

28.44. *Prior bequest*—The words "if the prior bequest shall fail" are important, for they indicate that if the prior bequest is void *ab initio* under section 113 or 114, the subsequent bequest will also fail under section 116. In other cases where the prior bequest is valid but fails, the ultimate bequest

1. Report on Evidence Act, Section 108A.
2. *Ismail Haji* v. *Umar Abdulla,* A.I.R. 1942 Bom. 155, 158 (Chagla J.).
3. *Jones* v. *Westcombe,* (1711) Prec. Ch. 316.
4. Roper, 4th ed. (1847), Vol. 1, p. 754.

is accelerated, e.g., in the English case of *Jull* v. *Jacobs*[1], there was a bequest to A for life and then to his children. The bequest to A failed, as he had attested the will. It was held that the bequest to the children took effect.

28.45. *Recommendation*—Incidentally, it may be noted that section 130, Indian Succession Act, 1925 is more precise, inasmuch as it repeats the word "particular" at the end also. The section, omitting the illustration, provides as follows :

"130. Where the will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest shall not take effect unless the prior bequest fails in that particular manner."

It may be desirable to add the word "particular" towards the end of section 27. This, of course, is a very minor change, which we recommend.

1. Jull v. Jacobs, 1976) 3 Ch. D. 703.

CHAPTER 29

CONDITIONS SUBSEQUENT

SECTIONS 28—30

29.1. *Introductory*—Where a qualification is annexed to an interest which provides that the interest shall take effect if the qualification is fulfilled, the case is one of a condition precedent which we have so far discussed. On the other hand, there may be created an interest to which a qualification is annexed whereby it is provided that the interest shall be transferred if a certain event happens or does not happen. The former types of conditions were dealt with in the last chapter and the latter type of conditions are now to be dealt with. They can also be called conditions subsequent—that, in fact is the terminology used in England, even where the interest entirely ceases and is not transferred to another person[1]. Conditions relating to events on the happening or non-happening of which the interest already created is directed to pass to another person, contemplate a prior disposition and an ulterior disposition[2]. The imposition of such conditions is permitted by the earlier half of section 28, subject to certain restrictions which are indicated in the latter half of that section.

29.2. *Section* 28—The section reads—

"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."

29.3. *Section* 28—*Case of duress*—Section 28 contemplates a literal transfer on the happening or non-happening of a certain condition. Since this is a condition of forfeiture, it appears that if the condition cannot be fulfilled or is violated on account of duress, the forfeiture is not incurred. Thus, a testator by his will directed that if any of the female members of his family, either from misunderstanding or any other reason, should live in a place other than a holy place for more than three months except for pilgrimage, they should forfeit the rights under the will. The plaintiff, a widowed daughter-in-law of the testator and minor, was removed from the house of the testator by her maternal relations and brother with the aid of the police and had to reside for more than three months with her mother. It was held[3] that although the police help was properly and legally given, this was a plain case of duress at the time of leaving, and ought not to attract forfeiture.

29.4. *Policy*—Since the insertion of a condition subsequent has a divestiture effect, the law considers it desirable to provide that the condition must be strictly fulfilled. This is another example of the anxiety of the law to favour the vesting of estates and the preservation of estates already vested.

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1 Cheshire, Modern Law of Real Property (1972), page 314, Section I.
2 For these expressions, see sections 29 and 30.
3 *Tin Cowri* v. *Krishna*, I.L.R. 20 Cal. 15, 17.

29.4A. *No change*—No change is needed in the section.

29.5. *Section* 29.—While in the case of a condition precedent, substantial compliance is enough, the reverse is the position in the case of a condition subsequent. It is on this principle that section 29 provides that an ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

In the illustration to the section, A transfers Rs. 500 to B, to be paid to him on his attaining his majority or remarrying, 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.

29.5A. *Analogous law*—This section and its illustration correspond to the section and illustration (iii) of s. 132 of the Succession Act, which extends the same rule to bequests. The illustration to section 29 is adapted from the three illustrations to section 132. The English cases lay down an identical rule and furnish apt illustrations of the doctrine here codified[1].

29.6. *Principle*—This is in accordance with the English law where it is held that a condition subsequent must be strictly fulfilled[2]. It will not occasion forfeiture if the fulfilment of the condition becomes impossible[3], if it is reasonably fulfilled[4].

29.6A. *No change in section* 29—No change is needed in the section.

29.7. *Section* 30—Cases may arise—these are taken care of by section 30—where the same transfer makes a prior disposition which is valid and an ulterior disposition which is not valid. In conformity with the policy of the law that what is vested ought not be divested or affected by collateral factor unless there are weighty reasons, the provision in section 30 is to the effect that if the ulterior disposition is not valid, the prior disposition is not affected by it.

The illustration is as follows—

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

This section and its illustration correspond to section 133 and illustration (ii) of the Succession Act, which run as follows :

"133. *Original bequest not affected by invalidity of record*—If, the ulterior bequest be not valid, the original bequest is not affected by it.

Illustrations

(i) An estate is bequeathed to A for his life, with a condition superadded that, if he shall not, on a given day, walk 100 miles in an hour, the estate shall go to B. The condition being void, A retains his estate as if no condition had been inserted in the will.

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1 *Clavering* v. *Ellison*, 7 H.L.C. 707; *Kiallmark* v. *Kiallmark*, 26 L.T. Ch. 1; *Harvey Bathrurah* v. *Stanley*, 4 Ch. D. 272; referrd to in Gour.

2 *Wagstaff* v. *Crossly*, 2 Coll. 746; *Re Sander's Trusts*, 1 Eq. 675; *Clavering* v. *Ellison*, 4 Drew. 451 : 7 H.L.C. 707.

3 *In re Brown's Will*, 18 Ch. D. 61.

4 *Astley* v. *Earl of Essex*, L.R. 18 Eq. 290; *Wynne* v. *Fletcher*, 24 Beav. 430.

(ii) An estate is bequeathed to A for her life, and if she do not desert her husband, to B, A is entitled to the estate during her life, as if no condition had been inserted in the will.

(iii) An estate is bequeathed to A for life, and, if he marries, to the eldest son of B for life. B, at the date of the testator's death, had not had a son. The bequest over is void under section 105 and A is entitled to the estate during his life."

29.8. *No change*—No change is needed in the section.

CHAPTER 30

CONDITIONS OF DEFEASANCE

SECTIONS 31-32

30.1. *Introduction*—As distinguished from conditions which terminate an estate by transferring it from A to B, we have, in section 31, the situation of a condition which merely provides that the interest shall cease to have effect in case a specified uncertain event happens or does not happen. This, as we have already pointed out, is known in England as a condition subsequent. But, to distinguish it from those conditions which transfer the interest to another person, we can describe such conditions as conditions of defeasance, to bring out the narrower sense. They are dealt with in section 31. This is how the section reads :—

"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."

30.2. *English law—Theory of re-entry*—In England, the theory is that in all cases of this type, there vests in the grantors, his heirs and assigns a right of re-entry, the exercise of which determines the estate of the grantee.[1] Of course, an interest may terminate by the *very nature of its tenure*—for example, a life interest.

This is not a case of termination by "condition"; the very words which create the estate denote its quantum, extent and duration, because the utmost time for which the interest can continue is indicated. This is not concerned with a condition which specifies some event which, if it takes place during the time for which an estate continues, will defeat the estate. We are concerned with terms which while creating an interest, define its duration.

The word "condition" in this context seems to have a heritage of about 400 years. In a case reported in 1596[2], it was observed—

"And here is a condition, because there is not a new estate limited over, but the estate to which it is annexed is destroyed".

1 Cheshire, Modern Law of Real Property, (1972), p. 315.

2 *Sergeant Rudhalls case,* (1596) Savile 76 cited in Re : Hollis Hospital (1899) 8 Chancery, 540, 549.

It is needless to say that a condition precedent creates a future interest, while a condition subsequent is concerned with a present interest subject to determination.

30.3. *Duration*—It is not always easy to decide whether a particular term in the transfer imposes a condition subsequent, or whether it defines the duration of the estate. This seems to have created an interesting debate in England. For example, Williams[1] states : A devise to a school in fee simple "until it ceases to publish its accounts" creates a determinable fee (duration of the interest), whereas a devise to the school in fee simple "*on condition* that the accounts are published annually" creates a fee simple *defeasible by a condition subsequent.*[2] In the first case, the determination is automatic, while in the second case, according to the theory of the English law, a right of re-entry is given. The distinction is subtle; and, according to some writers, it is a mere matter of words. It may assume importance in practice only if the condition subsequent is void. A condition subsequent in the strict sense, when void, is disregarded, and the transfer takes effect as if the condition had not been imposed. On the other hand, a determinable interest fails altogether if the possibility of revertor is invalidated. To take a hypothetical though not very realistic situation to illustrate this distinction, a property is given to a girl "until she ceases to carry on prostitution" (an obviously immoral stipulation). If the condition is not regarded as a condition subsequent in the strict sense but as a limitation of the tenure defining its duration, then, it would seem that the transfer itself is void, at least according to the English law.[3]

30.4. *Principle*—The condition here mentioned is a condition subsequent, and must, it appears, be construed subject to the provisions of sections 14 and 23. It must not be invalid as laid down in section 32.

A gift to a person on condition that if he marries under the age of twenty-five without the consent of a person named, the estate shall cease to belong to him is valid under the section; and the donee will forfeit the estate if he breaks the condition[4]. A proviso that, if the donee becomes a nun she shall forfeit the estate, is similarly enforced[5]. Similarly, a clause in a gift deed executed by one V who was sentenced to transportation for life in favour of S on the eve of V's departure for Port Blair (the place for transportation), providing that in the event of V's return, all the properties gifted to S should revert to V, was held to be legal and enforceable.[6]

30.5. *Conditions repugnant*—The difference between a repugnant clause which is invalid and a clause of defeasance to which the Court will give effect, has also been pointed out often. We cannot do better than quote the words of Chitty. J. In *Govindaraja's case*[7], where the court had

1 Williams, Real Property (1966), page 77.

2 Re : Da Costa, (1912) 1 Chancery 337.

3 Cheshire Modern Law of Real Property, (1972), page 318, (sub-paragraph (4). The hypothetical illustration is not taken from Cheshire.

4 S. 134, ill. (b), Indian Succession Act, 1925.

5 Section 134, Indian Succession Act, 1925, ills. (d) and (e).

6 *Venkatrama v. Aiyaswami,* 43 M.L.J. 340.

7 *Govindaraja* v. *Mangalam Pillai,* A.I.R. 1933 Mad. 80; 63 M.L.J. 911, 913

to construe a pre-nuptial settlement by a husband in favour of his wife in the following terms :

> "I have accordingly given you the undermentioned properties valued at Rs. 1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers should take the properties".

The wife pre-deceased the husband, leaving no issue. The Judge, in giving effect to the claim of the brothers, observed :

"The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative".

30.6. *Case law*—There have been many cases in which the Courts, in construing a deed of gift or a will, have found that the earlier clauses of the document if read by themselves and without reference to the rest of the document would confer an absolute estate, but that subsequent clauses if, read with the earlier clauses, indicate that the intention of the donor or testator, as the case may be, was that the donee should have such a degree of power of disposing of the estate as should not be inconsistent with the subsequent enjoyment of the second donee on the happening of the specified uncertain event. The earliest, of these cases was that of *Bhoobun Mohini Debia*[1], where a Hindu granted a talook to his sister, K by a sanad in the following terms :

> "You are my sister; I accordingly grant you as a talook for your support the three villages H, P. and K. belonging to my zamindari, with all rights appertaining thereto at a jama of Rs. 361. Being in possession of the lands and paying rent according to the tabutjama, do you and the generations born of your womb successively enjoy the same. *No other heir of yours shall have right or interest.*"

The opinion of the Privy Council, delivered by Sir Robert Collier, was that these words, had they stood exclusive of the last sentence, would have conferred an absolute estate upon K, but the last clause cut down this gift so that in the event of failure of issue living at the time of her death, the estate was *to revert to the donor and his heirs, that there was* nothing in the condition repugnant to Hindu law, and, that as the uncertain event contemplated had not occurred, K, the sister was able to dispose of the property by will.

1 *Bhoobun Mohini Debia* v. *Hurrish Chunder,* (1879) 4 Cal. 23; 5 I.A. 139; 3 Suther 537; 3 Sar 815 (P.C.)

30.7. In *Sreemutty Soorjeemoney Dossoy*[1], a Hindu testator governed by the Dayabhag law devised all his real and personal estate among his five sons in equal shares. The will contained the following clauses :

"should any among my said five sons die, not leaving any son from his loins, nor any son's son, in that event neither his widow nor his daughter nor his daughter's son, nor any of them will get any share out of the share that he has obtained of the immovables and moveables of my said estate. In that event, of the said property, such of my sons and my son's son as according to their respective shares."

On the construction of the will that the uncertain event was a failure of male issue of any one of his sons at the time of the death of that son, it was held that the gift over was not inconsistent with the general principles of Hindu law, and therefore the gift over was valid. The precise terms of the first gift are not described in detail in the report.

This case[2] was explained by the Privy Council in the subsequent case of *Kristoromoni Dasi*[3].

30.8. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift.[4]

30.9. *No change*—No changes are needed in the section.

30.10. *Section* 32—*Invalid condition*—Under section 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.

30.11. *Principle*—This section is the same as section 135 of the Succession Act. The section merely lays down that a condition must be valid before it can operate. Section 25 enumerates the conditions that are valid. An invalid condition precedent invalidates a transfer, though an invalid condition subsequent does not.

30.11. *No change*—The section needs no change.

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1 *Sreemutty Soorjeemoney Dossoy* v. *Denobundoo Mullick* (1861—63) 9 MIYA 123, I Sar 837 (P.C.)

2 *Sreemutty Soorjeemoney Dossoy* v. *Denobundoo Mullick*, (1861—63) 9 MIYA 123, 1 Sar 837 (P C).

3 *Kristoromoni, Dasi* v. *Narendro Krishna Bahadur*, (1889) 16 Cal. 383-16 IA 29-5 Sar 285 (PC).

4 *Jotendromohan Tagore* v. *Gunendra Mohan Tagore* (1872) IA Sup vol. 47—49 Beng LR 377-18WR 359-2 Suther 692-3 Sar 82 (PC).

CHAPTER 31

TIME FOR PERFORMANCE

SECTIONS 33-34

31.1. *Introduction*—Transfers of property are sometimes conditional on the performance of an act by the transferee. The transfer may not specify the time of performance, or it may specify such time. The first case is dealt with by section 33, and the second case by section 34. In the first case, the condition may be a condition precedent or a condition subsequent. The case of a condition subsequent is the case which section 33 has in mind, vide the use of the words "condition is broken", and the illustration to the corresponding section 136 of the Succession Act. The case of a *condition precedent* is not dealt with by section 33, and must be left to be dealt with by the general rule[1] as to contingent interest under which, until the condition is performed, the interest will not vest.

The language of section 34 which deals with cases where time *is specified,* is, in contrast, wide enough to cover both the types of conditions.

31.1A. *Section* 33—*Transfer conditional on performance of act, no time being specified for performance*—Section 33 provides that 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.

31.2. *Analogous law*—This section corresponds to section 136 of the Succession Act, and section 34 of the Contract Act[2].

The two illustrations appended to section 136 of the Succession Act are instances of cases (i) when the fulfilment of the condition is rendered impossible and (ii) when its fulfilment is indefinitely postponed[3]. These illustrations run as follows :—

Illustrations

"(i) A bequest is made to A, with a proviso that unless he enters the Army, the legacy shall go over to B. A takes Holy Orders, and thereby renders it impossible that he should fulfil the condition. B is entitled to receive the legacy.

(ii) A bequest is made to A, with a proviso that it shall cease to have any effect if he does not marry B's daughter. A marries a stranger and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect."

31.2. *Principle*—The principle embodied in this section is the same as discussed in the discussion under the preceding sections. In this

1 Section 21, first two sentences.

2 Gour.

3 Gour.

section the contingency is only the act of the person on which the transfer depends, and the transfer fails on account of his own act.

31.3. *English law*—Illustration (ii) to section 36, Succession Act quoted above,[1] is not in consonance with the English law on the subject. Thus, in a case[2] where a testator, after giving certain legacies to J and M, added—"If either of these girls should marry into the families of G or R, and have a son, I give all my estate to him for life (with remainder over); and if they shall not marry", to other persons. Lord Thurlow held this to be a condition precedent; and that nothing vested in the devisees over, while the performance by J and M was possible, which was during their whole lives; and that their having married into other *families did not preclude the possibility* of their performing the condition, as they might survive their first husbands.[3]

31.3A. *No change*—No change is needed in section 33.

31.4. *Section* 34 *Transfer Conditional on performance of act, time being specified*—Where the time for performance of the act is specified, the matter is dealt with by section 34, as under.

> "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."

31.5. *Fraud*—In order to constitute fraud, there must be some abuse of a confidential position, some intentional imposition or some deliberate concealment of facts.[4] The term 'fraud' has been this defined in the Indian Contract Act[5].—

17. "Fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) The suggestion, as to a fact, of that which is not true, by one who does not believe it to be true;

(2) The active concealment of a fact by one having knowledge or belief of the fact;

(3) A promise made without any intention of performing it;

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1. Para 31.1, *supra*.
2 *Randall* v. *Payne*, 1 B.C., C. 55.
3 2 Jarm 3; see also *Lester* v. *Garland* 15 Ves. 248.
4 *Dean* v. *Thwaite*, 21 Beav. 621.
5 Section 17, Contract Act.

(4) Any other act fitted to deceive;

(5) Any such act or omission as the law specially declares to be fraudulent.

"Explanation :—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech".

31.6. *Width*—This definition of fraud, however, is by no means exhaustive. Indeed, of fraud no definition is possible. It is infinite : *crescit in orbe dolus.*[1] Fraud may be positive or constructive. In the latter category, the term is used in its widest sense as embracing such acts or contracts, as, though not originating in any actual evil design or contrivance to perpetuate fraud or injury upon others, yet, by their tendency to deceive or mislead, or to violate public or private confidence, or, to injure the public interests, are equally reprehensible with positive fraud. and therefore, equally prohibited.[2]

31.7. *Scope*—Section 34 is general and would apply equally to a condition *whether precedent or subsequent.*[3]

31.8. *Principle*—The justification for the rule is the broad principle that no man can take advantage of his own fraud, or as Coke says : "Fraud *at dolus, nemini patrocinari debent."*[4] It is contrary to natural justice that a person who prevents a thing from being done should avail himself of the non-performance he has occasioned. The rule in the first place goes only so far as to undo the mischief attempted, where that can be done, and not to the extent of entirely dispensing with the observance of the condition, but where this would entail indefinite delay or inconvenience, equity regards it as done, what would have been done, but for the fraud of the adversary who is thenceforward precluded from taking advantage of it.[5]

No man shall gain a right by his own wrong, this does not imply that if he had a right independently of the fraud, he shall lose it, or the power of exercising it, by a wrong done in connection with it. The rule, again, is inapplicable where the right of a third party is to be affected. For a man cannot, by his wrongful act to another, deprive a third person of his right, against another.[6]

31.9. *No change*—No change is needed in the section.

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1 Gour.

2 Story Eq. Juris., 253.

3 *Sidhee Nusur* v. *Oojoodhyaram,* 10 M.I.A. 540; *Edwards* v. *Aberayon Mutual Insurance Society,* I Q.B.D. 563.

4 I.E. "Fraud and deficit ought not to be benefit any person" 3 co. 78. The same sense is conveyed by the maxim "Nullus commodum capere potest de injuria sua propria". (No one can take advantage of his own wrong.) So Ex dolo malo non oritur actio. (A right of action cannot arise out of fraud).

5 *Rooper* v. *Lane* 6 *H.L.C.* 443 (460, 461), In re : London Celluloid Co., 39 Ch. D. 190 (206).

6 Cf. C.108, Indian Contract Act (IX of 1872).

CHAPTER 32

ELECTION

SECTION 35

32.1 *Introductory*—Section 35 gives effect, though with a modification, to the doctrine of election. Where by a transfer property which does not belong to the transferor, is given to A and the same transfer gives another property to A, A must elect.

32.8 *Hypothetical case*—The position in regard to wills is the same. Suppose,[1] therefore, that Edward makes a will leaving £ 5,000 to Frank, and Frank's car, worth £ 2,000 to Geraldine. In this case, there are three possibilities open to Frank :

(a) he may disclaim the legacy under the will.[2] In this case he derives no benefit whatever from that gift and keeps his car;

(b) he may "take under the will", namely, accept the legacy of £ 5,000 and transfer the car to Geraldine; or

(c) he may "take against the will", namely, accept the legacy of £ 5,000 and retain the car, but pay to Geraldine £ 2,000 to compensate her for not receiving the car.

In both the second and third cases Frank is a net sum of £ 3,000 better off, and Geraldine receives either the asset or cash to the value of £ 2,000.

32.3 *Equity*—In our introductory discussion in this Report, we had referred to the fact that many of the provisions of the Transfer of Property Act have their genesis in Equity in England which were evolved in the Court of Chancery. Election furnishes an interesting example. This is incorporated in section 35—a principle which has been described by Lord Haldane[3] as "a principle which the courts applied in the exercise of *an equitable jurisdiction* enabling them to secure a just distribution substantially in accordance with the general scheme of the instrument".

This quotation from Lord Haldane shows that the paramount object is justice, and that literal compliance is replaced by substantial compliance in the interest of justice, taking care at the time that such action is in conformity with the general scheme of the instrument. The intentions of the testator or transferor are thus carried out and the expression thereof in the terms of the transfer is now moulded so that justice is done. The doctrine of election is rested usually on the rule that a person cannot accept and reject the same instrument.[4] This is a statement of another aspect of the rule which *shows why the* rule requires a person to elect.

32.4. *History*—The doctrine of election owes its origin to the civil law[5] By that law, a bequest of property which the testator knew to belong to another was not void, the legatee was entitled to recover from the heir

1. Illustration taken from Mellows, Law of Succession (1973), p. 485.

2 With the result that it is usually only prudent to disclaim where the value of the gift under the will does not exceed the value of the property to be given to the third party.

3 *Brown* v. *Greekson* (1920) A.C. 860, 868.

4 *Burmingham* v. *Kirwan*, (1805) 2 Sch. & Lef. 444, 450.

5 Story, Equity Jurisprudence, (1919) page 451, 1018.

either the subject of the bequest or, if the owner was unwilling to part with it for a reasonable price, its value. The heir, on his part, had the option of renouncing a burdonsome inheritance, for the heir could not accept the benefit offered by the will apart from its burden, nor, having accepted the former, could not discharge the latter by merely indemnifying the disappointed claimant, whom he was bound to satisfy to the extent provided in the will, irrespective of the benefit he had himself received.

32.4A *Need for election*—Why does need for election arise ? The need, it would appear, arises because, in the same instrument there is a duality of gifts or purported gifts. The two gifts cannot be given effect literally, and the law must evolve some just mode of giving them effect as far as possible. Where there is a gift of the donor's own property to E and also a gift of the property of E to a third person, an intention is implied that the gift to E shall take effect only if E *elects* to permit the gift to the third person also to take effect.[1] That the aspect of the *presumed intention* (and not the expressed intention) is important, would be clear from the fact that if a testator gives property subject to some *express condition* (for example as to abandoning a claim against the testator), the donee must elect in the sense of choosing whether to comply with the condition or totally lose the gift. This, however, is slightly different from the doctrine of election as it originated in equity. Again, if two gifts are made distinctly in the same instrument of *the property of the transferor* and one gift is beneficial while the other onerous, the doctrine of election (in the proper sense) does not compel the donee to adopt a particular course of action. He can take both, or he can accept the one which is beneficial and yet reject the onerous gift unless, of course, the intention of the transferor is to make the acceptance of one, a condition for the acceptance of the other. Such a case is outside section 35, which applies only when the transferor *professes to transfer property not his own.*

32.5 *Scope of section* 35—The case to which section 35 addresses itself is a narrow one. Where a person insists on transferring a property which he has no right to transfer and, as a part of the same transaction, confers any benefit on the owner of the property, it is then that the owner of the property professed to be transferred to a third person has to elect. The election is between confirming the transfer and dissenting from it. If he confirms the transfer, it takes effect in its entirely. If he dissents from the transfer, then certain consequences ensue,—(i) compulsory relinquishment of the benefit conferred (under the Indian law) subject to compensation by transferor in some cases, or (ii) liability imposed on that person (usually called the refractory donee) to compensate the disappointed donee, that is to say, the third person who does not get the very property which the transferor professed to transfer under English law. By a suitable arrangement, full effect is given to a donation of that which is not the property of the donor—not in a literal manner spelling out the terms of the transfer, but in a substantial manner. The arrangement is still based on carrying out in substance the intention of the transferor. The aspect of intention is brought out by Story[2] : Story takes the case where a testatory devises an estate belonging to his son to a third person, bequeating in the same will to his son a legacy of one hundred thousand pounds. "It would manifest that the testator intended that the son should take both, to the exclusion of the other devises and therefore he ought to be put to his election (as to)

1. *Noys* v. *Mordaunt,* (1706) 2 Vern. 581.
2. Story, Equity & Jurisprudence, (1919), page 450, paragraph 1076.

which he would take; that is, either to relinquish his own estate, or to compensate the party disappointed, or in the case of a testator his estate, out of the bequest under the will." Story[1] further points out that every case of election pre-supposes a plurality of gifts or rights, with an intention of the party who has a right to control one or both, that one should have a substitute for the other. The party has to make the choice—hence the word "election"—but he cannot enjoy the benefit of both.

32.6 *Choice*—The last-mentioned proposition has been taken substantially from Mr. Swanston's note to one of the early English cases.[2] The aspect of choice becomes significant in giving rise to the rule that for a binding election there must be a deliberate choice made with full knowledge of the rules relating to election and the relevant circumstances.[3] This is on the principle that if we exclude a party on the basis of his own election, it is necessary to show that he knew all the facts.[4] It is for this reason that an election made under a mistake of fact will not be binding.[5]

32.7 *Section* 35—In this background, we may now deal with the text of section 35, quoted below :

> "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 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.

Illustrations

The farm of Sultanpur 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 died before 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 own capacity, takes a benefit under the transaction, may in another dissent therefrom.

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1 *Story*, Equity & Jurisprudence, (1919), page 350, paragraph 1075.

2 *Dillon* v. *Parker*, (1883) 1 Swanston's 394 Note (b); 1 Cl & F 303;

3 *Wilson* v. *Thornburry*, (1865) 10 Chancery Appeals 239.

4 *Pread* v. *Norgan* 11 House of Lords cases 588.

5 *Kidney* v. *Coussmaker*, (1806) 12 Vos. 136.

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

32.8 *Compensation of forfeiture*—It is sometimes stated that the doctrine of election as incorporated in section 35 is based on forfeiture, unlike the English law which is based upon compensation. This is true to a large extent; but it must also be pointed out that even under section 35,—as is apparent from the third and fourth paragraphs,—while forfeiture takes place from the point of view of the refractory donee, yet the transferor or his heirs must compensate the disappointed donee, in certain cases specified in the section. The illustration to the fourth paragraph of the section makes this amply clear. In fact, the situations in which compensation is compulsory under the section cover most, if not all, of the situations in which justice requires that compensation ought to be made.

The only difference is that the compensation is to be made by the transferor or his representative and not by the refractory donee, unlike the position in English law and the liability is confined to the specified situations.

32.9 *Declaration of intention*—It is to be pointed out that the general and presumed intention of the transferor may be repelled by a *declaration in the instrument* of a particular intention inconsistant with the presumed

and general intention. This is the English law.[1] Though section 35 does not provide for such a case, Mulla[2] has expressed the view that the operation of the section can, in India, similarly be excluded by express words.[3]

One example of a provision giving effect to the contrary intention is already found in the Exception appearing after the 4th paragraph of the section, which corresponds to a similar provision in section 186 of the Indian Succession Act, 1925. The illustration to section 186, Succession Act, is as follows :

> "Under A's marriage-settlement his wife is entitled, if she survives him, to the enjoyment of the estate of Sultanpur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life, *in lieu of her interest in the* estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1,000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity, *but not the legacy of* 1,000 *rupees*".

A somewhat similar situation was also present in a Calcutta case.[4]

32.10 *No change*—Indian case law on the section has been gone through and discloses no need for amending the section.

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1 In re. *Vardon's Trusts* (1885) 31 Ch. D. 275., 279.

2. Mulla (1973) Comment on section 35.

3 Shephard and Brown, Tranfser of Property Act, note on section 35, referred to by Mulla.

4 *Pramada v. Lokhi* (1885) I.L.R. 12 Cal. 60

CHAPTER 33

APPORTIONMENT

SECTIONS 36-37

33.1 *Introductory*—The transfer of an interest in property sometimes raises problems, where the property carries income and the income is to be received from a third person. Such problems may arise either because of the creation of *successive* interests in property, or because of the co-existence of *concurrent* interests in property arising by reason of severance. In the first case, the chronological element becomes important. What are the respective rights of the predecessor and the successor? In the second case, the simultaneous co-existence of more than one beneficiary raises this question—What are the respective rights of the co-shares ? The first topic, conveniently described as "apportionment in point of time," is dealt with in section 36. The second topic, conveniently described as "apportionment in point of estate", is reserved for section 37.

33.2 *Section* 36—Apportionment of periodical payments in point of time, then, is the subject matter of section 36, which is condensed[1] from sections 2 to 4 of the (English) Apportionment Act, 1870.

Under the section, in the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the shape 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.

The section applies only where there is a transfer of property, though it relegates the words "upon the transfer of the interest" somewhere in the middle. What is transferred is the transfer of the interest of a person entitled to receive the specified payments, namely, rent etc. On such a transfer, it lays down the rule to be applied, *as between the parties to the transfer.*

33.3 *Meaning of apportionment*—Lord Coke remarked[2] that the word 'apportionment' cometh of the word *portio,* quasi *partio,* which signifieth a part of the whole, and "apportion" signifieth a division of a rent common, etc. or a making of it into parts. The term[3] is used in two senses; (i) to denote distribution of a common fund among the several claimants; and (ii) sometimes, to denote the contribution made by several persons having distinct rights to discharge a common burden. The words "rents, annuities, etc." here used, are nowhere defined in this Act or in the General Clauses Act. They are, however, defined in section 5 of the English[4] Statute in the following terms : "5. In the construction of this Act, the word 'rents' includes rent service, rent charge; and rent seek; and also tithes and all periodical payments or rendering in lieu of, or in the nature of rent or tithe. The word "annuities" includes salaries and pensions. The word 'dividends' includes (besides dividends strictly so-called) all payments made by the

1 Gour.

2 Co. Lt. 147-b. cited in Gour.

3 Story's Eq. Jur. (2nd Eng. Ed.) 305.

4 Apportionment Act. 1870.

name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed time or otherwise; but this does not include payments in the nature of a return or reimbursement or capital." It includes, however, occasional bonuses or surplus profits of the share-holders.[1] The phrase "as between the transferor and the transferee," implies that a stranger cannot apportion them, and the provisions expressed by "to accrue due from day to day", is only for the purpose of apportionment. Under the Bengal Tenancy Act, rent is not ordinarily regarded as accruing from day to day, but as falling due only at stated times according to the contract or tenancy of the general law[2].

33.4 *No change*—We have no changes to recommend in section 36.

33.5 *Section* 37—The subject matter dealt with in section 37 is apportionment by estate, in contrast with apportionment by time which was dealt with in section 36.

33.6 *Analysis*—The first proposition in section 37 lays down that when in consequence of a transfer, a 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. The second proposition makes the above rule subject to the proviso which requires that the duty must be a duty which can be severed and that the severance does not substantially increase the burden of the obligation. If the duty cannot be so 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.

This is yet another proviso, under which no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in the manner provided by this section unless and until he has had reasonable notice of the severance.

Finally, nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the official Gazette so directs.

33.7 *Illustration*—There are two illustrations to the section. In illustration (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.

This illustration illustrates the principal proposition laid down in the section as well as the first and the second provisoes. There is a duty in E to render the obligation to the several persons by breaking *up the amount,* but, so far as the *sheep* is concerned, the burden cannot be increased and it is for the owners to jointly designate the person in whose favour the obligation is to be performed. The illustration provides for notice, thus complying with the second proviso.

1 *Carr* v. *Griffith,* 12 Ch. D. 655.
2. Per Banerjee, J., in *Satyendra Nath* v. *Nilkantha* I.L.R. 21 Cal 383, 385.

Illustration (b) to section 37 takes the case where each house in the village being bound to provide 10 days' labour in 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 day's work in all, according to such directions as B, C and D may join in giving. This illustration lays emphasis on the fact that the burden is not to be increased by severance. It is not stated in the illustration, but it is assumed, that the ownership of the house of A was in consequence of a transfer, divided and came to be held in several shares by B, C and D.

33.8 *Easements*—This section is similar to section 30 of the Indian Easements Act, 1882 which refers to the effect of the partition of the dominant heritage upon an easement annexed to the dominant heritage. To take one of the illustrations to that section, A having in respect of a house an easement of light, divides the house into three distinct heritages. Each of these continues to have a right to have its windows unobstructed.

33.9 *Death*—Although section 37 does not deal with succession on death, that is, succession to property by several cosharers, it may be of interest to mention the position briefly. In India, on the death of the creditor, his numerous heirs are only jointly entitled to enforce the right which the deceased creditor if alive, could have singly enforced.[1] This also seems to be the English law, under which the debtor is not liable to as many claims as there are heirs of the promisee. The theory of English law is that the number of parceners constitute one heir and they are connected together by unity of interest and unity of title—unless of course, one of the heirs has received an authority from the other or others to enforce the share of the assigning heir also.

33.10 *English Law*—In England, certain special provisions seem to have been made in regard to leases where the reversion is severed.[2] But the general rule is as above.

33.11 *No change*—In this section also we have no changes to recommend.

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1 *Kandhiya Lal* v. *Chander*, I.L.R. 7 All. 313, 324 (F.B.) followed in *Ahimsa Bibi* v. *Abdul Khadir*, I.L.R. 25 Mad. 26.

2 Section 140, Law of Property Act, 1925.

CHAPTER 34

TRANSFER BY LIMITED OWNERS

SECTION 38

34.1 *Section* 38—With section 38 begins a group of sections which is concerned only with the transfer of immovable property. Of these sections, the first is section 38, dealing with transfer by a person authorised only under certain circumstances to transfer. According to Mulla,[1] the section would appear to be based on the leading case of Hanooman Prasad,[2] the principle whereof, laid down in the specific situation of the manager for an infant heir under Hindu law, has been regarded as applicable also to a Hindu widow or other limited heir,[3] and to transactions in which a father has made an alienation of an ancestral family estate.[4] The same principle applies to alienations by a Mahant or Shebait of property.[5] Though some of the situations have lost their importance because of the reform of the Hindu Law of succession, many of them have not, partly because the Hindu law of co-parcenership has not yet been modified and partly because the Hindu law of religious and charitable endowments has been left untouched by legislation so far as the limited nature of the power of Mahant or Shebait is concerned.

34.2 *Illustration*—The Ilustration to section 38 takes a familiar case, now obsolete, of a Hindu widow whose husband has left 'collateral *heirs*'—described in the text-books as reversioners—where the property held by her *as such widow* is insufficient for her maintenance and she agrees for purposes neither religious nor charitable to sell a field which is part of the property to B. Sale for the purpose of maintenance, it may be stated, is competent if there is a real necessity. The illustration further states that B satisfies himself by reasonable enquiry that the income of the property is insufficient for maintenance and the sale of the property is necessary. So satisfying himself and acting in good faith B buys the field from the Hindu widow. In such circumstances, as between the purchaser B and the widow and the reversioners, a necessity for sale shall be deemed to have existed.

34.3 *Crux*—The crux of section 38 lies in the expression "authorised only under circumstances in their nature variable to dispose of immovable property". This is the draftsman's way of describing what the Judicial Committee in *Hanooman Prasad's case* described as a limited and qualified power which can only be exercised rightly in the case of need or for the benefit of the estate, what is a case of need or which transfer is for the benefit of the estate must depend on circumstances which are in their nature variable.

34.4 *English law*—In England, a somewhat similar principle seems to have been followed in regard to transfer *per stripes*[6]. Ultimately, the rationale of the provision favouring the beneficial purchaser for value with-

1 Mulla (1973), page 179.

2. *Hanooman Prasad* v. *Mst. Bibee*, (1856) 6 Moores Indian Appeals 393, 423.

3 *Devi Prasad* v. *Gulal Bhagat*, (1913) I.L.R. 40 Cal. 721 (F.B.).

4 *Kameshwar Prasad* v. *Run Bahadur*, (1881) Law Reports 8 Indian Appeals 8.

5 *Niladri Sahu* v. *Mahantan Mahant Chaturbhuj Das*, A.I.R. 1926 P.C. 112.

6 *Societe General de Paris* v. *Walker*, 11 A.C. 20, 28.

out notice is protection against latent frauds perpetrated by the limited owner. This is not to say that any person can transfer the property of any other person. The section pre-supposes at least some right to transfer in the transferor, though that right is dependent on circumstances in their nature variable. The other conditions laid down in the section must also be satisfied in order to bring the rule of equity into operation. But neither good faith nor value nor reasonable enquiry will suffice to confer title where the transfer is by a person who has not a semblance of interest of property.

34.5 *No change*—The above discussions discloses no need to change the law.

CHAPTER 35

MAINTENANCE AND OTHER RIGHTS TO RECEIVE MONEY OUT OF PROFITS

SECTION 39

35.1. *Section* 39—The enforceability of certain rights connected with immovable property, though not directly amounting to an interest therein, is a topic which may arise in a number of situations. Of these, two are dealt with in the Act, namely, (i) right of maintenance and (ii) restrictive covenants on the use of land or obligations annexed to ownership, not amounting to interest or easement. These are contained in sections 39 and 40, respectively. They both speak of a "third person", but the third is not necessarily a person other than the transferor and the transferee. He could well be the transferor himself, at least in a case falling under section 40[1]. In fact, even under secton 39, one can well imagine a case where a person transferring property reserves the right to receive maintenance out of profits.

35.2. Coming to the text of section 39, it provides that where a third person has a right to receive maintenance, or a right to provision for advancement, or marriage, from the profits of immovable property, and such property is transferred, the right (to receive maintenance or to such advancement or provision for marriage) may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against the transferee for consideraton without notice of the right, nor against such property in his hands.

35.3. *Amendment of* 1929—Section 39 has been radically altered by the amendment of 1929. Under the old law, emphasis was laid upon the intention of defeating the right of maintenance etc., while under the present law, emphasis is laid on the element of notice. The mental element of the parties is irrelevant, except that the person against whom the right is sought to be enforced must have notice, or the transfer must be gratuitous. In short, the amendment renders it unnecessary for the maintenance holder to prove that the transfer was made with the intention of defeating the right[2].

There is a similar provision in the Hindu Adoptions and Maintenance Act, 1956, section 28 of which is modelled on section 39 of the Transfer of Property Act[3].

35.4. *Rights created by decree and rights amounting to charges—Scope of the section*—There appears to be some incompleteness in the language of the section on two questions which are of considerable practical importance, namely,—

(a) is it under the section, necessary that the right must be one in the form of a change ?

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1 **Mulla** (1973) p. 185, paragraph (2), third paragraph.

2 ***Ramamurthy*** v. *Kanakarathnam*, A.I.R. 1948 Mad. 205.

3 ***Kavari*** v. *Parmeshwar*. A.I.R. 1971 Ker. 216, 217 paragraph 3.

(b) is the section applicable to a charge created by decree ?

On the second question, we do not see any reason why the provisions legislature that the right should assume the form of a charge. In fact, it is a correct view—as was taken in a Nagpur case[1]—that section 39 is meant for rights which fall short of a charge. This is for the reason that enforcement of charges is a matter specifically dealt with in section 100.

On the second question, we do not see any reason why the provisions of section 39 should not apply to a right created by a decree not amounting to a charge enforceable under section 100. It is true that the Act, in general, does not apply to transfer by decree, but there are two weighty reasons why, in this particular case, a different approach could be adopted. In the first place, section 39 is not concerned with enforceability against a transferee by operation of law. The proposed amendment will not disturb that position, but will merely bring within the fold of the section rights of maintenance created by decree. Enforcement of the right will still be limited to a transferee by act of parties and, of course, will be subject to the other requirements of the section. Secondly, as a matter of policy, it is desirable that the beneficial provisions of this section should be extended to a transfer of a right created by a decree even if, in general, there may be any theoretical difficulty in extending a provision of the Act to transfers by decree.

We may incidentally mention that the question how far section 100 applies to decretal charges is one which we propose to examine[2] under section 100.

For this reason, we recommend that the following Explanation should be inserted below the section by way of making an amendment or clarification on both the points raised above :—

> "*Explanation.— This section applies also to a right created by a decree or order of a court, but not to a right* enforceable as a charge under section 100."

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1 *Ghasi Ram* v. *Kundan Lal,* A.I.R. 1940 Nag. 163, 165 (Stone C.J. & Vivian Bose J.).

2 To be considered under section 100.

CHAPTER 36

RESTRICTIVE COVENANTS AND OBLIGATIONS ANNEXED TO OWNERSHIP OF LAND

SECTION 40

36.1. *Introductory*—Questions concerning the rights of third persons may arise from covenants that are often entered into while transferring property. These covenants may impose a positive duty or a negative duty. The primary object in inserting such covenants, when property is transferred outright, is, in general, to preserve the saleable value of the residental amenities of the property of the transferor—though there may sometimes be other considerations not connected with the ownership or enjoyment of any particular property. Whether such a covenant is binding *qua* contract between the parties to the covenant personally is a matter which depends on the law of contract and, to some extent, on the provisions in the Transfer of Property Act relevant to the subject, of which sections 10 to 12 have been already considered. The question now to be considered is whether such a covenant entered into by a person, while transferring or accepting a transfer of property, can be enforced against a future transferee. In legal language, this question is concerned with the running of the burden of the convenant with the land. Conversely, when the person in whose favour the convenant was entered into—briefly, the beneficary—transfers the property—the question may arise whether the transferee can claim the benefit of the covenant. In legal language, the question is concerned with the running of the benefit with the land.

36.2. *Easement and leases*—This has been one of the most difficult matters in the law of transfer. In order to avoid discussion on matters about which there is no controversy, it is desirable to leave out of the discussion rules relating to two spheres of the law, namely, easements and covenants contained in leases. In general easements bind the servient heritage and permanently enure for the benefit of the dominant heritage, irrespective of who is the owner thereof.[1] As regards leases, again, normal covenants in a lease will run with the land and with the reversion. It was realised very early even by those who administered the common law that covenants contained in a lease might have a wider operation than ordinary contracts. They were, in a sense, regarded as being annexed to an estate in the land so that they could be enforced by any one who took that estate in the land.[2]

36.3. *Types of question arising*—Leaving aside these two matters, the possible queries that theoretically could be raised on the subject of transfer of the burden of a covenant could be fourfold :

(1) The transferee assigns his interests to A. Can A enforce the covenants inserted in the transfer in favour of the original transferee and binding on the original transferor ?

(2) The transferee assigns the interests to A. Can A be sued on the covenant inserted in the transfer binding on the original transferee.

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1 Cheshire, Modern Law of Real Property, (1972), pp. 578, 579.

2 Holdsworth, History of English Law, Vol. 3, page 158. See also Vol. 7, pages 287 to 292.

(3) The transferor assigns his interests to Z. Can Z enforce the covenants inserted in the original transfer and binding on the original transferee.

(4) The transferor assigns his interests to Z. Can Z be sued upon the covenants contained in the original transfer and binding on the original transferee.

There could, of course, be complex situations raising more questions than one. For example, A having made B enter into a covenant for the beneficial enjoyment of a property belonging to A, transfers the property to C. B in his turn transfers the burdened property to D. The questions to be considered would be—and this is not necessarily an exhaustive enumeration :—

(a) Can C enforce a covenant entered into for his predecessor's benefit ?

(b) Assuming that he can do so, can he do so against D who is not the original covenantor but his successor ?

36.4. *Act not comprehensive*—Unfortunately, the Act does not deal, in a comprehensive manner, with these questions in the manner set out above. This is partly due to the fact that the law on the subject was not in such a condition that a codification could be easily and confidently suggested. Partly, such an attempt was also, rendered unnecessary by the fact that some of the covenants concerning the sale of immovable property have been set out in section 55, and similar is the position regarding mortgages, the intention being that these covenants would not be affected by the transfer of the property, after the sale or mortage.

36.5. *General rule privity*—The general rule of the common law was that if there was privity of estate and not privity of contract, then only covenants which *concern the land* are enforceable. This rule became useful in relation to leases, mainly because privity of estate means that here is a tenure between the parties, that is, the relationship of landlord and tenant exists between them, though the contract was between the purchaser and the lessor.[1]

But if there is no privity of contract, nor of estate, then at common law, subject to two exceptions, no covenants are enforceable. The general rule is that covenants concerning the land are not, in the absence of privity of either type, enforceable. To this general rule, there were two important exceptions, namely, (a) the benefit of a covenant could be assigned with the land for the benefit of which it was made if the covenant was one which touched and concerned the land, for example, the grantor's covenant for title *concerning the land*. The benefit ran with the land conveyed, so that whoever is entitled to the land is entitled to the benefit of the covenant[2] Equity want further in enforcement of assignments of the benefits of the contracts generally, *whether or not connected with land*,—a matter now governed, as to the procedure, by statute both in England and in India. Thus, the benefit of a contract became assignable. But the burden remained unassignable at common law, except when there was privity of estate.

1 Williams, Real Property, (1966), page 725, paragraph 2.

2 Williams, Real Property, (1966), page 726, paragraph 3.

36.6. *Restrictive Covenants in equity*—Equity added another exception. It allowed the assignment not only of the benefit (as stated above), but also of the burden of *restrictive* covenants.[1]

36.7. *Restrictive*—A restrictive covenant is one imposing a negative obligation (for example, a covenant not to build), as opposed to a positive covenant (for example, a covenant to build); both the benefit and the burden of the restrictive covenant can run in equity only if there is both land which is benefitted and land which is burdened. And even this is subject to the qualification that a purchaser of a legal estate without notice takes it free from the burden. This qualification was based on the general principle[2] :—

> "Legal rights are good against all the world; equitable rights are good against all persons except a *bona fide* purchaser of a legal estate for value without notice ....."

36.7A. *Background of section* 40.—It is in this background that section 40 was enacted. The doctrine of equity relating to restrictive convenant was laid down in the leading case of *Tulk* v. *Moxhay*[3] and the provision in the first paragraph of section 40 is obviously based on that decision. There was, however, in 1882 one misconception as to scope of the rules as to enforcement of positive covenants, resulting from a misunderstanding of the observations made in *Tulk* v. *Moxhay*. This misconception was removed in later English cases, and in conformity with the later trend, section 40, first paragraph was enacted in 1929, so as to remove postive covenants from its scope. So, after 1929, the burden of a positive covenant does not run against the transferee from the covenant or except where a statutory provision governs the matter. This non-enforceability of a positive covenant has, of course, nothing to do with the position *as between the original covenantor and covenantee*. We have discussed[4] this aspect while considering section 11.

36.8 *Section* 40—*first paragraph*—Coming to the details of section 40, first paragraph, we may state that its gist can, in simple language, be expressed thus. Where, on a transfer of property a restrictive covenant (covenant to restrain the enjoyment of a piece of immovable property) is entered into, such covenant can be enforced against a transferee of that property with notice or without value, if intended for securing the beneficial enjoyment of another piece of immovable property of the covenantor. It may be noted that this proposition says nothing about personal covenants which do not purport to benefit the covenantee in the enforcement of immovable property whether such covenants are valid between the parties, and if so, whether they are enforceable against third persons who take the property from the covenantor are questions outside section 40. When they arise, they are to be determined with reference to the law of contracts and its rules relating to the legility of agreements and the assignments of contractual burdens.

36.9. Section 40—second paragraph—Section 40, second paragraph, dealt with an entirely different matter. It is not concerned necessarily with covenants entered into for the beneficial enjoyment of another

1 Williams, Real Property (1966), p. 726, paragraph 3.
2 Phill, Land Equity, 114, 115, referred to by Williams, Real Property, (1966), p. 119, paragraph 3.
3 *Tulk* v. *Moxhay*, (1848).
4 See discussion as to section 44.

piece of immovable property, reserved by the covenantee. Nor is it confind to covenants of a purely negative character. It devotes itself to "obligatons annexed to the ownership of immovable property, arising out of contract." These obligations do not, in postulates, amount to an interest in the property or to an easement therein. Nevertheless, the obligation can be enforced against the transferee of the property unless he be a transferee for value without notice. The word "obligation" emphasises the contractual element and is an apt word for another reason also—its enforceability only against a limited class of persons.

The principal examples of such obligations are—(a) the obligation resulting from a contractual right of pre-emption, and (b) an obligation undertaken by the owner of immovable property who has contracted to sell it.[1] This does not amount to an interest in property, but, can yet be enforced against a transferee with notice or without value.

36.10. *True position under section* 40—It would appear that the position is fairly clear after the amendment of 1929, which is based on the English law.[2] There was some difficulty before the amendment by reason of certain judicial decisions, holding that it was doubtful whether section 40 applied to affirmative covenants involving expenditure of money.[3] On the whole, the view prevailed that the first part of section 40 was not applicable to affirmative convenants[4] In view of this position, a further amendment of section 40 is not called for.

36.11. *Other provisions*—It should, however, be noted that section 40 does not deal with obligations which may be enforceable under some other provisions. There may, for example, be a charge created on the property, enforceability of which can be supported by reason of the specific provisions of section 100, even where section 40 does not apply.

36.12. *Case of attachment*—As regards the second paragraph of section 40, it was held in a Madras case[5] that the private sale of property pending attachment under a contract entered into prior to attachement confers good title even though the sale actually takes place after the attachment. This was on a construction of the term "transferee" in section 40 as including an *execution purchaser*. The matter, however, really pertains to the realm of procedure,[6] and need not be discussed in the present context.

36.13. *Multistoreyed buildings*—We have dealt with the implications and limitation of section 40, as it now stands. At this stage, it should be mentioned that need for legislation has often been felt in regard to multistoreyed residential or office accommodation which is now coming up in urban areas on an increasing scale. As was noted in the introductory discussion, many countries have enacted elaborate laws for regulating property rights in such cases. A fairly well-known example is the Conveyancing strata Titles Act, 1961, New South Wales. Legislation similar to it is in force in some other States of Australia and in Canada, Ceylon,

1 Section 54.
2. *Smith* v. *Colboural,* (1914) 2 Ch. 533.
3 A.I.R. 1925 Bom. 183, 185.
4 A.I.R. 1927 Cal. 41.
5 A.I.R. 1917 Mad. 4.
6 See section 64 of the Code of Civil Procedure, 1908.

Jamaica, Singapore and the U.S.A. To mention a few of the important provisons normally to be found in such legislation, a developer may adopt the device of registering a plan with the approval of the local authority—thereupon, the proprietors collectively become a corporate body which can sue and be sued, employ servant etc. and has powers for the management of the whole unit. Common property, such as, stair-cases, car-drivers and gardens, is held by the proprietors as tenants in common and they have easements of shelter, water supply and other services with rights of entry to do repairs in case of need. Such a scheme provides a more convenient range of proprietary rights and duties than the ordinary law of property. Where such a scheme recognised or regulated by statute is in operation the need for express comments practically disappears, and such limitations of the common law as are concerned with the enforceability of the burden of a covenant against assignees of the land are also modified to that extent.[1]

36.14. However, for obvious reasons, it is impracticable to introduce such detailed provsions in the general law of property which is codified in the Act. Legal difficulties in imposing obligations on future owners to keep a proper standards of repair, or to contribute to the cost of common services and amenities and so forth will, in the nature of things, have to be dealt with by special legislation.

Benefit and burden—We may also point out that apart from statutory developments, it is recognised even at common law that the person who takes a benefit under a deed must also accept its obligations. Upjohn J. in the case of *Halsall*,[2] in substance, hold that a long-standing obligation to contribute to the cost of maintaining roadways and other common amenities on a developed estate could be enforced against future purchasers. This decision was followed in a later case[3], and is based on the maxim that a person who wishes to take advantage of a service or facility must comply with any corresponding obligation to contribute to the cost of providing or maintaining it. In Latin, the maxim is *qui sentil commodum sentire debet et onus*.

36.15A. *Perpetuities*—Finally, we may state here that covenants, at least in Indian law, are not subject to the rule against perpetuities and they do not amount to an interest in land[4].

36.16. *No change*—In the result, no change is needed in section 40.

1 D. J. Hayton, "Restrictive Covenants as Property Interests" (1971) 87 L.Q.R. 539.

2 For comment see Megarry (1957) 73 L.Q.R. 154.

3 *E. R. Iyer Investment Ltd.* v. *High* (1967) 1 All. E.R. 504.

4 *R. Kempraj* v. *Burton Son & Co.*, A.I.R. 1970 S.C. 1872, 1875, para 8.

CHAPTER 37

TRANSFER BY OSTENSIBLE OWNER

SECTION 41

37.1. *Introduction*—To the general rule that only a person "competent to transfer" and "entitled" to transfer property can transfer property, the Act creates another exception in section 41. A transfer by a person who is not the real owner but only an ostensible owner of immovable property would, under the strict general rule of law, be ineffective. But, where the person concerned is an ostensible owner with the consent of the real owner, and the transfer is for consideration, a conflict of interests arises between the real owner and the transferee for consideration. Now, if the transferee for consideration further proves good faith and reasonable enquiry, the conflixt becomes more acute. Strict law would support the real owner, while equity would operate in favour of the transferee.

In the above circumstances, there are ethical considerations in his favour which override the purely legal considerations that could be urged in favour of the real owner. It is axiomatic that the business of the law is to provide for the resolution of conflicts.

Section 41 reflects the decision of the law to adopt one particular approach for resolving the conflict. Where, of two persons, one must suffer, he who is less innocent must suffer, because the equities are against him though strict law is in his favour. On this principle, section 41 favours the *bona fide* transferee for value without notice—not in every case but where the transferor is the ostensible owner with the consent of the true owner.

37.2. *Section* 41.—To quote the section—

> "41. Where, with the consent, express or implied, of the persons interested in immovable 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 authorised 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."

37.3. *English law*—This section harmonizes with the English Law, which similarly lays down that, if a person having a right to an estate, permits or encourages a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although covert or under age[1]. Even at law, as regards chattels, if a party negligently or culpably stands by, and allows another to contract in the understanding of a fact which he can contradict, he cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

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1 *In re Morgan, Pilgrem* v. *Pilgrem,* 18 Ch. D. 93;
Carrit v. *Real and Personal Advance Co.* 42 Ch.D. 263.

37.4. *Estoppel*—This rule is hardly discussed in this form in modern English text books on the law of real property. It is regarded as belonging properly to the domain of estoppel. It is also true that with the increasing use of registration of land titles, occasions for using this doctrine are not so frequent in modern times as before. In India, also, such occasions would have been rare, since the person who purchases or becomes a mortgagee of land would be expected to investigate the title of his immediate transferor, and it is, in most cases, necessary that the title to the land must ultimately find its source in an instrument registered and compulsorily registrable, thereby fixing the ultimate purchaser with notice. But a peculiar feature of Indian society—the practice of holding land benami—leads to the position that even the registered owner is not the real owner. So a person investigating title even on the basis of registered documents still remains unaware of the title of the real owner. If, in such circumstances, he can satisfy also the other conditions laid down in section 41, the section could come into play. We do not, of course, imply that *benami* ownership is the only case of ostensible ownership.

37.5. *Transfer need not be with consent*—There seems to be some misconception on the question whether *the transfer must be* with the consent of the real owner in order that the section may apply. While it is necessary that the ostensible ownership must have been permitted or created by the real owner, it is not necessary that he must have consented to the actual transfer which is now sought to be validated under the section. Thus, the view that the words "with the consent, express or implied" govern the word[1] "transfer" seems to be erroneous, and is opposed to the current of authority.[2-3]

37.6. *Recommendation, to amend section* 41—To express the position with greater clarity in this regard and to avoid misunderstanding, we recommend that the opening words of the section should be revised so as to read—

> "Where, a person *is the ostensible owner of immovable property* with the consent, express or implied, of the persons interested in such property and transfers the same for consideration .....".

The object is to separate the phrase "consent express or implied" from the word "transfers".

37.7. *Subsequent transfers*—It stands to reason that the operation of the section should not be limited to the immediate purchaser from the ostensible owner, but should extend to subsequent purchaser also, subject to certain conditions. Here, however, a question of detail arises. Is it necessary that the subsequent transferee must satisfy the other requirements prescribed in the section—such as, consideration, reasonable care and good faith ? Or, is it enough if the immediate purchaser had satisfied these requirements ? Or, is it necessary that *both the immediate* purchaser and the *subsequent transferee* must satisfy these requirements ? Yet another alternative would be to take the view that *either the immediate purchaser or the ultimate* purchaser satisfies the requirements. The last mentioned view seems to be the view judicially

1 *Shafiqullah* v. *Samiullah*, A.I.R. 1929 All. 923.
2. *Fazal Hussein* v. *Mohd. Kasim*, A.I.R. 1934 All. 193.
3. *Fakhruddin Sahib* v. *Ram Sethi*, A.I.R. 1944 Mad. 299.

taken.[1-3] There is much to be said in favour of each of these views. In support of proposition that it is necessary and sufficient that the immediate purchaser satisfies the requirements laid down in the section, we can state that it is only if he gets a title not challengable by virtue of the section that he in his turn can pass on a good title.

On the other hand, in support of the proposition that it is enough if the ultimated owner satisfies the requirements, it can be stated that since the ultimate purchaser acted honestly and with care, he meets the desideratum of equity and therefore, he is entitled to the protection irrespective of the non-fulfilment of the statutory requirements by the first purchaser. Then, in support of the view that it is enough if *either of them* satisfies the requirements, it can be urged that such a view would combine the good features of the first and the second views.

37.8. *No Change*—Having considered all aspects of the matter, we think that although theoretically there is much to be said for the first view, yet, having regard to the fact that courts have taken a different view, it may not be expedient to disturb the judical construction which seems to adopt the last view. We do not, however, think that there is need for putting in the section what has been held by the courts.

37.9. *Mortgages*—It remains now to deal with the questions of applicability of the section to mortgages. There are two aspects of the matter. That the expression "transfer" in the section is not limited to an outright sale, is fairly apparent from the judicial decisions on the subject[4] relating to mortgages by the ostensible owner, and needs no clarification. The other aspect of the matter is concerned with the question whether an ostensible mortgagee could be treated as an ostensible owner. In this connection, it is to be pointed out that he is the ostensible owner of 'immovable property'—using the expression 'immovable property' as wide enough to cover an interest in such property. On this view, we agree with Mulla's view that an ostensible mortgagee is the ostensible owner of the mortgagee's interest. This point was the subject-matter of a difference of opinion in a Calcutta case[5], and has been discussed in a Madras case[6]. In our view, the section applies to an interest in immovable property as much as it applies to full-ownership of the property, there being no reason for taking a different view, and we do not consider any amendment to be necessary on this point.

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1 *Cholam Saddique* v. *Jogindernath*, A.I.R. 1926 Cal. 916.
2. *Porminderndth* v. *Dhanmal*, A.I.R. 1940 Cal. 565.
3 See also Mulla (1973), page 206.
4 See case law cited in Mulla (1973), page 198.
5 *Jogendra* v. *Solaman*, A.I.R. 1930, Cal. 92.
6 *Parvati Amal* v. *Angamutu*, A.I.R. 1942 Mad. 730.

CHAPTER 38

TRANSFER AFTER REVOCABLE TRANSFER

SECTION 42

38.1. *Introductory*—Doubts or defects regarding title may arise from various causes. The defect may be of a fundamental nature—no title—section 41—or non-existence of the property or right in the property—section 43. But it could be a defect of a different nature, arising from the fact that certain powers which could have been, and ought to have been, exercised by the transferor have not been exercised by him. In other words, the property is in existence and the transferor has also, in the abstract, power to transfer it, but this power is subject to the fulfilment of a certain condition. The law then, in the interests of justice, takes a position as to the performance of the conditions.

In particular, there may arise a competition between two transferees of the same property, claiming under a transfer executed by the same transferor. Such a situation justifies the application of certain equitable doctrines.

The first transfer is in favour of A, but is revocable. The same property is then transferred to B, but the transferor has not exercised the power of revocation. The transferor, by the second transfer, creates a conflict of interest, which now must be resolved. The approach of equity in such cases is that though the power of revocation has not been exercised expressly, it should be deemed to have been exercised by the transferor. This is analogous to the implied repeal of a statute.

38.2. *Maxim*—This is similar to the maxim of equity that equity regards that as done which ought to be done, or that equity imputes an intention to perform an obligation. It is this principle which is enacted in legislative language in section 42. This section is fundamentally linked with equity. Its connection with the earlier sections which are themselves based on equitable considerations is also not difficult to perceive, because the object of the section is to protect the subsequent transferee against the fraud, mistake as well as indifference of the transferor. This protection, of course, is subject to the qualification that if the equities are in favour of any other person deserving of a better protection, then the section does not apply.

In equity, where a man covenants to do an act and he does some other act which may be regarded as a completion of the covenant, equity presumes that the latter act was intended to be in performace of the covenant. Thus, in *Sowden* v. *Sowden*,[1] a husband on marriage, covenanted to pay the trustees the sum of £ 2,000 to be laid out by them in land in the county of D to the uses of the marriage settlement. The husband did not pay the money, but himself purchased lands in the county of D and died intestate. It was held that the lands must be deemed to have been purchased by the husband in *pursuance of his covenant* and so subject to the trusts of the settlement.

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1 *Sowden* v. *Sowden*, (1785) 1 Cox, Eq. Cas. 165, 29 E.R. 1111.

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The doctrine of performance proceeds upon the ground that a person is to be presumed to do that which he is bound to do and, if he has done anything, that he has done it in pursuance of his obligations.[1] Section 42 reflects a similar though not identical, principle. According to section 42, where a person transfers any immovable 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 revocation of the former transfer to the extent of the power.

The illustration to the section is a case of lease. 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.

38.3. *Two transfers*—This section contemplates the case of two transfers, one conditional and the other absolute. It lays down that where the transferor reserves to himself power to revoke the first conveyance, and, subsequently transfers the same property to another, the latter transfer operates as a cancellation of the first transfer, subject only to fulfilment of the condition upon which revocation was dependent. The object of this section is to validate such transfers and to declare that in such a case the subsequent transfer has the effect of cancelling the former, for, the subsequent transfer being only possible when it is made to take effect in defeasance of the prior transfer, the transfer is deemed to have been thereby revoked by necessary implication[2].

In construing the section, the intent of the statute "is to be expounded against fraud and to suppress fraud and to maintain just dealing[3].

38.4. *History of section* 42—The provisions of the section ultimately owe their origin to an English statute passed in 1584—section 5, 27 Elliz. Ch. 4—later repealed by the statute law Revision Act, 1863[4]. It may be of interest to note that a power to revoke a transfer can, in certain circumstances, be reserved by the transferor, though not in the case of a gift[5].

38.5. *First transfer*—It would appear that the first transfer referred to in section 42 could be a transfer for consideration. In fact, if the first transfer is a gift and is revocable at the will of the donor, then the gift is void under section 126. This has been pointed out by Mulla[6]. It may also be stated that the illustration to the section itself takes the case of lease, which is for consideration.

38.6. *Recommendation for verbal amendment*—While no changes of substance are needed in section 42, it seems to be desirable to improve the

1 (a) *Tubbs* v. *Broadwood*, (1831) 2 Russ & M. 487; 39 E.R. 479;
(b) *Lechmere* v. *Lechmere* (Lady), (1735) Cas. Temp. Talb. 80; 25 E.R. 673.

2. Gour.

3. *Bullock* v. *Thorne*, F. Moo. 615, T.P.A. 63.

4. Gour.

5. Section 126.

6. Mulla (1973), p. 207.

drafting of the latter half of the section. At present, the language employed is—"such transfer operates in favour of such transferee....." It would be better if the words "such transfer" and "such transferee" are replaced by the words "the subsequent transfer" and "the subsequent transferee" respectively.

This would bring this part of the section in harmony with the earlier portion, where the expression "subsequently transfers" is used. It would also indicate that we are speaking of the subsequent transfer, in contrast with "the former transfer" mentioned towards the end of the section. Accordingly, we recommend that section 42 should be revised as under :—

> "42. Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently, transfers the property for consideration to another transferee, *the subsequent* transfer operates in favour of *the subsequent* transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power."

CHAPTER 39

TRANSFER BY UNAUTHORISED PERSON SUBSEQUENTLY ACQUIRED INTEREST

SECTION 43

39.1. *Introductory*—An important situation involving a consideration of more than one provision of the Act and requiring a discussion of certain important doctrines is dealt with in section 43. What happens when a person professes to transfer property which he is not, *at the time of transfer*, entitled to transfer, but which be becomes competent to transfer by reason of subsequent events ? Should the law take a strict view and take into account only the facts as they stood at the time of transfer ? Or should it also have regard to later developments ?

39.2. *Section* 43—Equity's choice was for the latter alternative. In the Act, the rule on the subject is to be found in section 43.

> "Where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable 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."

ILLUSTRATIONS

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

39.3. *Amendment*—The words "fraudulently or" added by the Amending Act, 1929, were intended to improve the sense of the section; since a fraudulent representation cannot fail to be erroneous, and it was so held even before the amendment.

The use of these two expressions points to the fact that it is the position of the innocent transferee that the section has in mind. This brings us to the relevant doctrine of equity.

39.4. *Halroyd* v. *Marshall*—In equity, the famous rule in *Halroyd* v. *Marshall*[1] lays down that the mortgage of non-existent property, though inoperative as a present transfer, operates as an executory agreement which attaches to the property the moment it is acquired, and which, in equity, transfers the beneficial interests to the mortgages when any new act is done by the mortgagor to confirm the mortgage. This subject was closely connected with the evolution of rules of equity relating to assignment. At common law, an assignment of property to be *acquired in the future* was

1 *Halroyd* v. *Marshall*, (1862) 10 House of Lords Cases, 191.

void, but, in equity, such an assignment was treated as an enforceable contract, if made for valuable consideration.[1] In fact, in equity, even the mere expectancy of the heir-at-law of succeeding to the estate of his ancestors or the next of the kin succeeding to the personality of a living person was treated as assignable and this included an interest which a person might take under the will of a living testator.[2] There is an interesting English case[3] in which copyright in songs yet to be written was held to be assignable. The principle was long ago stated by Story[4] in these words :

> "Courts of equity give effect to assignments of interest held in trust; and whether the interests are contingent or executory including so remote an interest as a *spes successionis*, whether they are in real or in personal estate, as well as to assignments of choses in action."

Thus, while at law, to make an assignment valid, the thing which is subject of it must have actual or potential existence at the time of grant or assignment, courts of equality recognised assignment of things which have no present or potential existence. In equity, such an assignment was considered as amounting to a *declaration of trust* and to permit the assignee to make use of the assignors name in order to recover the debt or to reduce the property into possession. This seems to be the explanation of the fact that section 43 makes an exception in regard to intermediate transfers of value without notice.

39.4A. *English law*—Under section 43, the right is declared to exist only as against the transferor and persons claiming under him, e.g., the heir[5]. Thus, where he is deprived of the property in an execution sale, it has been held that the transferee cannot follow up the property in the hands of his auction purchasers[6].

39.5. *Meaning of transfer*—It is to be noticed with reference to section 43 that the expression used is "transfer" and this is wide enough to cover not only a sale but also a mortgage, lease or exchange. Since the section is a kind of 'Estoppel', there is no need why the operations should be confined to sale, and the section does not contain any such restrictive language.

39.6. *Evidence Act*—In the Evidence Act, section 115, the words used are "declaration, act or omission", while in section 43, the words used are "fraudulently or erroneously *represents*". However, it is generally understood that representation, within the meaning of section 43, would include not only an express declaration, but also an act or omission which amounts to an implied representation. In fact, the section is believed to be nothing but a branch of the law of estoppel.

39.7. *Obscurity*—There seems to be a certain amount of obscurity as to the application of section 43 to cases of after acquired property. The controversy becomes acute where the property is not yet in existence. The correct position would seem to be that the section should operate, unless, of course, the transfer of a particular property is prohibited by law on the ground of fundamental public policy.

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1 *Warmatrey* v. *Tanfiend*, (1628) 1 Reports of Chancery 191.

2 Snell, Equity (1966), pages 91, 92.

3 *Performing Right Society* v. *London Theatre of Waristics*, (1924) A.C. 1.

4 Story, Equity Jurisprudence (1919), page 432, paragraph 1040.

5 *Radhey Lal* v. *Mahesh Prasad*, I.L.R. 7 All. 864.

6 *Alukmonee* v. *anee Madhub*, I.L.R. 4 Cal. 677.

An important question to be considered in this context is—where a person has only a hope of succeeding—section 6(a)—should section 43 apply ? The proper view would seem to be that section 43 should apply if what is *professed to be transferred* is present property; this does not nullify section 6(a). Section 6(a) deals with certain kinds of expectations and prohibits a transfer *simpliciter* of such expectations. On the other hand, section 43 deals with representations as to title or right to transfer, made by a transferor who had no such title or right at the time of the transfer. Section 6(a) enacts a rule of substantive law, while section 43 enacts a rule of estoppel. The two provisions operate in different maner. Where the transferee knows as a fact that the transferor does not possess the title which he professess to transfer, then, of course, he cannot be said to have acted on it when taking a transfer. But there is a distinction between a transfer which is professedly one of a mere hope (reversion or expectancy) and a transfer of specific property which, the transferor erroneously represents, he is authorised to transfer though actually he has only the interest of a reversioner therein. The former transfer falls under section 6(a) and hence is void, but there is no reason why the latter transfer should not be given the benefit of section 43.[3]

The correct view is that section 43 applies even to cases of heirs if they profess to transfer the *property itself* and not only the right of succession. Where professedly there is a transfer of a mere hope of succeeding, section 6(a) would apply, but, where an erroneous representation is made by the transferor to the transferee that he is a *full owner* of the property and the property purporting to be transferred is not a mere chance of succession, and the transferee acts upon such erroneous representation, then, if the transferor subsequently happens to acquire an interest while the contract is still subsisting, the previous transfer can, at the option of the transferee, operate on the subsequently acquired interest according to the Allahabad view.[2] To some extent, support for such construction can also be drawn from the illustration (a) to section 43.

Case law--The earlier case law on the subject was discussed in a case decided by the Madras High Court[3] and need not be discussed in this Report.

39.8. *Supreme Court Case*—It has been decided by the Supreme Court[4] that where a person transfers property, representing that he has a present interest therein while in fact he has only a *spes successionis*, the transferee is entitled to the benefit of section 43. If he has taken the transfer on the faith of the representation and for consideration. This judgment of the Supreme Court settles the position. In view of the fac tthat a cursory reading of section 6(a) may give a different impression it seems to be desirable to state the true position in section 43 so that the section may be made self-contained. We shall make a recommendation on that point in due course.

Although the section is confined to immovable property, the principle should apply to movable property. The statement of the law in the leading

1 *Shyam Narain* v. *Mangal Prasad*, A.I.R. 1935 All. 244, 246 (Sulaiman C.J. and Rachhpal Singh J.).
2 *Shyam Narain* v. *Mangal Prasad*, A.I.R. 1935 All. 247.
3 *Jamma Masjid* v. *K. Devich*, A.I.R. 1953 Mad. 637.
4 *Jamma Masjib* v. *K. Deviah*, A.I.R. 1962 S.C. 847, 853 paragraph 18.

case of *Halroyd* v. *Marshall*[1] is not confined to real property. This is what Lord Westbury observed in that case—

> "If a vender or mortgagor agrees to sell or mortgage property *real or personal,* of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering to the description in the contract, there is no doubt that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

39.9. *Section* 43—*Recommendation*—For the reasons stated above, it seems to be desirable to add a provision in section 43 clarifying the position as regards the non-applicability of section 6(a). The best course would be to insert a sub-section as follows :—

> "(2) *Where the case falls under this section, it shall not be a defence that the interest which the transferor had at the time of the transfer was of the nature referred to in clause (a) of section* 6."

We recommend that the section should be so revised.

39.10. *Acting on the representation—Recommendation to add*—There is one important ingredient of estoppel, which does not find an express mention in the section. The section does not provide that the transferee seeking the protection of the section must have *acted on the representation*—whether fraudulent or erroneous—made by the transferor. If the transferee knows the truth and is in no way misled by the transferor's representation, what are his equities ? On the one hand, it can be contended that the section operates on the interest acquired subsequently independently of the transferee's having acted on the representation, since the section contains no such restriction. On the other hand, there can, in general, be no estoppel by a false or erroneous statement when the truth as to the matter state dis known to both parties. If so, one should read into the section such a condition to be satisfied by the transferee. Although the point was not in issue before the Supreme Court in the *Jama Masjid case,*[2] the observations in the judgment support the narrower view, namely, that the transferee must have acted on the representation.

In a sense this position is implicit in the expression "represents", because it connotes a corresponding action on the part of the person to whom it was made. If the representation has not had any effect. It should have no significance. That, indeed, comes to be the rationale, underlying those judicial decisions which held that the expression of a non-committal opinion does not bring the equity into being. It appears to be desirable to state the position clearly in the section by adding after the words "for consideration", the words *"and the transferee acts on the representation"*. We recommend accordingly.

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1 *Holroyd* v. *Marshall,* (1862) 10 H.L.C. 191.
2 *Jama Masjid* v. *K. Deviah,* A.I.R. 1962 S.C. 847.

CHAPTER 40

TRANSFERS BY CO-OWNERS

SECTION 44

40.1. *Introductory*—Cases of transfers by a person who is not the real owner having been discussed in the preceding section, the Act now proceeds to deal with transfer by a person who, though he has an interest in the property, is only a co-owner. In such a case it becomes necessary to work out the rights of the other co-owners who are not parties to the transfer and also of the transferee who would certainly have an interest in implementing his transfer and exercising the rights of the co-owner which are transferred to him, in so far as such exercise is practicable. We shall refer later to the background of the section and its utility in the field of Hindu law, but it will be appropriate to mention that the section is not confined to an alienation by one of the co-parceners in an undivided Hindu family. At least the first paragraph of the section is wide enough to cover every case of co-ownership. An undivided Hindu family or coparcenary is not the only case governed by the section.

40.2. *Aspect of Partial interest*—Section 44, with the three following sections (45 to 47) sets out the law relating to the transfer of property where the transferor or transferee possesses or obtains *only a partial interest*[1] therein. As the transferee acquires all the right, title, and interest of the transferor conveyed to him, it follows that he may claim joint possession like his predecessor-in-title, but since the presence of a stranger might lead to serious breaches of peace, these sections confer on certain parties, the right to partition. The second paragraph has been inserted in accordance with the judgment of Westropp, C.J., who observed.[2]

> "We also deem it a far safer practice, and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with members of a Hindu family, which may be not only of different caste from his own, but also different in race and religion."

40.3. *Right of purchaser*—A purchaser of a co-parcener's undivided interest in joint Hindu family property is not *entitled to separate possession of what he has purchased.* His only right is to sue for partition of the property and to ask for allotment to him of that which on partition, might be found to fall to the share of the co-parcener whose share he has purchased. His right to possession would date from the period when a specific allotment was made in his favour. The purchaser is not entitled to possession of the interest purchased by him till the partition has been made[3].

40.4. *Section* 44—This principle is put in legal language in section 44. It reads—

> "44. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share

1 Gour.
2 *Balaji* v. *Ganesh,* (1880), I.L.R. 5 Bom. 504.
3 *Sheo Nath* v. *Krishna Kumari* A.I.R. 1973. All. 496.

or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession 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 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".

40.5. *Second paragraph*—The second paragraph to the section did not find place in the Bill of 1879, but was subsequently added by the Select Committee with a view[1] to preventing a stranger from claiming joint possession of a family dwelling house. In cases determined before the Act, it was held that according to the law as administered in Bengal, the purchaser at a Court-sale of the rights of one member, may be entitled to be put into physical possession even of a part of the family house, which could only be obviated by purchase of the right by the other members at the sale, or by a suit for partition.[2] The inconvenience and in inequity of permitting a stranger to intrude himself upon the privacy of a joint Hindu or Mohamedan family residence was manifest, and the second paragraph was accordingly considered necessary.

40.6. *Scope of discussion*—Having regard to the fact that the section deals with a matter affecting the mode of living of almost every inhabitant of the country, we propose to deal with it at length. After considering a few general propositions as to its significance and scope, we shall discuss the connected provision in section 4 of the Partition Act, 1893. We shall then revert to a more detailed treatment of certain specific questions arising out of a few important ingredients of section 44 and recommend amendments that will be intended mainly to make the section self-contained in its expression and more helpful to lawyers as well as to laymen.

40.7. *Significance*—The section provides for partition as a means of making the possessory right available. This is its significance.

40.8. *Scope*—The section applies to all kinds of transferees including mortgages and lessees. This shows its wide scope.

40.9. The principle of the section can be applied to involuntary sales as a rule of equity, justice and good conscience[3].

Hence, a suit by an auction-purchaser for joint possession against the other co-parceners in the family dwelling house would not lie.

40.10. *Hindu law—Pre-*1929 *position not affected*—The Act—and therefore section 44—now applies to Hindus. Of course, the fact that by the amendment of 1929, the section is made applicable to Hindus and Buddhists does not mean that the right of an alienee to institute a suit for partition to work out his purchase is enlarged, or that the principles pre-

1 Gour.

2 *Ramtonoo* v. *Gobindo*, (1857) S.D.A. 1585; *Koonwar Bijoy* v. *Shama Soonduree*, 2 W.R. 30 (Mis) F.B.; *Eshan Chunder* v. *Nund Coomar*, 8 W.R. 239; cited in Gour.

3 *Jagatbandhu* v. *Ishwar Chandra*, A.I.R. 1948 Cal. 61.

viously evolved by the courts in this context are effected.[1] The section does not override the provisions of Hindu law.[2] At the same time, it is to be noted that in regard to those areas where a right of alienation by a co-parcener was recognised, the section is substantially in conformity with the previous law.

40.11. *Evolution of Hindu law*—Long before the Act was passed, courts in India had laid down that in certain parts of India, Hindu law recognised the rights of a co-parcener even where he was not the father or manager, to alienate his interest in the joint family property, at least by way of sale or mortgage.

As early as 1813, the right was recognised by Sir Thomas Strange.[3] The right to partition at the instance of the alienee began slowly to be recognised and was settled by 1863, both in Madras[4] and in Bombay.[5] In this connection, the form of decree granted by the Privy Council (Sir James Colville) in *Deen Dyal*[6] is of interest. Though it was a case of the rights of an execution purchaser, it was expressly observed that judicial decisions had affirmed the general right of one member of a joint family to dispose of his share in his joint estate by voluntary conveyance without the concurrence of his co-parceners—the reference was to the Madras and Bombay cases. A declaration was granted to the purchaser at the execution sale that he had acquired the share and interest of the judgment-debtor in the property and that he was entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition.

One cannot fail to notice the substantial similiarity between this declaration and the provisions of section 44.

40.12. *Landmark case in Bombay*—The year 1874 saw a landmark in the law—a decision of West and Nanabhai Haridas JJ.[7] This was a case of mortgage by two members of an undivided Hindu family. In execution of the mortgage decree, the property was purchased by the plaintiff, who then instituted a suit against the third member of the undivided family for possession of the extent which he had purchased in the court sale. It was held that the right of the purchaser was to sue for partition and not for recovery of possession. But it was also observed that while, in an undivided family, the share of a person in the estate as a whole could be ascertained only by taking a general account and making a distribution in accordance with its results, yet, in making that distribution it would only be equitable that the share purchased by the auction purchasers be so made up as to embrace wholly or so far as possible, what the auction purchaser has purchased as his. Similar principles were laid down by the Privy Council in 1879[8].

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1 *Pernakayam* v. *Shiv Ram*, A.I.R. 1952 Mad. 419, 434, para. 28.
2 *Laxminarasamma* v. *Rangaviangakamma*, A.I.R. 1964, Orissa 43, 45.
3 *Ramaswami* v. *Sehsadiri*, (1827) Strangers Notes of Cases, Vol. 2, 234.
4 *Veeraswamy* v. *Aayaswamy*, (1863) 1 Madras High Court Reports 471.
5 *Damodar Vithal* v. *Damodar Hari*, (1363) 1 Bombay High Court Reports 182.
6 *Deen Dyal* v. *Jagdip Narain Singh*, (1876—1877) I.L.R. 3 Cal. 198 (C.B.).
7 *Pandurang* v. *Bhaskar*, (1874) 11 Bombay High Court Reports 72.
8 *Suraj Bansi* v. *Shiv Prasad*, (1879) I.L.R. 5 Cal. 148 (P.C.).

40.12. *Madras view*—The subject received an illuminating treatment in a judgment of Bhashyam Ayyangar J. in Madras.[1] It was there stated to be settled law that the purchaser can enforce the sale by a partition of the entire family property and if, in such a partition, the property sold can, with due regard to the interests of the other shares and to the debts due by the family and to an equitable allotment of the various items of family property, be wholly allotted to the vendors, the purchaser will be entitled to the whole property which the vendor professed to convey to him. Of course, it would not be strictly accurate to describe the interest of a co-parcener in an undivided family as his "share". But this expression is ordinarily used as meaning the interest of a co-parcener in the undivided property.[2]

40.13. *Position in England before* 1926—In England, before 1926, it was possible to hold land under four types of "co-ownership", namely,

(a) joint tenancy;
(b) tenancy in common;
(c) co-parcenary;
(d) tenancy by entireties.

The terms "co-ownership" or "concurrent interest" would each be used to include all the four forms of co-ownership.[3]

40.14. *Joint tenancy in England*—As regards joint tenancies, joint tenants, as between themselves, can have separate rights, but as against everyone else, they have no separte right[4].

The right of survivorship and the "four unities"—unity of possession, unity of interest, unity of title and unity of time—along with survivorship, were the principal features of a joint tenancy.

In a tenancy in common, the tenant's interests could arithmetically be separate, though the property has not yet been divided among them. Then, there is no right of survivorship and of the four unities predicated of a joint tenancy, only the unity of possession is essential in a common tenancy[5].

40.15. *Co-parcenary in England*—Co-parcenary, in England, arose mainly when there was the death of a person interstate before 1926, and his real property descended to two or more persons who were not males. They took the land as "parceners" or "co-parceners". For example, where two or more females inherited the land of an interstate, co-parcenary would arise. In the theory of law, they constituted a single heir[6]. Each co-parcener held a distinct but undivided share, which might be equal or unequal to the size of the share of others. The co-parcenary could come to an end, *inter alia*, by partition or by alienation. Where the co-parcener alienated his share, it was forthwith held under a tenancy in common, the other tenants remaining co-parceners *inter-se*. At common law, the remaining co-parceners could enforce a partition, but the purchaser, being a tenant in common, could not[7].

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1 *Saigiri Ramaiya* v. *Venkataramaiya*, (1902) I.L.R. 25 Mad. 690 (F.B.).
2 *Peranakayam* v. *Sheo Ram*, A.I.R. 1952 Mad. 419, 432, para. 25.
3 Magarry and Wade, Real Property (1966), page 408.
4 Megary and Wade Real Property (1966), page 408.
5 Megary and Wade Real Property (1966) page 408.
6 Megary and Wade, Real Property (1966), page 441.
7 Megary and Wade, Real Property (1966), page 443, and footnote 79.

40.16. *Position in England after* 1925—After 1925, by reason of the Law of Property Act, lands which would have previously been held in co-parcenary or tenancy in common or joint tenancy—i.e., every case of undivided share—would now be held subject to a statutory trust for sale[1]. The legislation of 1925 further enacted that an undivided share in land shall not be created except behind a trust for sale. It also abolished tenancy by entirety, previously existing in regard to husband and wife.

Of course, the "statutory trustees" are not necessarily bound to sell the property because, instead of selling it, they can partition the land among the beneficiaries entitled[2]. Disputes as to the appropriate date of sale are to referred to the court which hears the application[3]. It is only with the consent of all the trustees that the sale can be postponed.

40.17. *Section* 44, *second paragraph—principle*—To revert to section 44, the principle of the second paragraph can be deduced from the judgment of Westropp C.J. in a Bombay case[4].

> "We deem it a far safe practice and less likely to lead to serious breaches of peace, to leave a purchaser to a suit for partition, than to place him by force in joint possession with the members of a Hindu family, who may be not only of a different caste from his own, but also different in race and religion."

40.18. *Second paragraph—principle*—The principle of the second paragraph is that a stranger purchaser cannot have joint possession of the family dwelling-house. While this paragraph takes away the right of a stranger purchaser of a share of a dwelling-house belonging to an undivided family to ask for joint possession along with other co-owners, but, at the same time, it does create a right in favour of the other co-owners of the dwelling house who are affected by the sale, to ask for an injunction restraining the stranger purchaser from exercising any act of joint possession with them in respect of the joint family residence. The stranger purchaser has certainly a title to the share of the dwelling-house purchased by him; but his remedy lies in a suit for partition and he can possess his own share by instituting a suit for partition unless, of course, he is pre-empted under section 4 of the Partition Act[5].

40.19. *"Co-owner"—meaning of*—Reverting to the section, the expression "co-owner" in section 44 is not defined, but it is wide enough to cover almost every case where more than one person is interested in the ownership and the interests are of a concurrent nature and of a similar nature, *even if not arithmetically equal.* The principle of the section is that of substitution, but on certain conditions. The transferee steps into the shoes of the transferor who is a co-owner, but with certain restrictions.

40.20. *Dwelling house*—Some of the important expressions may now be dealt with. The word "dwelling house" does not mean a dwelling

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1 Sections 1—6 and sections 34—36, Law of Property Act, 1925, rea dwith Schedule IV, para 1(10).

2 Section 37, Law of Property Act, 1925.

3 Section 30, Law of Property Act, 1925.

4 *Balaji* v. *Ganesh,* (1881) I.L.R. 5 om. 499, 504 (Westropp C.J.).

5 *Alekha* v. *Jagabandhu,* A.I.R. 1971 Orissa 127.

house occupied by the undivided family which owns it; the words "belonging to an undivided family" do not mean that the house must be occupied temporarily or permanently by the undivided family or that they be joint in mess[1].

40.21. *Undivided family*—In section 44, "undivided" family includes a group of persons related in blood who live in one house or under one head or management. This is the interpretation placed on the word "family" by Ashutosh Mookerjee, J. with reference to section 4 of the Partition Act,[2] and it should apply to section 44 also.

40.22. *Belonging to undvidide family*—It is also well established that the expression "undivided family" merely means a family which is not divided *qua the dwelling house*.[3] It is not confined to a Hindu joint family or a joint family The essence of the matter is that the house itself should be undivided amongst the members of the family who are its owners.[4]

Chakravarti C. J.'s observations are of interest.[5]—

> "But assuming that the house concerned must be a residential house of the members of the family owning it, I am altogether unable to agree that any suspension of occupation or, for the matter of that, the absence of the owners of the house therefrom or an occupation or terminable occupation by tenants, can have the effect of making the house cease to be a dwelling-house. As is well known, the object of both section 4(1), Partition Act and section 44, Transfer of Property Act, is to keep off strangers who may purchase the undivided share of some co-owner of an immovable property and so far as dwelling houses are concerned, to make it possible for the co-sharer, who has not sold his share, to buy up the stranger purchaser. The whole object therefore is to provide for peaceable privacy. The need for making such provision cannot possibly come to an end, if, by reason of special circumstance the owners of the house find it necessary to let it out to tenants for a time or to allow it to be occupied by a licensee. It has already been held in cases, too numerous to mention, that in order that an application under section 4(1), Partition Act, may lie, it is not necessary that the co-sharer owners should be in constant residence at the house. From that position to the position where the house has been let out to tenants, is but a short step forward."

40.23. *Undivided family*—An undivided family means simply a family not divided *qua* the dwelling-house—in other words, a family which owns a dwelling-house and has not divided it. It does not mean a Hindu joint family or even joint family. The members need not be joint in mess. The essence of the matter is that the house itself should be undivided amongst the members who are its owners.[6]

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1 *Subramanya* v. *Sh. Ghannu*, A.I.R. 1935 Mad. 628.
2 *Khirode Chandra* v. *Saroda Prosad*, (1910) 7 Indian Cases 436, cited in *Paluni Devi* v. *Rathi Mallick*, A.I.R. 1965 Orissa 111.
3 *Bhim Singh* v. *Ratnakar*, A.I.R. 1971 Orissa 198.
4 *Boto Krishna* v. *Akhoy Kumar*, A.I.R. 1950 Cal. 111.
5 *Dulal Chandra* v. *Gosthabehari Mitra*, A.I.R. 1953 Cal. 259, 260, para 6 (Chakravarti C.J. and G. N. Das, J.).
6 *Bheim Singh* v. *Ratnakar*, A.I.R. 1971 Orissa 198 (R. N. Misra).

40.24. *Section 4 analogous to section 44, Transfer of Property Act*—Section 4 of the Partition Act, 1893, is also based on the same principle as forms the basis of section 44, Transfer of Property Act. As the two provisions are supplementary to each other, courts have always tried to ensure that they are construed in harmony with each other.[1]

40.25. *Section 4, Partition Act*—Section 4 of the partition Act, 1893, has been described as a logical sequel or corollary to section 44 and makes certain provisions relevant to the topic under consideration. The relevant portion of section 4(1) is quoted below :

> "4. (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf."

40.26. *Section 4, Partition Act,* 1893—Section 44 having provided that the stranger purchaser is not entitled to joint possession or other common or part enjoyment, section 4 of the Partition Act takes the next step, and enables the members of the family to buy out the outsider. It can, therefore, be said, that section 4 takes up the law from the point at which section 44 of the Transfer of Property Act has left it.

40.27. *Section 4-Contitutional validity of*—The constitutional validity of section 4 has been upheld in a Madras case,[2] where the court seems to have rejected the argument that it was "illegal discrimination" to enable the member of the family to buy out the transferee, while denying that right to the transferee.

40.28. *Section 4—Interpretation of*—The various expressions used in section 4, such as "dwelling house", "undivided family", and "member of such family", have come up for interpretation in several decisions of the various High Courts and the courts have placed a wide and liberal construction on these expressions, keeping in view the object underlying section 4, namely, to provide for peaceable enjoyment of the property and to secure privacy.[3] For example, it has been held, that a "dwelling house" does not cease to be so merely because of a temporary suspension of occupation or absence of the co-sharers, provided the members are likely to return to its occupation.[4] Constant residence of the members is not necessary.[5] The

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1 *Cf. Boto Krishna* v. *Akhoy Kumar,* A.I.R. 1950 Cal. 111 113, para 11 (R. P. Mookerjee and P. N. Mitra, JJ.).

2 *Krishna Pillai* v. *Perukutty Ammal,* A.I.R. 1952 Mad. 33, 34, para 6 (panchapakesa Ayyar J.).

3 *Dulal Chandra* v. *Gosthabehari,* A.I.R. 1953 Cal. 259 (Chakravarti C.J. and G. N. Das, J.).

4 *Kalipada* v. *Tulsidas,* A.I.R. 1960 Cal. 467.

5 *Sushila* v. *J. B. Baral,* A.I.R. 1956 Orissa 56 (Case of Christians) (reviews case-law).

term "house" has also been liberally interpreted, so as to include the appurtenant lands or premises which are necessary for its proper occupation enjoyment.[1] The word "family" has also been given a liberal interpretation.[2]

40.29. *Undivided family*—As regards the requirement connected by the word "undivided" in section 4, it has been held,[3-5] that it does not mean a joint Hindu family, or even any joint family, but simply connotes that there is a family the members whereof have not divided the *property*.[6] The emphasis is on the undivided *character of the house*.[7] Accordingly, a Muslim widow who, though re-married long ago, continued to live with the second husband in the family house, has been held entitled to the benefit of the section.[8] The fact that all other property has been partitioned, would also not take away the operation of the section, if the family is still undivided in relation to the *dwelling house*.

The term "family" has also been widely construed, so as to cover cases of Hindu sisters[9] or Muslim sisters[10] living together.

40.30. *Summary of position concerning section* 4, *Partition Act*—A good summary of the effect of the various decisions regarding section 4 is contained in a Calcutta decision as follows[11].

> "These decisions lay down that the word "family" as used in the section ought to be given a liberal and comprehensive meaning and it includes a group of persons related in blood, who live in one house under one head or management; that is "not restricted to a body of persons who can trace their descent from a common ancestor; but it is not necessary, for the members to constitute an undivided family, that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess; that it is sufficient if the members of the dwelling house which they own; that it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play : and that the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live."

40.31. *Injunction*—To revert to section 44 of the Transfer of Property Act, there seems to be some misconception on the question whether a person who is a stranger who purchases a share in a joint property with reference to section 44, 2nd paragraph, can be restrained by injunction

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1 *Nilkamal* v. *Kamakshy Charan*, A.I.R. 1928 Cal. 539, 542.
2 *Khirode Chandra* v. *Saroda Prasad*, (1910) 12 Cal. L.J. 525; 7 I.C. 436 (Mookerjee, J.).
3 *Babulal* v. *Hulla Mollah*, A.I.R. 1938 Pat. 13.
4 *Bai Fatima* v. *Gulamnabi*, A.I.R. 1936 Bom. 197.
5 *Mt. Gangi* v. *Atma Ram*, A.I.R. 1936 Lah. 291.
6 *Sultan Begum* v. *Debi Prasad*, (1908) I.L.R. 30 All. 324 (F.B.).
7 *Boto Krishna* v. *Akhoy Kumar*, A.I.R. 1950 Cal. 111.
8 *Shafian Begum* v. *Mt. Kifiata*, A.I.R. 1939 All. 640 (Collister J.).
9 *Krishna Pillai* v. *Parukutty*, A.I.R. 1952 Mad. 33.
10 *Aley Husson* v. *Toorab Hussain*, A.I.R. 1958 Pat. 232 (Ramaswami C.J. and Prasad J.).
11 *Nilkamal* v. *Kamakshya Charan*, A.I.R. 1928 Cal. 539, 541 (M. N. Mukherji, J.).

from taking possession. There is a Calcutta decision[1] to the effect that since the provisions of section 44 are of a negative nature, no positive right is created in favour of the members of the family and such a threat by the stranger purchaser is not in the nature of a tort. On the other hand, it has been held by the Orissa High Court[2] to the effect that the strange purchasers in such circumstances are liable to be restrained from claiming possession and even a decree for ejectment is sustainable. With great respect to the judgment of the Calcutta High Court, it appears to us that the section, by framing the provision in negative terms, does not necessarily imply that the rights of the stranger purchaser are enlarged in other respects. Since the object of the section is to keep off strangers so far as dwelling houses are concerned,[3] it is a reasonable view to take that the injunction of the nature quoted above could be so issued provided the case is otherwise a fit one for the grant of injunction. In fact, we find another judgment of the same High Court taking a different view.[4]

40.32. *Recommendation to revise section* 44—Having considered the scope of the important expressions as used in section 44 of the Act and section 4 of the Partition Act, 1893, it appears to us that it is desirable to codify in the section the important propositions laid down judicially. This is desirable in view of the practical importance of the section and in order to avoid future controversies as far as possible, as well as to make the section self-contained. It is not, of course, necessary to encumber the section with every small point that has been decided in the courts, but the following appear to be worthy of codification—

(a) meaning of the expression "undivided family" in the second paragraph,[5]

(b) meaning of the words "belonging to"—there is no requirement that the house must be occupied,[6]

(c) meaning of "house" as including grounds and structures appurtenant thereto,[7]

(d) permissibility of remedy of injunction—express provision[8] on the subject.

We recommend that the law on the above points should be codified on the basis of the position as discussed above in the relevant paragraphs.[9]

1 *Jogendra Nath* v. *Adhar Chandra,* A.I.R. 1951 Cal. 412, 413 para 14 (R. P. Mookerjee, J.).

2 *Bhim Singh* v. *Ratnakar Singh,* A.I.R. 1971 Orissa, 198, 202, para 23 (R. N Misra, J.).

3 *Dulal Chandra Chatterjee* v. *Gosthabehari Mitra,* A.I.R. 1953 Cal. 259.

4 *Lal Behari* v. *Gourhari,* A.I.R. 1958 Cal. 253 (Lahiri, J.).

5 Para 40.21, *supra.*

6 Para 40.22, *supra.*

7 Para 40.28, *supra.*

8 Para 40.31, *supra.*

9 See the preceding footnotes.

CHAPTER 41

TRANSFERS TO MORE THAN ONE PERSON

SECTION 45

41.1. *Introductory*—The arithmetical adjustment of interests in property becomes necessary where property is transferred to two or more persons and there is nothing in the contract between the parties to indicate what is the numerical extent of the share of each transferee in the property. Not the entire topic, but a few segments of it, are dealt with in section 45. The section is so framed that at the first sight, the situations dealt with in the section are not very clear. However, by way of introduction, it may be stated that where there is a joint transfer for consideration—joint in the sense that there is more than one transferee—the section determines the arithmetical share of each transferee by having regard to the consideration paid by each. Such consideration might have been paid out of a common fund, or it may have been paid out of separate funds belonging to the various transferees. The broad principle in those cases is that the amount of consideration paid by each measures the interest of each in the property bought.[1] If the consideration is paid from a common fund, then their interests are measured, in the absence of a contract to the contrary, with reference to the interests to which they were respectively *entitled in the fund.* If the consideration is paid out of separate funds belonging to them respectively, then, in the absence of a contract to the contrary, their interests are measured with reference to or in proportion to the *shares of the consideration* which they respectively advance. In other words, the fraction of the total amount of the consideration, as borne by each represents the fraction showing his interest in the property purchase therewith. In this sense, the section adopts the principle of substitution.

Cases may, however, arise where evidence as to the consideration paid by them is absent. For this situation the rule enacted in the section is that such persons—that is, the transferees—are presumed to be equally interested in the property. As every student of equity knows, equity leans towards equality and the rule in question is in consonance with this doctrine of equity, apart from the fact that it is the only just and practicable solution which can be adopted where the cirmcustances rule out evidence.

41.2. *Scope for improvement by way of addition and structural changes*—One can hardly quarrel with the substance of the section so far as it goes. But reported cases show that there are a few points on which we can usefully add to the section. It would also appear that there is a structural defect in the framework of the section, in so far as it does not deal with the two situations in distinct paragraphs, so that the reader does not at the first sight easily get the sense of the section. We shall make our recommendations on both these aspects in due course.

41.3. *Section* 45—This is the text of the present section—

"45. Where immovable 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

1 *Arakal* v. *Domingoinas,* (1911) I.L.R. 34 Mad. 80.

contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they are 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 advance.

> "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 advance, such persons shall be presumed to be equally interested in the property."

41.4. *Scope*—A similar rule prevails for determining partners, mutual relations. The principle of section 45 applies to involuntary sales also.[1]

41.4A. *Nomenclature*—The section, it has been stated,[2] does well in sailing clear of the corresponding English nomenclature, and thus avoiding the technical and sometimes embarrassing distinctions drawn in that law between a joint tenant and a tenant in common. In India, where proprietary rights to property are recognised, to designate a co-owner as a joint-tenant, would have been singularly inapt and inaccurate, and yet such terms of English feudalism are often used in discussions on Indian law as if they had been part and parcel of Indian jurisprudence.

41.5. ***Position in England and India***—The incidents of the law of joint tenancy have but limited application to the Indian co-sharer. In England, a joint contract for purchase by two persons with equal payments, creates a joint tenancy, which therefore carries with it the right of survivorship.[3] But it is by no means necessarily so in India.[4] Even in England, a tenancy-in-common is presumed if there are circumstances showing that the right of survivorship was not intended to be preserved, or if the proportions of the contribution are not equal or the parties have been dealing with the estate as tenants-in-common.[5]

41.6. *Rights of co-owners*—As to the rights and liabilities of co-owners, it may be generally presumed that as regards the possession and enjoyment of the quantum of interest, co-owners stand in the relation of partners to one another, and therefore any advantage secured by one[6] by means of any dealings within the scope of the business,[7] e.g. the renewal of a lease,[8] or an abatement of incumbrances charged on the property,[9] or a secret bonus from the vendor for effecting the sale[10] enures to the benefit of the others. On the other hand, one co-owner cannot infringe the right

1 *Reazaddi* v. *Yakub*, A.I.R. 1941 Cal. 416.
2 Gour.
3 *Aveling* v. *Knipe*, 19 Ves. 441; *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 291; *Rigden* v. *Valliar*, 2 Ves. 253.
4 *Cf. Jogeswar* v. *Ramchandra*, I.L.R. 23 Cal. 670 (P.C.).
5 *Harrison* v. *Barton*, 1 John & H. 287;
Bigden v. *Valliar*, 2 Ves. 258.
6 *Somerville* v. *Mackay*, 16 Ves. 382.
7 *Dean* v. *McDowell*, 8 Ch. D. 345, 351.
8 *Featherstonchough* v. *Fobwick* 17 Ves. 298;
Clegg v. *Fishwick*. 1 M. & G. 294.
9 *Carter* v. *Horne*, 1 Eq. Ca. Ab. 7 Dart., p. 1051
10 *Beck* v. *Kantorowick*, 3 K. & J. 230.

of the other by either taking exclusive possession of the property or altering its condition materially, without his permission.[1] He cannot exclude the other co-shares from equal enjoyment.[2] In any of these cases he can be restrained by an injunction,[3] or the aggrieved party may obtain redress by a suit for partition,[4] or for compensation.[5-6] Relief by way of an injunction being discretionary, the Privy Council[7] has held that where no specific rule exists, the courts are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restraint him from proceeding with his work, or to allow any shareholder to appropriate to himself the fruits of the other's labour and capital.

41.7. *Second paragraph*—The second paragraph of section 45 is a rule of construction based upon the principle that in the absence of evidence to the contrary, which the party alleging inequality must adduce,[8] all co-sharers are to be deemed to be equally interested in the property jointly acquired by them, otherwise, their shares will be proportionate to the consideration paid by each, or in the case of the consideration being paid out of a joint fund, to the interests to which the co-sharers were respectively entitled. The section does not declare that in such a case, the co-sharers would become joint-tenants or only tenants-in-common without the right of survivorship. The section defines only the quantum, and not the quality, of the interest of joint-transferees.[9]

41.8. *Nature of interest not dealt with*—Section 45 thus deals only with the quantum of interest, and not with the mode of enjoyment or nature of interest. Whether the transferees take as "tenants-in-common" or "joint tenants", is not a point specifically dealt with in the section. Our use of these expressions should not be taken as implying that the use of these expressions should be perpetuated. They have come into vogue as convenient starting, points for discussion—pegs on which to hang the bases of classification. The point to be made is that if, in theory, the mode of enjoyment and other rights of co-owenrs could be of more than one species, then the section is non-committed about that. Since the section is silent, controversy arose in the past as to whether the transferees should be regarded as joint tenants or an tenants-in-common. We need not elaborate again the meaning of these two expressions—a matter which we have dealt with while considering section 44.[10]

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1 *Lala Bishambhar Lal* v. *Rajaram*, 3 B.L.R. (App) 67;
Nocury Lal v. *Bindabun*, I.L.R. 8 Cal. 708.

2 *Shadi* v. *Anup Singh*, I.L.R. 12 All. 436 (F.B.).

3 *Rajendrolal* v. *Shama Charan*, I.L.R., 5 Cal. 188;
Holloway v. *Wahid Ali*, 12 B.L.R. 191.

4 *Parasram* v. *Sheriff*, I.L.R. 9 All. 661;
Shadi v. *Anup Singh*, I.L.R. 12 All. 436.

5 *Watson & Co.* v. *Ramchand*, I.L.R. 18 Cal. 10 (P.C.),
overruling *Ramchand* v. *Watson & Co.* I.L.R. 15 Cal. 15 Cal. 214.

6 Caselaw taken from Gour.

7 *Watson & Co.* v. *Ramchand*, I.L.R. 18 Cal. 10. 22

8 *Jadobram* v. *Bulloram Dev*, I.L.R. 26 Cal. 281. 282.

9 *Gobind Prasad* v. *Inayat Khan*, I.L.R. 27 All. 310

10 See Chapter 40, *supra*.

But it is necessary to state here that notwithstanding repeated pronouncements from the highest Court, this obscurity does persist. The reported cases—some of them not very old—show this.[1] Our law does not, as a rule, favour joint-tenancy.[2] In this position, it is hardly proper that such important points should be left to implication. There may be cases—e.g. transfers to members of a joint Hindu family—where there may be room for application of some of the incidents of joint-tenancy. But, by and large, there is no room for the application of the technical concept of joint-tenancy in India. We shall make an appropriate recommendation on this point in due course. At this stage, a few theoretical matters relevant to the concept may be usefully dealt with.

41.9. *Joint-tenancy not favoured in equity*—Unlike the common law, equity did not favour joint tenancy,[3] for equity often did not follow the law where it was merely feudal in character, and equity in this case was more concerned to achieve fairness than to simplify the tasks of conveyancers. Equity therefore preferred the certainty and equality of a tenancy in common to the chance of "all or nothing" which arose from the right of survivorship.[4] "Equity leans against joint tenancy". This maxim meant that a tenancy in common would exist in equity not only in those cases where it would have existed at law, but also in certain other cases where an intention to create a tenancy in common ought to be presumed. There were three such special cases, in all of which persons who were joint tenants at law were compelled by equity to hold the legal estate upon trust for themseleves as equitable tenants in common. We are concerned with one of them—purchase money provided in unequal shares.

41.10. *Purchase-money provided in unequal shares*—If two or more persons together purchased property and provided the money in unequal shares, the purchasers were presumed to take beneficially as tenants in common in shares proportionate to the sums advanced.[5] This, if A found one-third and B two-thirds of the price, they were presumed to be equitable tenants in common as to one-third and two thirds respectively. If, on the other hand, the purchasers provided the money in equal shares, they were presumed joint tenants. This distinction has been criticised,[6] but it has long been accepted as sound.[7] The presumptions could be rebutted by evidence of circumstances showing that those providing the purchase-money equally intended to *take as tenants in common*,[8] or *vice versa*.[9]

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1 E.g. (a) *Mahomed Jusab* v. *Fatimabai*, A.I.R. 1948 Bom. 53;
(b) *Venkayya* v. *Subbarao*, A.I.R. 1957 A.P. 619.

2 *Venkatakrishna* v. *Satyavathi*, A.I.R. 1968 S.C. 751.

3 *Gould* v. *Kemp*, (1834), 2 My. & K. 304, 309.

4 "Survivorship is looked upon as odious in equity";
R. v. *Williams*, (1735) Bunb. 342, 343, per cur;
and see *Re Woolley*, (1903) 2 Ch. 206, 211.

5 *Lake* v. *Gibson*, (1729) 1 Eq. Ca. Abr. 290, 291;
Robinson v. (1858) 4 K. & J. 505, 510;
Bull v. *Bull*, (1955) 1 Q.B. 234.

6 *Jackson* v. *Jackson*, (1804) 9 Ves. 591, 604n.

7 See Lewin 131.

8 (a) *Edwards* v. *Fashion*, (1712) Prec. Ch. 332;
(b) *Ayeling* v. *Knipe*, (1815) 19 Ves. 441, 444;

9 *Harris* v. *Fergusson*, (1848) 16 Sim. 308, as explained in *Robinson* v. *Preston*, (1858) 4 K. & J. 505, 516 (*initial joint tendency held to extend to addition to it made with purchase-money provided unequally*); *Garrick* v. *Taylor*, (1860) 29 Beav. 79.

Further, the principle of proportionate division does not always apply as between husband and wife[1] (as distinct from a man cohabiting with his mistress),[2] for, in such cases, not only statute gives the court a wide discretion[3] but also courts have adopted a different approach.[4]

41.11. *Quantum of interest "Gifts"*—To revert to section 45, the section as it stands at present, is confined to transfers for consideration, and does not lay down any rule for determining the quantum of interest in cases where there is a gift of property. The question then requires to be considered is, whether such a provision should be inserted. While the first paragraph of the section obviously cannot be extended to gifts—since it is based on consideration,—the provision in the second paragraph which is based on the well-known maxim of equity, appears to be of great practical utility.

41.12. Where property is gifted to A and B without specifying the shares which they are to hold, that is to say, without delimiting the quantum of their interest, the question naturally arises how such quantum is to be determined.

41.13. *Sections* 106-107, *Succession Act*—In the Indian Succession Act,[5] certain rules are laid down on the subject and it is sometimes taken for granted that these Rules lean in favour of joint tenancy. Sections 106-107, Succession Act, are in these terms :—

> "106. If a legacy is given to two persons *jointly*, and one of them dies before the testator, the other legatee takes the whole."

ILLUSTRATION

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

(This section applies also to Hindus etc.)

Section 106 deals with a bequest to persons as joint-tenants; section 107 deals with a bequest to persons as tenants-in-common.

Section 107 reads—

> "107. If a legacy is given to legatees in words *which show that the testator intended to give them distinct shares of it,* then if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.
>
> *Illustration*
>
> A sum of money is bequeathed to A, B and C, to be equally divided among them. A dies before the testator. B and C will only take so much as they would have and if A had survived the testator."

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1 *Rimmer* v. *Rimmer,* (1953) 1 Q. B. 63;
Appleton v. *Appleton,* (1965) 1 W.L.R. 25.

2 *Diwell* v. *Farnes,* (1959) 1 W.L.R. 624.

3 Married Women's Property Act, 1882, Section 17.

4 Para 41.17, *infra.*

5 Sections 106 and 107, Indian Succession Act, 1925, *infra.*

This section also applies to Hindus etc.

The principle is that as equity leans against joint tenancy and favours a tenancy-in-common, any words which in the slightest degree indicate the testator's intention to give distinct shares will create a tenancy-in-common.

41.14. *Extension of section* 106, *Succession Act*—It has been held by the Andhra High Court that even where section 106 is, in terms, inapplicable, e.g., where one of the joint donees *dies after the testator,* the rule underlying it could be made use of in construing wills in proper cases.[1] But unless there is an intention expressed to the contrary, the sons, taking the self-acquired property of their Hindu father under a will or gift by him, take it as tenants-in-common, and not as joint tenants,[2], according to the Patna High Court.

41.15. *View that sections lean in favour of joint tenancy criticised*—We are not sure if the view sometimes taken that these sections lean in favour of joint tenancy,[3] is entirely accurate. It should be noted that section 106 uses the word "jointly", which makes all the difference. We are concerned with a deed of gift where the quantum of interest of each donee *is not specified.* It stands to reason that in such cases there should be a presumption that the intention was to benefit both the donees equally.

Since we are concerned with transfers without consideration, the test adopted in the first paragraph of section 45, namely, the source of the purchase money, would be of no use, and in the general run of cases, there would not be available any other test indicating the positive intention. Therefore, if some rule, constituting a provision in the nature of a presumption to start with, could be inserted, its practical utility can hardly be contested.

41.16. *Equality is equity*—In equity, a maxim of general use is, that equality is equity; or, as it is sometimes expressed, "equity delighteth in equality". This maxim is variously applied; as, for example, to cases of abatement of legacies, where there is a deficiency of assets; to cases of apportionment of moneys due on incumbrances among different purchasers and claimants of different parcels of the land; and especially to cases of the marshalling and the distribution of equitable assets, which were applied in payment of debts proportionally, without reference to their dignity, or priority of right at law, except as regards Crown debts.[4]

41.17. *Husband and wife*—In this connection it may not be inappropriate to refer to a few English decisions relating to husband and wife where the doctrine of equity that "equity delighteth in equality" was, in substance, applied. Some of these cases were cases of purchases and not of gifts, but what is relevant to our purpose is the judicial attitude favouring the application of the doctrine of equality where the facts, as a whole, permit of its application.

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1 *Surareddy* v. *Venkata Subbareddi*, A.I.R. 1960 AP. 368.

2 *Srimati Tewary* v. *Ramsurat Devi*, A.I.R. 1959 Pat. 116.

3 *Arakal Joseph* v. *Domingo Imas*, (1910) I.L.R. 34 Mad. 80 (Case on old Act).

4 Story, Equity Jurisprudence (1919).

Thus, in *Rimmer* v. *Rimmer*,[1] where it was not possible fairly to assess the separate beneficial interest of the husband and wife by a reference to the contributions which they had made towards the purchase of the house, and where in all the circumstances the proper and equitable course was to divide the proceeds of sale between them in equal shares, Evershed M. R. and Denning and Romer L.JJ. applied this doctrine. Even though the husband and wife contributed to the cost of the house in varying amounts, Romer L.J. observed that cases between husband wife ought not to be governed by the same strict considerations as are commonly applied to the ascertainment of the respective rights of strangers, when each of them contributes to the purchase price of the property.

41.18. *Need for tentative provision*—Of course,, we are not concerned with the precise situation in issue in *Rimmer* v. *Rimmer,* but the point to be made is that where there is absolutely no evidence of a contrary intention, the law should have a tentative provision at least in the case of gifts, whether such gifts be in favour of a married couple or otherwise. The case of married couple and disputes between the parties to the marriage may in the future social conditions even in this country be more frequent. Not only can such disputes arise when the marriage comes to end, but also they may arise where one of the parties dies and the question arises of the respective rights of the survivor and the heir of the deceased.

41.19. *Property rights-husband and wife*—Questions often arise between husband and wife as to the ownership of property. Property rights, of course, have to be ascertained as at the time of purchase of transfer; the rights so ascertained will not be altered by subsequent events, unless there is an agreement to alter it.[2] In the first place, the beneficial ownership of the property in question must depend on the agreement of the parties determined at the time of acquisition.[3] If the property in question is land, ordinarily there must be some lease or conveyance which shows how it was acquired—"conveyance" is used here in a wide sense as to include all transfers of ownership of immovable property. If the document declares not merely in whom the legal title is to vest, but also in whom the beneficial title is to vest, it necessarily includes the question as to title as between the spouses for all time, subject to variation by a subsequent agreement where permissible.[4] But if the document is silent as to the beneficial title or as to the arithmetical shares of each spouse and if there is no available evidence on that point, then what are called, the presumptions come into play.

41.20. *Presumptions*—What, then, are the presumptions? In England, it used to be considered previously that there was a presumption of advancement in the case of husband and wife, but it appears that the strength of this presumption has much diminished in the changing conditions of society.[5] In India, the presumption of advancement was long ago discarded by the Privy Council, at least so far as the majority of the inhabitants are concerned.[6]

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1 *Rimmer* v. *Rimmer,* (1952) 2 All E.R. 683 (Court of Appeal).
2 *Pettit* v. *Pettit,* (1969) 2 Rll. E.R. 385, 397 (H.L.).
3 *Pettit* v. *Pettit,* (1969) 2 All. E.R. 385, 405 (H.L.).
4 Article in (1966) Vol. 30 Conveyancer, 354, 428.
5 Pettit, Equity and the Law of Trusts, (1974), page 107.
6 *Gossain* v. *Gossain,* (1863) 6 M.I.A. 53 (P.C.).

41.21. *Section* 82, *Trusts Act*—The Indian Trust Act[1] deals with the case of transfer of one person for consideration paid by another in these terms :

"82. Where property is transferred *to one person for a consideration paid* or *provided by another person* and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36."

We are, however, concerned at the moment,[2] with a different situation, namely, where *there is a transfer to two or more persons, without consideration.* In such cases, the most equitable and convenient provision to be inserted, in the absence of evidence to the contrary, would be to provide for equal shares for each transferee.

41.22. *Joint account of husband and wife*—It would, appear that in England even in cases where there was a certain consideration given by the husband, the Courts applied the doctrine of equality. In *Jones* v. *Maynard,*[3] the facts were interesting. In 1941, a husband, about to go overseas, authorised his wife to draw on his bank account, which was thereafter operated as a joint account. Both the husband and the wife drew upon the account and both paid their earnings into it. The husband withdrew money to pay for investments made in his name from time to time In 1948, they were divorced. The former wife now brought an action against the former husband, claiming the balance of the account and half the investments. The claim was upheld. Vaisey, J., in his judgment held that where there is a joint account between husband and wife, and a common pool into which they put all their resources, it is not equitable that it should be subsequently picked apart to establish the proportionate shares of each, the husband being credited with his earnings and the wife with hers. This would be quite inconsistent with the original fundamental purpose of a joint purse or common pool—

> "That being my view," he continued, "it follows that investments paid for out of the joint account although made in the name of the husband, "were in fact made by him in his own name as a trustee as to a moiety for his wife. If the investments out of the joint account had been made in the name of the wife alone, there is no doubt that the ordinary presumption of law would have applied and she would have been entitled to the investments; but as they were made in the name of the husband, it seems to me that the assumption of half and half is the one which I ought to apply."

41.23. *Judicial attitude*—We need not go into the troublesome and thorny area of joint accounts in bank payable to "either or survivor". The above case is cited here for an entirely different purpose—judicial attitude favouring equality. In conformity with that attitude, the case of gifts should be covered and the principle of equality introduced.

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1 Section 82, Indian Trusts Act, 1882.
2 See para 41.11, *supra.*
3 *Jones* v. *Maynard,* (1951) 1 Ch. 572 (Vaisey, J.).

41.24 *Recommendation*—In the light of the above discussion, our recommendations to section 45 are as follows :—

(a) the section should be split up to indicate distinctly the various situations with which it concerns itself;

(b) the case of gifts should be added to the section besides the doctrine of equality. A provision per (d) below be also inserted;

(c) if the transfer is for consideration, it should be made clear that in the absence of evidence to the contrary, the nature of their interests[1] in the property will be identical with the nature of their interests in the consideration;

(d) if the transfer is not for consideration, the transferees should, in the absence of evidence to the contrary, be taken to be common owners of their interests in the property. The expression 'common owner' is one which we choose to rule out 'joint tenancy' in the absence of evidence to the contrary.

41.25. *Revised section* 45—Revised section 45 should be somewhat on the following lines :—

"45. (1) Where immovable property is transferred for consideration to two or more persons, *the following provisions shall apply* in the absence of a contract to the contrary—

(a) *the nature of their interests in the property shall be identical, as nearly as may be, with the nature of their interests in the consideration, subject to clauses (b) and (c) of this sub-section;*

(b) *where* such consideration paid out of a fund belonging to them in common, they are, *as regards the quantum of their interests respectively* entitled to interests in such property identical, as nearly as may be, with the interests to which they are respectively entitled in the fund;

(c) *where* such consideration is paid out of separate funds belonging to them respectively, they are, as regards the *quantum of their interests* respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced;

(d) 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."

(2) *Where immovable property is transferred otherwise than for consideration to two or more persons, the following provisions shall apply in the absence of evidence to the contrary—*

"(a) *the transferees shall be common owners*[2] *of the property which is the subject matter of the transfer;*

(b) *they shall be presumed to be equally interested in the property.*"

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1 This is different from quantum, already dealt with in the section.

2 The expression "common owners" is tentatively used to rule out joint tenancies.

CHAPTER 42

TRANSFERS BY PERSONS HAVING DISTINCT INTERESTS

SECTIONS 46-47

42.1 *Introductory*—The case dealt wth in section 45 was one in which several persons are *transferees*. The case where several persons are *transferors* is dealt with in section 46, which is the converse of section 45. The problem in section 45 is—What is the share of each transferee *in the property* transferred ? The problem in section 46 is—What is the share of each transferor in the consideration received for the property transferred ? In this manner, section 46 is the converse of section 45. The principle adopted is, in substance, the same—the principle of substitution, in the absence of a contract to the contrary.

42.2 *Section 46*—Accordingly, section 46 provides as follows :

"46. Where immovable 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 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."

There are two illustrations to the section in these terms—

(a) A, owing a moiety, and B and C, each a quarter share, of mouza Sultanpur, exchange an eighth share of that mouza for a quarter share of mouza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura and B and C each to a sixteenth share in that mouza.

This is, of course, simple arithmetic. In illustration (b), A, being entitled to a life-interest in mouza Atrali, and B and C to the reversion, sell the mouza 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 are entitled to receive Rs. 400.

This illustration takes the case of interests which, though concurrent, are not of identical character. One is a life interest, the other a reversion. This shows that "interests" in section 46 is not identical with share.

43.3 *Principle*—It has been laid down[1-2] that the proper mode of apportioning the prices of a life-estate and reversion, when sold together for a lump sum, is to value both interests separately, and not to put a value on one and deduct that from the total price.

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1 In *re Cooper and Allen's Contracts*, 4 Ch. D. 802;
Rede v. *Oakes*, 32 Beav. 555; *Cavendish* v. *Vavendish*, 4 L.R. 10 Ch. 319;
Morris v. *Debenham*, 2 Ch. D. 54.

2 Gour.

42.4 *Distinct interest*—As illustration (b) shows, the principle is applicable where the interests, though concurrent, are of different nature. The owner of a lease has a distinct interest from that of a reversioner.[1] So also has the owner of an undivided fourth part of an estate, joining with the owners of the rest, in selling the whole for a lump sum[2].

42.5 *No change*—The above discussion does not disclose any need for amending the section.

42.7 *Section* 47—A slightly different and more complicated situation is dealt with in section 47. When the property transferred is not immovable *property in the entire,* but a share therein, two situations are possible. A co-owner may transfer his specific share therein. In such a case, the transferee is not concerned with the interests of the other co-owners, since the other co-owners do not participate in the transfer. Of course, the transferee has to satisfy himself that the co-owner is competent to transfer his share. This is a matter which may affect the validity of the transfer, but if the transfer is valid, then this aspect has no relevance to the quantum of interest and its ascertainment. But there could be a slightly different situation. All the co-owners join, but what is transferred is neither (i) the entire property, nor (ii) the share of one co-owner, but (iii) a notional share in the property not corresponding to a particular share. This share is just a mathematical abstration. How is such a transfer to be worked out ?

Section 47 provides the answer as follows :

"47. Where several co-owners of immovable 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."

The illustration to the section takes these facts—

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mouza Sultanpur, transfer a two-anna share in the mouza 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-anna share from each of the shares of B and C.

42.7 *Principle*—It is to be observed, that here the transfer takes effect according to the extent of the shares of each co-owner, and not according to the quantum of consideration received by each. Probably, this rule was enacted to guard against the complications which the latter course would have entailed. For, the value of two shares, otherwise equal, may considerably vary, and if inquiry had to be made as to the value of each share, much unnecessary inconvenience and delay would have been inevitable[3].

42.8 *Construction*—Of course, a general agreement to sell property implies sale of the *proprietary rights therein,* and a transfer of a limited interest cannot be inferred from the smallness of the price[4]. The section does

1 *In re Cooper and Allen's Contracts,* 4 Ch. D. 802; *Clark* v. *Seymour,* 7 Sim. 67.
2 *Powlett* v. *Hood,* L.R. 5 Eq. 115.
3 Gour
4 *Hughes* v. *Parker,* 8 M. & W. 244.

not apply merely because a person's ownership is found to be deficient, Where a person conveys property, a portion of which he has no right to convey, the purchaser is entiled to treat the whole contract as broken, and to sue for damages; and the vendor cannot be heard to say, that he would make an allowance *pro tanto,* for the purchaser may reply that it is not the interest which he had agreed to purchase[1]. But, in such a case, the purchaser may elect to take the interest which the smaller has, with compensation. In certain cases where the deficiency is negligible, it seems that the purchaser may even be compelled to take it at a proportionate price[2]. But, if there be a material discrepancy between the property sold and the property offered, the court, so far from interfering in the vendor's favour, will assist the purchaser in recovering his deposit[3].

In such cases, if the other co-owners can be made to join in the transfer and the entire property is not transferred, the section could apply.

42.9. *No change*—No changes appear to be needed in the section.

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1. *Farrer* v. *Nightingale,* 2 Esp. 639.
2. *Guest* v. *Homfray,* 5 Ves. 818; *Hauger* v. *Eyles,* 2 Eq. Cas. Abr. 639.
3. *Long* v. *Fletcher,* 2 Eq. Ca. Abr. 5.

CHAPTER 43

PRIORITY OF RIGHTS CREATED BY TRANSFER

SECTION 48

43.1 *Introductory*—Where the same transferor creates or purports to create by transfer rights in or over the same immovable property, it obviously becomes necessary to determine whose right shall prevail. Such a situation may arise by mistake, accident or design. Whatever be the circumstances leading thereto, a conflict arises and requires to be resolved.

43.2 *The priority of rights created by transfer*—The general rule for resolving the conflict on the subject is contained in section 48, which reads—

> "48. Where a person purports to create by transfer at different times rights in or over the same immovable 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."

We propose to examine first the principle of the section then its scope and operation and then certain supposed and real limitations and exceptions.

43.3 *Principle*—The section is a statement of the English equitable maxim "*qui prior est tempore, potior est jure*"[1] a relic of the primitive law to which the right of ownership in property may be ultimately traced. The section is, however, subject to the exceptions comprised in cases falling under sections 78 and 79. The rule, again, does not affect the specific provisions of section 50 of the Indian Registration Act[2], under which registered documents relating to land, of which registration is optional, were for the first time declared to take effect against unregistered documents relating to the same property, not being a decree or order, whether such unregistered document be of the same nature as the registered document or not. As regards property generally, whether movable or immovable, a registered instrument relating to property is, by another section (section 48—Registration Act), declared to take effect against any oral agreement or declaration relating to such property, except where the agreement or declaration has been accompanied or followed by delivery of possession.

Section 48 of the Transfer of Property Act states the rule applicable in general to resolve conflicts arising by successive transfers of the same interest.

43.4 *Natural justice*—It is a principle of natural justice that if rights are created in favour of two persons at different times, the one who has the advangtage in *time* should also have the advantage *in law*. This rule, however, applies only to cases where the conflicting equities are otherwise equal. In a contest *between persons having only equitable interests*, priority of time is the ground of preference last resorted to, *i.e.*, a court of

1 "He who is first in time is better in law". Co. Litt. 14a. Broom's Legal Maxims (6th Ed.), 335.

2 Indian Registration Act, 1908.

equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground for preference between them. But the rule, in general, is as stated above.

This approach of the law could be justified on certain deeper considerations. The law favours security of title, and is hesitant to interfere with the status already established except for special reasons. If a person has acquired an interest in property, he who comes later on the scene must show an overriding consideration for superseding the state of things already existing—or, to put it in legal language—to disturb a right already created. It should not be forgotten that if the law creates a right, there is, in general, an ethical justification for the creation of that very right. A right is, in the language of jurisprudence, a claim recognised or enforceable in law. But it has roots in the implicit ethical notion that the law recognises or enforces the claim because it is just to do so. The German word "Recht" indicates this link more expressly. Such a right having been created over a property, the legal system would be failing in consistancy if another "right" in the same property is recognised or enforced. There would be chaos and it would be impossible to maintain any certainty or order in the application of the law. Priority in point of time thus becomes, in general, an imperative necessity of the legal system of a civilised society, once that system has decided to recognise or enforce a claim and a claim of that nature has already been created by the parties, relying on the legal system. Exceptional circumstances may necessitate a different approach, but those exceptional circumstances themselves are illustrations of situations where ethical considerations of a wider import are present—*e.g.* claims in salvage—or the demands of greater certainty constitute the basis of a different rule—*e.g.* registration.

43.5 *Doctrine of priority in Hindu law*—The doctrine of priority was not unknown to Hindu Law. It is given by Yajnavalkya as follows :—

> "In the case of a pledge, a gift and a sale, however, evidence in support of the prior claim pre-ponderates."[1]

Jimultavahana, commenting upon this verse, provides the exception that if possession is given to the second transferee, who retains it for 20 years, he will get preference over the first transferee. So he says :[2]

"If a person after a gift, or mortgage to him allows the property to remain with the seller, donor or mortgagor, who subsequently transfers it to another with possession and the latter holds it for 20 years then the first dealing, though prior is, of no avail".

Scope—To revert to the section, let us say a few words about its scope.

43.6 *Need for the section—Modes of transfer*—If there had been only one legal mode of transfer, namely, by delivery or possession, there would be no great need for a provision regulating priority. But the law does not provide transfer of possession as the only mode of transferring an interest in property. And, further, certain kinds of transfer e.g. certain species of mortgages—do not contemplate a transfer of possession at all. There is scope for conflict between two transfers, because the law leaves scope for a variety of modes of transfer.

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1 Yaj. II. 23(2).

2 Jimutavahana—Vyavaharamatrika, pages 348-349. Lingat Classical Law of India page 162.

The modes of transfer allowed by law vary—in some cases, there can be an oral transfer; in some cases there may be transfer by an instrument in writing without registration; and, in some cases, there may be a requirement of writing coupled with registration. Where the transferor employs such a mode of transfer (that is, a transfer otherwise than by delivery of possession), difficulty could arise if the oral transfer is made or the transfer in writing is executed at different times in favour of different persons. For example, a writing may be in favour of transferee A, in regard to an interest in immovable property and after a few days (or, may be, at a later time on the same day)[1] the same transferor executes a transfer in favour of B in regard to the same interest. So long as physical delivery of possession is not the only legal mode of transfer, theoretically the possibility of such a conflict always remains.

43.7 *Conditions for application of the section*—The section postulates that the rights so created cannot co-exist or be concurrently exercised. The words "cannot exist together", indicate that the two interests cannot be beneficially enjoyed without prejudicing each other. Equitably, the prior transferee has the preference, unless there is a contract or reservation by which he is bound or where through his fraud, misrepresentation or gross neglect, another person has been induced to advance money. In the latter case, the prior transferee, being estopped, is postponed to the subsequent transferee[2].

43.8 *Separate rights*—There can be no need for priority where separate rights created in favour of different persons can all be exercised to their full extent without encroaching on each other. In that case they may be treated as relating to different entities. This section does not apply to two substituted security rights. The case of priority arises only where the same property is successively mortgaged.[3] A case for priority arises not because the persons are different, but because the interest cannot all be fully exercised. Such interests may coalesce by merger, or one interest may be waived or abandoned and priority may be conferred by contract and forfeited by negligence.

43.9 *Scope for priority*—The principle of the section cannot, therefore, apply where the two interests do not conflict. Thus, in a case where the property is mortgaged to one and subsequently sold to another, this section will not apply, for the purchaser has obtained only the equity of redemption, an interest which can exist side by side with the mortgage.[4] So there is no conflict between a completed sale and a contract for sale, as the latter confers no right on the property[5]. An unregistered sale-deed, where registration is compulsory, would confer also no rights upon the vendee, and he cannot, therefore, claim as against the registered transferee.[6-7]

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1 *Cf.* para 43.12, *infra.*

2 Section 78.

3. *Krishnaveni Ammal* v. *Subramaniam Chetty,* A.I.R. 1938, Mad. 547.

4. *Ramachandra* v. *Krishna* I.L.R. 9 Mad. 495.

5. Section 54, last paragraph.

6. *Waman* v. *Dhondiba,* I.L.R. 4 Bom. 127;
Chundernath v. *Bhovrub,* I.L.R. 10 Cal. 250;
Ram Autar v. *Dhanauri.* I.L.R. 8 All. 540.

7. Illustrative cases taken mostly from Gour.

If A mortgages or sells property to B, and afterwards C purchases at a court-sale the then existing right, title, and interest of A, C buys in the first case (mortgage), the equity of redemption, and in the second case (sale), nothing at all. In such a case registration cannot help C for, on the very fact of his certificate of sale, the property comprised therein is not the property previously conveyed to B, but only the residue of A's estate after such conveyance.[1]

43.10 *Time of taking effect*—For the determination of the question as to the priority of rights created by transfer, it is, in the first place, essential to inquire as to the exact time from which a transfer begins to operate—a question which, in its turn, depends upon the mode and nature of the transfer. A sale[2] or a mortgage[3], except a mortgage by deposit of title deeds, or an exchange[4] of immovable property of a value of less than Rs. 100 may be made either by a registered instrument or by delivery of the property. A lease of immovable property for more than one year can only be made by a registered instrument[5], and a gift of whatever value must needs be registered[6].

43.11 In cases where a transfer may be validly made by delivery of possession, it will take effect only when possession is transferred, but in other cases where registration is resorted to, the transfer is deemed to take effect not from the date of the registration, but from the date of the execution of the conveyance[7].

Now, since a document may be presented for registration at any time within four months[8], and in special cases within eight months[9], it is conceivable that by merely antedating a deed one transferee may obtain priority over another, and thereby defeat its purpose. Other things being equal, a deed takes effect from the moment of its execution, even though its registration is delayed.

43.12 *Time of execution*—On a question arising[10] as to the effect of two deeds relating to the same subject-matter, *both executed on the same day,* it must be proved which was, in fact, executed first; but if there is anything in the deeds themselves to show an intention that they shall take effect *pari passu,* then the Court will presume that the deeds were executed in such order as to give effect to that intention.

43.13 *Transfers by operation of law*—As regards transfers by operation of law, it is provided by the Code of Civil Procedure that "when a sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time

1. *Sobhagchand* v. *Bhaichand*, I.L.R. 6 Bom. 193 (F.B.) followed in *Bamaraja* v. *Arunachala*, I.L.R. 7 Mad. 248.
2. Section 54.
3. Section 59.
4. Section 118.
5. Section 107.
6. Section 123.
7. Section 47, Indian Registration Act, 1908.
8. Section 23, Indian Registration Act, 1908.
9. Section 24, Indian Registration Act, 1908.
10. *Gartside* v. *Silkstone and Co.* 21 Ch. D. 761

when the sale becomes absolute.[1] This was an alteration of the law as laid down in section 316 of the old Code of 1882, by which the title of the purchaser dated only from the date of confirmation of the sale.[2]

43.14 *Competing auction-purchasers*—As between the competing auction-purchasers, the principles which govern preference are the same as those which regulate the claims of priority among mortgagees. Independently of any preference secured by reason of registration or possession, the purchaser must redeem all charges created before the sale. He must be held to have made his bid with full knowledge that the property was burdened with debts, and he can only claim possession by paying off those debts. His certificate of sale confers on him no right to require the later mortgagees (or those purchasing under them as auction-purchasers) to return back the money he paid either personally or out of the property[3]. The plea of purchase without notice, though it may be a good defence against an equitable claim, is no defence against a legal claim[4].

A person purchasing property with notice of prior contract in favour of another is bound to hold the property for his benefit to the extent necessary to give effect to that contract[5]. Where the subsequent transferee has taken a conveyance, the person in whose favour the prior contract subsists suing for possession will get a decree declaring that the subsequent transferee holds the property for the benefit of the plaintiff to the extent necessary to give effect to *his contract*, and that he do execute to the plaintiff a proper conveyance, and a decree for possession. Where the prior transferee suing his vendor for specific performance of his contract knows of the subsequent interest he should also implead him in the same suit. But where, he is ignorant of the subsequently created right a separate suit would then be necessary.[6]

43.15 *Notice*—It is to be pointed out that section 48 does not operate on the basis of notice. A subsequent transferee cannot, therefore, get higher rights on the ground that he had no notice of the prior transfer, except in cases which are specifically dealt with by a distinct provision of the law which recognises the relevance of notice.[7]

43.16 *Registration*—We may state that registration has no relevance, so that even if a document is registered later, yet if it is executed earlier, the registration has retrospective effect. Conversely, it is not in every case that prior registration of a subsequently executed document necessarily confers priority. The answer depends on the terms of the provisions in the Registration Act and the circumstances of the case. Under section 50 of the Registration Act, a deed registered subsequently gets priority over a prior un-

1 Section 65, C.P.C.

2 *Mohima Chander* v. *Nobin Chunder* (1805) I.L.R. 23 Cal. 48, 51. (Petheram C.J. & Baverlay J.).

3 *Baijnath* v. *Bhimappa*, 3 Bom. L.R. 92.

4 *Gaffur* v. *Bhikaji* I.L.R. 26 Bom. 159.
Section 91, Indian Trusts Act (2 of 1882).

5 *Gaffur* v. *Bhukaji*, I.L.R. 26 Bom. 159.

6 *Gaffur* v. *Bhikaji*, I.L.R. 26 Bom. 159, 162.
H. G. Section 40.

registered deed of which registration is optional. But this execution is subject to the doctrine of notice.[1]

An instrument operates from the date of its execution and even if it is registered, it will operate from the date of execution.[2] Therefore, while registration may be necessary to confer validity on an instrument where the Registration Act or any other law so provides, it does not except the operation of section 48 as such.

43.17 *Registration and interests whose co-existence is compatible.*— Where there is a competition between two registered documents in respect of the same property, the document executed first has priority, even though the document executed subsequent was registered first[3].

It has already been pointed out that section 48 has no relevance where the two interests created by successive transfers can co-exist. For example, the purchaser of immovable property cannot evict from possession a tenant for cultivation admitted into the property by the mortgagee in possession[4].

43.18 *Limitations*—The limitations of the section ought also to be noted. 'Transfer' in this section means a complete transfer, and does not include a mere contract for sale, or an incomplete sale by an unregistered sale-deed where registration is compulsory.

Where one of the documents is only an agreement to transfer and the later document is a transfer in the completed sense, then again section 48 has no relevance[5]. This is for the reason that an agreement to transfer immovable property not only does not create an interest in land in general, but also is not a 'transfer' within the terms of section 48. Of course, there could be other provisions which may bind the subsequent transferee with the obligation created earlier by the transferor in the form of a contract to transfer. Such is section 40, but in such cases notice and certain other ingredients will have to be fulfilled.

43.19 *Charges*—Difficult questions arise in regard to charges and equitable mortgages. In determining such questions, we must have strict regard to the scheme of the Act and to the concept of 'equitable mortgage' and the concept of 'charge' as spelt out in section 100. A charge does not create an interest in property; it creates rather a right to property, but this does not mean that it is entirely disregarded. How far a charge binds persons subsequently dealing with the property charged, depends upon how far the case falls within section 100, of which the most important ingredient is the requirement of notice.

As regards equitable mortgages, it is to be remembered that an equitable mortgage—in those cases where it is permitted—is as much a mortgage as any other type of mortgage. Section 58 does not create any distinction as

1 Amir Chandra v. Sohi Bhushan, (1904) I.L.R. 31 Cal. 305.

2 Section 47, Indian Registration Act, 1908. For earlier law, see *Santaya Mangarsaya* v. *Narayan*, I.L.R. 8 Bom. 182.

3. *Arunachalam* v. *Sivan*, A.I.R. 1970 Mad. 226.

4. *Thakur Singh* v. *Karam Singh*, A.I.R. 1925 Lah. 165.

5. A.I.R. 1938 Bom. 357.

between the various kinds of mortgages enumerated in that section *inter se*. In fact, the expression 'equitable mortgage' is one used in practice for the sake of convenience, but the legal name in section 58(f) is 'mortgage by deposit of title deeds'. A mortgage by deposit of title deeds does not require writing.[1] If a writing is executed and it incorporates the mortgage, it requires registration, but, if the mortgage is complete without the writing, a mere memorandum of the mortgage does not require to be registered. Subject to these observations, there is no superiority conferred by the law on any other kind of mortgage in contrast with equitable mortgages.

43.20 *Priority for Government debts*—While the Government possesses, to a certain extent, a priority in regard to debts, this does not appear to extend to conferring a priority in regard to secured debts.

The result is that such priority as the Government possesses, does not affect the provisions of section 48. Therefore, the area of operation of the Government priority in respect of debts does not embrace the priority of transfers. This is for the reason that generally the priority is understood as extending only to unsecured debts, in the absence of specific statutory provisions to the contrary.

43.21 *Exception-Section* 78—Some of the exceptions to section 48 may now be considered. One exception to the rule enacted in section 48 is enacted by section 78, under which a prior mortgagee is postponed to a subsequent mortgagee, where, through the fraud, misrepresentation or gross neglect of the prior mortgagee, another person has been induced to advance money on the security of the mortgaged property. The postponement of the prior mortgagee in such cases is really a species of estoppel, which enables the creation of the subsequent mortgage. While the prior mortgagee need not go out of his way to give notice of his security when he fears that the mortgagor is dealing with the property, the situation is different where there is fraud[2].

43.22 An exception to the rule *"qui prior est tempore"* is also to be found in the salvage charges created on account of advances made to save the encumbered property from loss or destruction[3]. Such advances are payable in priority to all other charges of earlier date, and, amongst themselves, have precedence in the inverse order of their respective dates. On the same principle, where the Court authorizes the Receiver to borrow money on a mortgage, directing that it should constitute a first charge on the property, it will take priority over any other mortgage though of an earlier date[4]. But, in order to confer such priority, the loan must have been raised for the purpose of *preserving the property*. If, in such a case, the court even improperly confers priority, of which the mortgagees affected thereby have notice, the order may hold good against them unless it is set aside.

43.23 *Estoppel*—The rule in section 48 also yields to the equitable principle of estoppel. So also where the registered purchaser was present

1 Jeevan Das v. Framji (1870) 7 Bombay High Court Reports 45 (Original Civil Jurisdiction.).

2. Mulla (1973) page 541.

3. Fisher, Mortgage, 958, cited in Gour.

4. *Giridharilal* v. *Dhirendra* I.L.R. 34 Cal. 427, 441, 442.

when possession was made over to the unregistered purchaser, the former was, on that account, postponed to the latter,[1] when he raised no objection.

43.23. *Registration*—An instrument operates from the date of its execution,[2] and it immaterial that it is compulsorily registrable, for in that case too, it will operate from the same date.

43.24. *No change*—The above discussion, which was intended to draw attention to a few salient features of the section, does not disclose any need for amendment of the section.

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1 *Somnathdas* v. *Sindhu,* 5 C.P.L.R. 97, cited by Gour.

2. Section 47, Indian Registration Act, 1908.

CHAPTER 44

TRANSFEREE'S RIGHT UNDER POLICY

SECTION 49

44.1. *Introductory*—As between the transferor and the transferee of immovable property, a number of situations arise where the adjustment of claims becomes necessary in regard to immovable property. Many such problems are sought to be dealt with in sections 54-55—the latter section, incorporating a large number of provisions which constitute a Code for regulating the relations between the seller and the purchaser of tangible immovable property. Similarly, in sections 108 to 112, there is given, in relation to leases, an elaborate set of provisions regulating the inter-relationship of lessor and lessee. Certain matters of a general nature were considered appropriate for being dealth with in the present Chapter by way of working out the mutual rights of the transferor and the transferee. Section 49 addresses itself to one specific problem, namely, what happens to rights under a policy of insurance against loss or damage by fire in regard to immovable property which is transferred *for consideration* ? The section deliberately avoids any provisions for gifts,—probably on the assumption that since the principal property itself is transferred for love and affection or on other non-mercenary considerations, the rights under a policy of insurance would also be expressly provided for if necessity arises.

44.2. *Section* 49—Section 49 reads—

> "49. Where immovable 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."

44.3. *Period to which section* 49 *applicable—first view*—There seems to be considerable misconception as to the setting in which section 49 is to operate. Does it deal with the period between the contract for transfer and the actual transfer ? Or, does it deal with the situation after the completed transfer ? The first view seems to have been taken in a Rangoon case,[1] and it is sometimes stated that the section is based upon the dissenting judgment of James, L.J., in *Rayner* v. *Preston*.[2] The English case was, however, concerned with the sale of property where damage by fire occurs *after the contract* but before the completion of the sale. The majority of the judges of the Court of Appeal in that case, with James, L.J. dissenting, held that the purchaser was not entitled to the benefit of insurance money. James, L.J., in his dissenting judgment, took the view that though the seller in a contract of sale was not technically a trustee, yet, once a contract is completed by an actual conveyance, then that relates back to

1 A.I.R. 1923 Rang. 6, 8.

2 *Rayner* v. *Preston*, (1881) 18 Ch. D. 1.

the contract and then it is ascertained that the relation was of trustee and beneficiary. The legal estate, it is now ascertained, was in the vendor, but the beneficial interest was in the purchaser. "This being the relation between the parties", James, L.J. continued, "I hold it to be a universal rule of equity that any right which is vested in a trustee—the benefit of which accrues to a trustee, from whatever source or under whatever situation of legal ownership of the property—that right and that benefit he takes as trustee for the beneficial owner." We shall revert to the merits of this point later, but, at present, it is enough to say that the English case was not concerned with post transfer position.

44.4. *Period to which section applicable—second view*—The second view of section 49 is that the section deals with completed transfers. This view gets support from the words "is transferred" which occur in the section. However, a query then could naturally arise—why would the transferor get it insured after he has already dealt with the property ? The answer would be that where the transfer is by mortgage or lease, the mortgagor or the lessor would have an insurable interest. He would recover the amount from the insurer on the basis that he has suffered a loss. If so, he should transfer it to the transferee. Also, it can be suggested that if the policy has not been transferred as such, and the transferor, even by way of sale, recovers the amount, he should be made to apply it as provided in the section. It is to be noted that under section 55(5)(c), the purchaser is to bear the loss occurring to the property after purchase. Section 49 does not exclude sales of immovable property, which is an aspect which might require consideration.

44.5. *Need for amendment to guard against non-receipt*—After transfer, the purchaser is liable to bear the loss arising from destruction or deterioration of the property, not caused by the seller[1]. In England, the purchaser becomes, in equity, the owner of the property by mere force of the contract, but in India, this doctrine of the Court of Chancery has been expressly departed from[2]. Now, while it is clear that the transferor may be compelled to apply the insurance money which he actually receives under the policy in reinstating the property,[3] what is to happen if he declines to receive it from the insurer ? Having once completed the sale of the property and received the purchase-money, the vendor may well decline to enforce payment of the insurance money, and the insurer may equally decline to make payment; for the contract being one of indemnity the insurer is not bound to pay when the assured has already recovered full value of the property[4]. Of course, if the vendor's right under the policy has been assigned over to the purchaser, there is no difficulty. But, if no such assignment has been made, the solution of the problem is only possible by describing the position of the vendor and purchaser as that of trustee and *cestui que trust*, as long as the contract is *in fiedi* and therefore, "any benefit which accrues to a trustee from whatever source or under whatever circumstances, by reason of his legal ownership of the property, that right and that benefit he takes as trustee for the beneficial owner"[5]. In this view, the vendor is both (a) bound to recover the amount due under the policy and (b) to pay it over to the purchaser, or, as is

1 Section 55(5)(c).

2 Section 54.

3 Gour.

4 *Castellain* v. *Preston*, 11 Q.B.D. 380; *West of England & Co.* v. *Issaacs*, (1986) 2 Q.B. 377, 383, o.a. (1897) 1 Q.B. 226.

5 *Rayner*, v. *Preston*, 18 Ch. D. 1, 13, 14 (James, L.J.).

enacted in the section, to apply it towards re-instating the property. The balance, if any, may have to be repaid to the insurer. On the other hand, the purchaser may compel the insurer to pay and the vendor to receive the money, if necessary, though he cannot recover it himself[1].

44.6. *Rule not in conformity with English rule*—The section states a rule departing from the decided cases in England[2], where the contract for fire-insurance is held to be a contract for mere personal indemnity[3]. Applying[4] the same principle, it is further settled in England that where a vendor receives his purchase-money without any abatement on account of damage by fire pending completion, the insurance company is entitled to recover from the vendor, out of the purchase-money, a sum of equal to the insurance money upon the principle of subrogation.[5] But, in English conveyancing practice, it was usual, even before 1925, to insert a clause providing for reinstatement, in case of destruction, and such a condition was then, of course, enforced.[6]

The position has been further modified by the Law of Property Act, 1925, section 47, to be mentioned later.

44.7. *Passing of risk*—In England, since in equity, the property at once belongs to the purchaser, the risk also passes to him at once.[7] Thus, if a house has been sold and is, without fault of the vendor, destroyed by *fire before completion,* the purchaser must nevertheless pay the full purchase-money and take the land as it is. It is important for a purchaser of buildings to insure at once in his own name, since he undertakes the risk of accidents *before he takes the property itself.* He cannot take the benefit of any insurance maintained by the vendor in the vendor's name alone; for insurance is normally only a personal indemnity against loss, and since the vendor is entitled to the whole purchase-money and so loses nothing, he can recover nothing under this policy[8]. If the vendor does, in fact, obtain payment of the insurance money, the insurers can recover it[9]. Even if they do not, equity does not require the vendor to pay the money to the purchaser, for his qualified trusteeship extends only to the land, and not to the proceeds of a personal contract of insurance[10].

44.8. *Section* 47, *Law of Property Act,* 1925—It is, therefore, essential for the purchaser, if he wishes to insure buildings, to take out insurance on his own account. A common practice is to arrange, with the consent of the insurers, for the vendor's existing insurance to be extended to cover the purchaser. Before 1926 it was usual to stipulate that this should be done

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1 *Chetty* v. *Motor Union Insurance Co.,* A.I.R. 1923 Rang 6.

2 *The North of England & Co.* v. *The Archangel & Co.,* L.R., 10 Q.B. 249, following *Pawls* v. *Innes,* 11 M. & W. 10; *Poole* v. *Adams,* 12 W.R. (Eng.) 683; *Colingridge* v. *Royal Exchange Assurance Corporation,* 3 Q.B.D. 173.

3 *Darrel* v. *Tibbitts,* 5 Q.B.D. 560.

4 See Gour.

5 *Castellain* v. *Preston,* 11 Q.B.D. 380.

6 a. *Garden* v. *Ingram,* 23 L.J. Ch. 478;
b. *Less* v. *Whiteley,* L.R. 2 Eq. 143.

7 Megarry & Wade, Real Property (1966), pages 584—586.

8 See *Castellain* v. *Perston,* (1883) 11 Q.B.D. 380.

9 *Castellain* v. *Preston,* (1883) 11 Q.B.D. 380.

10 *Rayner* v. *Preston,* (1881) 18 Ch. D. 1 (Majority view).

and that the purchaser should pay the premium as from the date of the contract[1]. It is now provided by the Law of Property Act[2] that any insurance money which becomes payable under the vendor's policy in respect of damage to the property *after the date of the contract* shall be paid by the vendor to the purchaser *at completion,* subject to (a) the terms of the contract, (b) any requisite consents of the insurers, and (c) the payment by the purchaser of his share of the premium. Where, therefore, the insurers consent to include the purchaser in the insurance, it is now unnecessary to make further terms about the insurance money or premium. Where the insurance is left in the vendor's name only, section 47 will not normally apply at all: for if the vendor can prove no personal loss, no insurance money will ever become payable under the Policy[3].

44.9. *Position in England—Effect of assignment on insurable interest*—In England, the position in the law of insurance[4] is this. Where the assignment is by the voluntary act of the assured, e.g., in the case of a sale or a gift, the validity of the policy depends upon whether the assured, after the assignment, retains his insurable interest in the subject-matter.

An absolute conveyance of the subject-matter from the assured to a purchaser, accompanied by the receipt of the agreed price, divests the assured of his interest in the subject-matter[5]. He cannot, therefore, in the event of its subsequent destruction, e.g., by fire, recover upon any policy by which it may have been insured, since he has suffered no loss, and there is consequently nothing to which the right of indemnity can attach[6].

44.10. *Effect of contract on validity of insurance*—The validity of a policy is not affected by the mere fact that the assured has entered into a contract to convey the subject-matter of insurance[7], even though, as between the assured and the purchaser, the risk has been passed to the purchaser[8].

The existence of the contract does not, in itself, divest the assured of his insurable interest, which continues by reason of his legal ownership of the subject-matter; and he acquires a further interest arising out of the possibility of the purchaser refusing to carry out the contract, and thereby throwing the loss on him[9].

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1 Williams, Vendor & Purchaser, 88, 89.

2 Section 47, Law of Property Act, 1925.

3 Megarry & Wade, Real Property (1966), page 586.

4 Ivamy, General Principles of Insurance Law (1966), page 256.

5 *Colinridge v. Royal Exchange Assurance Corp.* (1877) 3 Q.B.D. 173 (fire insurance) per Lush, J., at p. 177; where the fire took place before the conveyance; *Ecclesiastical Commissioners v. Royal Exchange Assurance Corp.*, (1895) 11 T.L.R. 476 (fire insurance) where the fire took place after the conveyance.

6 *Rayner v. Preston*, (1881) 18 Ch. D. (C.A.) (per Cotton L.J.), "The fact that the insured had parted with all interest in the property insured would be no answer to the claim on the principle that the contract is one of indemnity only."

7 *Collinridge v. Royal Exchange Assurance Corporation*, (supra), (fire insurance)

8 "The risk of fire was the Corporation's risk from the time of the notice to treat" *Phoenix Assurance Co. v. Spooner*, (1905) 2 K. B. 753 per Bigham, J., at page 756.

9 *Castellain v. Preston*, (1883) 11 Q.B.D. 380 (C.A.) (fire insurance) per Brett, L.J. at page 385.

44.11. ***Fire before completion***—In the case of a fire policy, where the fire takes place before the sale is completed by the execution of the conveyance and the receipt of the price, the assured is entitled to recover to the full extent of his loss within the limits of the policy. The existence of the contract and even the certainty that the assured will finally suffer no loss at all because of the purchaser's intention to complete, and his undoubted solvency, cannot be taken into account as diminishing the amount recoverable[1].

44.12. *Effect of completion*—Where, however, the sale is afterwards completed, and the price paid, the assured has, in the events that have happened, suffered no loss[2]. He cannot, therefore, either enforce the policy, or, if he has received the proceeds of the policy, retain both the proceeds and the price for his own benefit.[3]

A conveyance of the subject-matter, unaccompanied by the receipt of the price, does not, apparently affect the validity of the policy, if the fire takes place before the assured has parted with his lien as unpaid vendor[4]. Although the conveyance divests him of his legal ownership, he nevertheless retains, by virtue of his lien, an insurable interest sufficient to keep the policy alive, and it is immaterial that it is reduced from a legal interest to a mere equitable one. He, therefore, is entitled, as in the previous case, to enforce his policy, so long as such interest remains. If, however, he parts with his lien before he has received his price, his insurable interest under the policy is extinguished, inasmuch as his relationship to the subject-matter of insurance has ceased to exist. He has no longer a right to look at the subject-matter as securing payment of the price: his sole right is a personal right as an ordinary creditor against the purchaser himself[5].

44.13. *Payment of price*—If the price has been paid, but the conveyance of the subject-matter has not been completed, the assured retains an insurable interest by virtue of his legal ownership[6]. The policy therefore remains in force, notwithstanding such payment[7]. But, in the event of a loss before completion, the assured, not being indemnified by the loss, will not be entitled to enforce it against the insurers for his own benefit, although if the conditions of the Law of Property Act, 1925, section 47 are fulfilled, he may enforce it for the benefit of the purchaser. Where, however, the assured has contracted with the purchaser to be responsible for the safety of the subject-matter, the position will be different; and, unless the language of the policy is prohibitive, the value of the subject-matter will be recoverable by the assured[8].

44.14. The contract under which the assignment of the subject-matter takes place may contain a provision that the assured is to keep alive an

1 *Collingridge* v. *Royal Exchange Assurance Corporation* (*supra*) (fire insurance).
2 Ivamy, General Principles of Insurance Law (1966), page 257.
3 *Castellain* v. *Preston*, (*supra*) (fire insurance).
4 Cf. Sale of Goods Act, 1893, section 41.
5 Cf. Sale of Goods Act, 1893, section 43.
6 Ivamy, General Principles of Insurance Law (1966), page 256.
7 *Castellain* v. *Preston*, (*supra*) (fire insurance).
8 *Martineau* v. *Kitching*, (1872) 7 Q.B. 436 per Blackburn, J., at page 458.

existing policy for the benefit of the purchaser.[1] Where,—as is usually the case,—the consent of the insurers is obtained to what is to all intents and purposes, an assignment of the policy[2] no difficulty can arise.

44.15. *Recommendation to remove difficulties arising from the present section*—It appears to us that the section, taken literally, is of very limited application and in any case its full implications are not set out. Moreover, there is the problem arising from the rule of insurance law—that after title passes, the vendor has no insurable interest. Lastly, the vendor is not, at present, compellable to sue the insurer. All these difficulties should be removed by a suitable amendment which we recommend.

44.16. *Propositions*—The true position can be stated as follows, with reference to the various stages at which the loss or damage occurs—

(a) Where the loss or damage by fire *occurs before the contract*, the transferee is not concerned with the matter, since at that time he had no interest in the property. Moreover, when he offered the price or other consideration, he would, at least in the vast majority of cases, have fixed it on the basis of the property as already damaged.

(b) Where the loss or damage by fire *occurs after the contract but before the transfer*, the transferee, though he has not yet acquired an interest in the property in the legal sense, is concerned in so far as the value of the property diminishes after the price or other consideration is fixed. The price or other consideration may have been fixed on the basis of the state of the property as existing previously, that is to say, in the "undamaged" condition. If so, the benefit of the policy—i.e., the amount received by the transferor under the policy on account of that loss or damage—should go to the transferee. All that can be said in favour of the transferor is that the transferor should be entitled to the proportionate premium attributable to the period in question. This situation is not covered by section 49 as it stands at present. It should be added in the Act to complete the statement of the law.

(c) Where the loss or damage by fire *occurs after the transfer*, the transferee is definitely interested in the property and should be reimbursed as already provided by section 49. In case of a sale, the Act in section 55(5)(c) expressly provides that the purchaser has to bear the risk. That merely means that he cannot rescind the sale on the ground of such loss or damage. It does not affect the justice of the provision in section 49.

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1 *Doed Pearson* v. *Ries*, (1832) 8 Bing. 178;
Poole v. *Adams*, (1864) 33 L.J. Ch. 639;
North British and Mercantile Insurance Co. v. *Moffatt*, (1871) L.R. 7 C.P. 25;
Martineau v. *Kitching*, (1872) L.R. 7 Q.B. 436.

2 *Garden* v. *Ingram*, (1852) 23 L.J. Ch. 478, where the insurers were willing to pay the purchaser;
Darrell v. *Tibbitts*, (1880) 5 Q.B.D. 560 (C.A.) where it was purchaser who had received payment under the policy.

(d) In the case mentioned in (c) above, there is need for adding a further provision that the transferee may call upon the transferor to take effective steps for realising the amount and if he fails to do so, he may himself take such steps, making the transferor a party in any legal proceedings that may have to be instituted. Also it should be provided that the insurer shall not be entitled to object on ground of transfer. Also the seller may retain the right to enforce the unpaid vendor's lien.

In the result, amendments as per propositions (b) and (d) above should be made, by revising section 49.

44.17. In this context, we may make it clear that the amendments which are being recommended would not conflict with any specific provisions of the Act regarding the passing of risk or with any provisions of the general law of insurance. What is being suggested is only an adjustment of the mutual rights of the transferor and transferee, in relation to the benefit of an insurance policy against fire. In particular, in regard to proposition (b) above, it may be made clear that such a clarification or amendment will advance the cause of justice and will, in general, be equitable. Of course, if there is a contract to the contrary, that will prevail.

It has not been possible to ascertain the business practice in this regard, but we believe that the section as proposed to be amended does not introduce any such rigidity as would interfere with the practice of businessmen or owners of property.

44.18. *Movable property*—Incidentally, it might also be stated that the action is not concerned with movable property, and if a question of a similar nature arises on the transfer of a movable property,—say, a motor car or jewellery or other costly articles,—the matter would have to be determined on general principles of law; but a comprehensive and self-contained section—which section 49 would become after the recommended amendment —might well serve as a model as illustrating the principle that can be applied on the grounds of justice, equity and good conscience. We have devoted some length to a discussion of this topic in view of its practical importance and in view of the fact that to the layman the general principles of insurance law and their application in this particular field are matters of obscurity.

CHAPTER 45

RENT BONA FIDE PAID TO HOLDER UNDER DEFECTIVE TITLE

SECTION 50

45.1. *Introductory*—The transfer of immovable property may raise questions which affect the position of third parties, of which a particular situation which is a frequently recurring one, is the position of a person who holds property "of another person", in regard to rents or profits of the property. Difficulties may arise where a person, having paid the rents or profits of property to A, is faced with the objection by B that A has transferred the property to B and that the rents and profits should be paid to B. In such a case, if the person paying the rents or profits is made to pay twice over, there would be hardship. Instead of compelling the person paying to bear the hardship where he has acted in good faith in all respects, the law adopts a different approach; it protects him, leaving the transferor and the transferee—A and B in the above illustration—to litigate against each other, if they so choose. The determination of the relevant question in that litigation will, of course, in general, depend on specific statutory provisions—for example, section 55(4)(a) and 55(6)(a) of the Act or a contract between the parties. But so far as the person paying the rents or profits is concerned, he receives protection. Of course, our mentioning the situation of a transfer of immovable property should not be taken as implying that the section which we are going to discuss is confined to that situation.

45.2. *Section 50*—The section reads—

> "50. No person shall be chargeable with any rents or profits of any immovable 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."

The illustration to the section takes the case of lease of a field. A lets the 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.

Incidentally, this illustration omits to mention one important ingredient of the section, namely, that B should have accepted the lease in good faith or should be holding the property in good faith. As we shall show later, good faith is required in two aspects in the section.

The section does not deal with rights to rent as between transferor and transferee. In regard to sale,[1] this aspect is separately dealt with.

45.3. *Sections 109 and 130*—This section (like the proviso to section 109 and section 130) is an application of the general principle of law, that if a party fulfils an obligation without notice of the rights of a third party, his obligation is discharged. The section is a general provision, applying to all cases where property is held by one person under another. Section 109, proviso, applies only to leases for non-agricultural purposes.

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1 Sections 55(4)(a) and 55(6)(a).

The section covers several classes of cases :

(1) Where a person who has a right to a land or other property lets it to X and then transfers the property. Thereafter X, without notice of the transfer, in good faith, pays the rent to the transferor. This is the case referred to in the illustration to the section.

(2) Where a person who has no title to a property lets it to X, who takes it in good faith and pays the rent to the lessor in good faith. In this case there is no 'transfer' to any person during the tenancy of X. But the lessor has no title to let it to X. Even in such a case, X cannot be charged by the real owner with rents and profits of the property. The remedy of the latter is only to proceed against the lessor.

(3) The lessor has a defective title and the person having superior title comes on the scene. He cannot demand the rent again.

45.4. *Lis pendens*—This section is subject to the doctrine of *lis pendens* contained in section 52. If, therefore, the tenant takes the lease and makes any payment to the mortgagor during the pendency of the suit to enforce the mortgage by the mortgagee, the tenant does so at his own risk and he cannot claim protection under this section[1].

45.5. *Genesis*—Section 50 is, almost word by word, the same as an earlier Indian Act[2] which was applicable only to cases governed by the English law under section 3 thereof. That section was, in turn, based on earlier English statutes, and its ancestry could be traced to the Statute of Anne[3].

The principle of the section represents a general rule of jurisprudence that if a person enters into a contract without notice of any assignment and fulfils the contract to the person with whom he has made that contract, he is discharged from his obligation.[4] A tenant is not bound to canvass his landlord's title more than is necessary for his purpose. Indeed, any attempt by him to probe into the secret flaws in the landlord's title might have the effect of terminating his own tenancy in many cases.[5]

45.6. *Cases other than transfer*—Of course, the section is not confined to cases of transfer or to cases of landlord and tenant. Any payment of rent or delivery of profits in regard to immovable property, made *bona fide,* is protected. This is illustrated by a Bombay case[6]. A took possession of certain property as a mortgagee and created a lease for 12 years. A died and his interest as mortgagee survived to his brother B. After B's death, A's widow took possession of the property and managed the same and got her name recorded in the revenue papers. The person really entitled to the property was, however, B's sister. B's sister sued the tenant for rent, but the tenant pleaded payment *bona fide* to A's widow. By reason of section 50, the tenant was held to have been protected.

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1 *Girdharlal* v. *Liladhar*, A.I.R. 1931 Bom. 539.

2 Mesne Profits and Improvements Act, 1855 (11 of 1855).

3 4 Anne Chapter 16, sections 9 and 10.

4 *Alimuddin* v. *Hira Lal*, (1896) I.L.R. 23 Cal. 7 (F.B.).

5 Gour.

6 *Kaveriamma* v. *Lingappa*, I.L.R. 33 Bom. 96 (Scott C.J. and Chandavarkar, J.).

45.7. *Scope of section* 50— We have already pointed out[1] that section 50 is not confined to cases of transfer. Not only is it applicable to cases of succession, but also it applies when there is neither succession nor transmission of interest. Thus, a person paying rent to A in good faith after taking a lease from A in good faith, is not required to pay rent to B, even though it is ultimately held by a court that A had no title or had a defective title to the property. In this sense, it would be correct to say that the person paying rent to the ostensible owner or *de facto* owner is protected if the other requirements of the section are satisfied.

45.8. *Ingredients*—What, then, are the ingredients of the section ? In the first place, the person making the payment must have done so in good faith. In the second place, he must have held the property of the person to whom he makes the payment in good faith. If these two ingredients are satisfied, it is immaterial that the person to whom such payment was made had no right to receive it. (For brevity, we are not specifically mentioning the case of delivery other than payment, but the principle is the same).

45.9. *Good faith—Two aspects*—In order that X who has paid or delivered the rents and profits of immovable property to Y may be protected under this section from the demands of Z,—the person who is really entitled to such rents and profits,—it is necessary for X to show that—

(1) he held the property in good faith from Y and

(2) he paid the rents or delivered the profits to Y in good faith.

If he did not hold the property in good faith from Y, a payment of rents and profits to the latter cannot obviously be in good faith. X is, therefore, not protected under this section. The mere fact, however, that he holds the property in good faith from Y, does not necessarily mean that payment of delivery of the rents and profits to Y is in good faith. He may hold the property from Y in good faith, but at the time of payment he might have become aware of the fact that Z and not Y was entitled to such rents and profits.

45.10. *Good faith—Proper construction of the expression*—Having regard to the importance of the requirement of good faith, it is obvious that its scope and meaning ought not to be subject to serious obscurity. It is well known that Indian statutory law contains two parallel definitions of the expression "good faith"—the one in the General Clauses Act, section 3(22), and the other in section 52 of the Indian Penal Code. According to the General Clauses Act, an act is said to be done in good faith if it is done honestly, whether or not it is done negligently. According to the Penal Code, nothing is said to be done in good faith unless it is done with due care and attention. Thus, the General Clauses Act does not require due care and attention. Of course, want of due care and attention may be evidence in some cases of want of *bona fides*. But, as a matter of theory, the definition in the Penal Code is more stringent than the definition in the General Clauses Act. In this position, two questions arise for consideration, namely, (a) which definition is applicable to section 50, and (b) if the definition in the General Clauses Act is the one applicable, which definition ought to be favoured as a matter of legislative policy ? On the first question, the answer would appear to be simple. The definition in the Penal Code is meant only for the purposes of that Code, having been enacted in stringent terms by reason of the

1 Para 45.6 *supra*.

fact that the sections in which the definition occurs exempt a person from criminal liability or reduce the gravity of the offence. It would, however, appear that there have been judicial decisions[1], which regard the tenant's failure to make an inquiry as a grossly negligent act and as one taking away the protection of section 50 on the ground of want of good faith. We are not, with respect, convinced that this is a correct approach. Whatever may be the aspect of evidence, the concept of honesty of purpose and the concept of due care and caution are two different concepts. In the absence of express statutory provision, we do not think that it would be a proper construction to read due care and attention as an ingredient of good faith.

45.11. The Patna judgment[2] expressly holds that by reason of want of proper enquiry, the payment falls outside section 50, even though the person paying honestly believed that the person receiving was entitled to receive the rent. With this construction, we do not find ourselves able to agree.

45.12. This, however, disposes of only part (a) of the query raised above. It still remains to consider query (b), namely, what ought to be the law ? This is a difficult question to decide, since the monetary rights of the real owner are involved. At the same time, it should not be overlooked that the real owner is not entirely without remedy, because he can recover the rents and profits from the person who received them from the innocent payer. On the whole, therefore, it would appear that it would not be unjust to provide that good faith need not require due care and attention.

45.13. The second aspect of good faith relates to good faith as holding the property "of another person". The section raises the question of good faith on the part of the payer twice; good faith has to be proved not only with regard to the payment, but also with regard to the title of the person from whom the property is held. Here again, good faith should be so defined as to exclude need for due care and caution. We recommend that the section should be suitably amended.

45.14. *Rent payable in advance*—Some obscurity exists on the point of rent payable in advance. One comes across judicial decisions taking the view that the rent must not be paid in advance, as rent paid in advance would become a mere loan[3], as was held in Rajasthan. However, it is obvious[4] that where it is a part of the contract, that the lessee should pay the rent in advance, he does so in fulfilment of an obligation under the contract and section 50 ought to apply.

45.15. The Rajasthan case[5] was one of loan. Rent paid in advance before the rent became due was treated as substantially a loan. It was held that if rents and profits are paid to the former landlord before they became due, it is a simple loan and cannot be taken as a discharge for the rent becoming due after notice of transfer to the tenant.

It is not vary clear from the facts as given in the judgment whether there was a specific obligation to pay the rent in advance. But there is a

1 *Butto Kristo Roy* v. *Govindram*, A.I.R. 1939 Patna 540, 544 (Harries, C.J. and Chatterji, J.).

2 *Butto Kristo Roy* v. *Govindram*, A.I.R. 1939 Patna 540.

3 *Katha Bhatt* v. *Chokylal*, A.I.R. 1960 Raj. 19, 20, para. 6.

4 *Mani Ram* v. *Satpal*, *A.I.R.* 1972 J. & K. 37.

5 A.I.R. 1960 Raj. 19. Para 45.14, *supra*.

review of the case law. To avoid, doubts in the matter, it is, in our view, desirable to provide that the section applies to rents or profits payable in advance of the period to which they relate, where the person paying them is *under a legal obligation to do so*. The definition of "lease" is wide enough to cover a lease accompanied with payment of advance rent[1].

45.16. *Recommendation*—In the light of the above discussion, we recommend the insertion of the following Explanations at the end of section 50 :—

> "*Explanation* 1.—*A thing is said to be done in good faith if it is in fact done honestly, whether or not it is done negligently.*
>
> "*Explanation* 2.—*This section applies also be rents or profits paid or delivered by a person in advance of the period to which such payment or delivery relates, if such payment or delivery is made or done in good faith in the discharge of an obligation to make payment or delivery as the case may be, in advance*[3]."

1 *Lachman Das* v. *Zumbermal*, (1972) 75 Bom. L.R. 678, 680 (Vaidya J.).

2 See para. 45.11 and para. 45.13 *supra*.

3 See para. 45.15, *supra*.

CHAPTER 46

IMPROVEMENTS MADE IN GOOD FAITH

SECTION 51

46.1. *Introduction*—The golden thread of good faith which is woven into section 50, and which runs through some of the earlier sections, appears again in the next section, where good faith has even a positive role to play. If, section 50 merely gives protection from liability for a payment made in good faith, section 51 goes further and confers positive rights in regard to improvements made by a person on immovable property who, owing to defective title, is ultimately evicted. If he can show good faith, he is entitled to compensation. The legal defect in his title is not allowed to override his claim based on equitable considerations. This is yet another example of the genesis of some of the important provisions of the Act in equity[1] and gives the lie to the charge sometimes made that the law is based on technicalities. Justice in the wider sense, justice with an all-embracing eye, is the dominant spirit underlying section 51.

46.2. *Not based on estoppel*—Although an equitable claim for compensation for improvements can arise on the basis of estoppel also, that is not the factual situation contemplated by section 51. The section reads :

> "51. When the transferee of immovable 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 improvement estimated and paid or secured or the transferee, or to sell his interest in the property to the transferee as 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 thereof, he is entitled to such crops and to free ingress and egress to gather and carry them."

The situation which the section is concerned with is one mainly of eviction. Eviction being a remedy of a specific nature, equity would compel the persons seeking that remedy to have regard to the position of the person evicted, where improvements have been made by that person *bona fide* and in the belief that he was absolutely entitled to the property. There are certain conditions to be satisfied in this regard, but at this stage it is sufficient to point out that the crux of the protection given by the section is "good faith". The rest are matters of detail, while good faith constitutes the heart of the matter.

This section is, to some extent, founded upon the principle that he who will have equity must do equity. As observed by Snell : "A constructive trust may also arise where a person, who is only part-owner, acting *bona*

1 For a detailed discussion of the English law, see "Quickied Plantation" solo credit selo (1963) 215 L.T. 143.

fide, permanently benefits as estate by repairs or improvements; for a lien or trust may arise in his favour in respect of the sum he has expended in such repairs or improvements.[1]

46.3. *Hindu law and Muslim law*—Somewhat similar principles are recognised in Hindu law and Muslim law. Narada says—[2]

> "If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when he leaves the house, the thatch, the timber, the bricks and the other building material; but if he has been residing on the ground of a stranger, *without paying rent and against that man's wish*, he shall, by no means, take with him, on leaving it, the thatch and the timber."

Under the Muslim law, according to the 'Hedaya' :

> "A person usurping land and planting trees in it, or erecting building upon it, must be directed to remove the trees and clear the land and restore the same to the proprietor. If the removal is injurious to the land, the proprietor of the land has the option of paying to the proprietor of the trees or of the buildings, a compensation equal to the value and thus possessing himself of them[3]."

46.4. *Civil law*—The section deals with only one aspect of a wider principle which allows similar relief. It declares only what has been the pre-existing law on the subject[4]. Embodying as it does a rule of equity, it is applicable alike to both Hindus and Mahomedans[5]. The Civil law carried its doctrine in cases of this sort much further, and allowed[6] the purchaser or other person making improvements innocently and under the belief that he was the true owner, compensation for the benefit actually conferred upon the property[7]. (described as "meliorations")[8] Domat lays down as a general doctrine that those who have spent money on improvements of an estate, have, by the civil law, a privilege upon those improvements, as upon a purchase with their own money.

46.5. *English law*—The rule here enacted is much wider than that deducible from the English cases, according to which it is necessary that the real owner must have had knowledge not only of the expenditure incurred[9], but also of his own rights in the property[10]. But this is by no means

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1 *Lake* v. *Gibson*, 1 Eq. Ca. Ab. 290.

2 Sacred Books of the East, 1889 Edn., Vol. 33, pages 114, 145. Ganganath Jha, Hindu Law in its Sources (1930 Edn.) Vol. 1, page 302, Narada, Vol. VI-20, 21, cited in *Mofiz* v. *Rasik Lal*, (1910) I.L.R. 37, Cal. 815, 820.

3 (a) Hedaya : (Hamilton's Translations), Vol. 3; cited in *Pannalal* v. *Gobardhan Das*, A.I.R. 1949 All. 757, 759, 760.

(b) (1902) 26 Bom. 1, 15, 16, 28 Ind App 121 (P.C.) (Case from Zanzibar where Muhammadan law applied—the above passage was held to contain the rule applicable).

4 Gour.

5 Section 2(d); *Durgosi* v. *Fakeer Sahib*, I.L.R. 30 Mad. 197.

6 See *Pannalal* v. *Govardhan Das*, A.I.R. 1949 All. 757, 759.

7 Dig. Book 50, tit, 17, l 206 "June nature cequm est, reminem cum alleries detrimento et injuria fieri l cupletiorem.

8 A creditor was allowed lien for meliorations (Dig. Bk. 121, tit, 1, I, 25; 1 Domat. Bk 3, tit. 1, 5 arts. 1 -7).

9 *Ramsden* v. *Dyson*, L. R. 1 H.L. 129, 141.

10 *Wilmott* v. *Barber*, 13 a. D. 36, o.a., 17, Ch. D. 772.

necessary under the section, which requires only that the person making improvements must have acted in the *bona fide* belief that he was *absolutely* entitled to the property. Where he fails to prove this, he cannot claim protection[1]. Provision for compensation for improvements under varying and various conditions is also made in the several Provincial Acts which provide for compensation to tenants and persons occuping land.[2-3]

46.6. *Other situations*—A claim for compensation for improvements may be made successfully or unsuccessfully in several situations. Some of the important ones are the following[4] :

(a) When improvements are made by a person who believes himself in good faith to be absolutely entitled to the property. This is the situation in section 51. Relief under that section has nothing to do with the conduct of the real owner.

(b) Where the owner has encouraged another person to make improvements by his declaration, act or omission. Relief in this case is based on estoppel[5] which bars ejectment without compensation.

(c) Where improvements are made by a co-owner without the concurrence of the other co-owners. In such a situation the other co-owner may obtain relief without proof of material injury[6]. The case would be decided purely on proprietory rights.

(d) Where improvements are made by holders of a limited interest. In such a case, compensation is admissible only when the improvements can be traced to some encouragement by the full owner. Such a claim may be made by the tenant against the landlord[7-8] or by a mortgagee against the mortgagor.

(e) Where improvements are made by a pure trespasser without the consent of, or encouragement by, the owner. In such a case, compensation is not allowed.[9-10]

As to situation (b) above, it may be stated that where the owner encourages improvements to be made, equitable estoppel may arise by reason of the conduct of the real owner.

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1 *Moti Chand* v. *Hr. India Corp. Co. Ltd.*, I.L.R. (1932) All. 210.

2 Section 69(1), Punjab Tenancy Act (XVI of 1887). The Central Provinces Tenancy Act (XI of 1898). Bengal Tenancy Act (VII of 1885). Malabar Compensation for Tenants Improvements Act (Madras Act 1 of 1900).

3 Gour.

4 Gour.

5 *Ramsden* v. *Dyson*, L.R. 1 H.L. 129, 168.

6 (a) *Paras Ram* v. *Sherjit*, I.L.R. 9 All. 661, 664;
(b) *Nocury Lal* v. *Bindabun* I.L.R. 8 Cal. 708;
(c) *Joy Chunder* v. *Bipproo*, I.L.R. 14 Cal. 236;
(d) *Madan Mohun* v. *Rajab Ali*, I.L.R. 28 Cal. 223;
(e) *Sashi Bhushan* v. *Ganesh Chunder*, I.L.R. 29 Cal. 500;
(f) *Fazilatunnessa* v. *Liaz Hassan*, I.L.R. 30 Cal. 901.

7 Section 108(m), (n), (q).

8 (a) *Beni Ram* v. *Kundan Lal*, I.L.R. 21 All. 496 (P.C.).
(b) *Raja of Venkatagiri* v. *Mukku*, 7 I.C. 202, 208.

9 Section 63.

10 *Maddanappa* v. *Chandramma*, A.I.R. 1965 S.C. 1812, 1816, para 14.

After discussing these theoretical aspects, we proceed to a consideration of some concrete questions.

46.7. *Food faith and inquiry*—We have already stated[1] that good faith is the crux of the section. Its content is therefore a matter of some importance.

46.8. *Inquiry*—On the question whether good faith in section 51 also requires proof of proper inquiry, there is some obscurity. In a Madras case,[2] the grantee of land under an order of the Tehsildar spent money on improvements without knowledge of an appeal which had been filed against the order and which had resulted in cancellation of the grant. The section was regarded as applicable. Probably in this case proper inquiry would have disclosed the proceedings by way of appeal. In an earlier case of the same High Court,[3] however, the claim of a purchaser from Hindu widow for compensation for improvements was repelled on the ground of want of good faith. The purchaser in that case did not make any inquiries as to necessity for the sale and the sale was set aside at the instance of the reversioner. It was held that since the purchaser could not, in the circumstances, have believed that he was absolutely entitled, there could be no valid claim under section 51.

There are some decisions of the other High Courts taking the same view.[4]

With respect, we are not convinced that this is a correct view of the section as it now stands. The question is whether or not that honest belief is preceded by proper inquiry. To say in such circumstances that the purchaser could not have believed that he was absolutely entitled, is to equate good faith with the element of careful inquiry, which is not the ordinary understanding of the expression "good faith". Theoretically, one cannot overlook the distinction between what is the belief of the person and what is the reasonable belief of that person. While actual knowledge of a defect in one's title may bar the application of section 51 for want of good faith, it does not appear to be a correct view to take that negligence as such would preclude good faith. We would agree rather with those decisions,[5] which take the view that honesty of purpose suffices. So far as the section under consideration is concerned, it should be provided that what is done honestly is done in good faith, whether or not it is done negligently.[6]

46.9. *Invalid instruments*—There is a difference of opinion as to whether a person in whose favour an instrument is executed which is invalid for want of registration is a "transferee" within the meaning of section 51. According to the High Court of Madras[7] he is a transferee. According to the High Courts of Allahabad[8] and Rangoon,[9] he is not.

1 Para 46.3, *supra.*

2 *Narayanmurthi* v. *Secretary of State,* 48 M.L.J. 682, A.I.R. 1925 Mad. 63.

3 *Nangappa* v. *P. Goundan,* I.L.R. 32 Mad. 530.

4 *Bimol Chandra* v. *Mammatha Nath,* A.I.R. 1954 Cal. 345, 347.

5 *Mohammad Ali Khan* v. *Kanulal,* A.I.R. 1935 Cal. 625.

6 *Cf.* discussion as to section 50, *supra.*

7 *Ramanathan* v. *Rangenathan,* A.I.R. 1919 Mad. 1083, 1090, (F.B.).

8 *Ram Prasad* v. *Chajju,* A.I.R. 1964 All. 300, 302.

9 *Madan Gopal* v. *Sundaran,* A.I.R. 1940 Rang. 172, 174.

46.10. *Qualified owner*—Then, there is a controversy as to whether the section applies to a case where the transfer is from a qualified owner. It is the view of the Allahabad High Court[1] that section 51 is applicable only to defective transfers and not to defensible transfers. The Madras and Nagpur view is to be contrary[2-3]. One is reminded in this context of the phrase used in section 43—power of a person to transfer property "in circumstances which are in their nature variable." We are of the opinion that the wider view—the Madras view—should be adopted, having regard to the beneficial object of the section.

The answer to such questions depends partly on the meaning which one attaches to the expression "transferee" and partly on the emphasis to be placed on the words "believing himself to be absolutely entitled in good faith." We see every reason why the wider view should be adopted. The emphasis should be on the honest belief of the person making the improvements that he is a transferee and not on the validity of his title. Once good faith is established, the equities in his favour should not be disregarded.

46.11. *Compensation—whose option*—Although the language of section 51 might suggest that the choice of mode of compensation is of the person evicted, that is not the intention.[4] *The choice is of the* person evicting.[5-6-7]. This seems to be a point requiring clarification by express amendment in the section.

46.12. *Amount*—As to the amount of compensation, it has been decided by the Privy Council[8] that the amount of expenditure has occasionally very little to do with the real issue, and that the real issue is to what extent enhancement of the subject matter has been brought about. In other words, the real question is: Has the property as a marketable subject enhanced in value or not? In that case a temple built on the land did not enhance its marketable value and was not regarded as falling within section 51.

46.12A. *Removal*—This brings us to a connected question, namely, is the evicted person entitled to remove the materials which constitute the improvements ? The answer could appear to be in the affirmative[9-10] provided the land is not injured.

46.13. *Estoppel*—We must make a distinction between those improvements which involve an equitable estoppel and those which do not. Equitable estoppel goes far beyond the rule in section 51, because while section 51 merely puts the party on terms to pay compensation, estoppel may compel him to make good his representation. In the well-known case of ***Forbes*** v. ***Ralli Brothers,***[11] the defendant lessee raised a pucca guilding on a leasehold.

1 *Lachmi Prasad* v. *Lachmi Narain,* A.I.R. 1928 All. 41—42, (Ashworth, J.).
2 *Nangappa* v. *P. Coundan,* I.L.R. 32 Mad. 530.
3 *Vithal* v. *Narayan,* A.I.R. 1931 Nag. 69 (Jackson, A.J.C.).
4 *Famaiya* v. *Narayanaswamy,* 51 M.L.J. 313.
5 *Narayan* v. *Ganesh,* A.I.R. 1926 Bom. 599, 600.
6 See decree in A.I.R. 1956 S.C. 727, 729, *Narayan Rao Basavarayappa.*
7 *Nagaratnamma* v. *Ramayya,* A.I.R. 1963 A.P. 177, 184, para 18.
8 *Kedar Nath* v. *Muthumal,* I.L.R. 48 Cal. 555 (P.C.).
9 *Hans Raj* v. *Somi,* I.L.R. 44 All. 655.
10 *Krishna Prasad* v. *Adyanath Ghatak,* A.I.R. 1944 Pat. 77.
11 *Forbes* v. *Ralli Brothers,* A.I.R. 1925 P.C. 146.

He purported to do so on the strength of the permission of the landlord, given by a letter which stated that the lease was a permanent one and gave to the lessee the right to erect buildings.

It was held that though the lessee was not entitled to hold the land at a fixed rate of rent and that the rent was liable to be enhanced after proper legal notice, yet a suit by the landlord for ejectment on the ground of construction of the pucca building was not maintainable by reason of estoppel arising on the letter written by the landlord.

46.14. *Meaning of transferee*—How does section 51 apply to a transferee from a transferee? A decision of a single judge of the Calcutta High Court[1] is to the effect that a claim for improvements under section 51 can be made only by the first transferee, and not by his representative in interest.

In the Calcutta case, these observations were made with regard to the argument relating to section 51:—

> "I had best state my construction of that section at once. If it was intended to provide for rights higher and wider than those that *I shall now state, in my view, the section should be re-drafted.* I will paraphrase it as follows: X has a right to compensation provided that he is (1) a transferee, (2) he has made such improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled, and (4) he was evicted. In my view, the section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It appears to me that it was intended to provide for a right to compensation to an individual who fulfils all the conditions laid down."

It is held in the Calcutta decision that such a right is neither heritable nor transferable and apart from section 51, there are no equitable principles under which the evictee can claim compensation. The actual decision in that can be supported on the ground that the defendant who claimed compensation was the purchaser of the *property at a court sale* so that he cannot claim to be a transferee within meaning of section 51 of the Transfer of Property Act.

But the reasoning goes beyond that, and would deny the benefit of section 51 to any transferee. The judgment gives a very mild hint of a need for reform of the law.

A different view was expressed in a Madras case,[2] holding that section 51 applies to the subsequent transferee also. The Madras case dissents from the Calcutta case.

There are at least two Privy Council decisions[3-4] in which compensation seems to have been awarded to the transferee's representative in interest. The first case was one in which a transferee from a Hindu widow without legal necessity effected permanent improvements. His successor-in-interest was allowed to claim compensation for the improvements made by

1 *Nagendrabala* v. *Panchanan*, A.I.R. 1934 Cal. 290.
2 *Md. Basiruddin* v. *Govindroy*, A.I.R. 1971 Mad. 44.
3 *Bhagwat Dayal* v. *Ram Ratan*, A.I.R. 1922 P.C. 91, 93.
4 *Narayanan* v. *Rama Iyer*, A.I.R. 1930 P.C. 297, 300.

his predecessor. In the second case, the transferee who had effected improvements in good faith was succeeded by his heir and it was the heir who was awarded compensation for the improvements effected by his predecessor. Having regard to this position, it is desirable to take the opportunity of making it clear that the expression "transferee" in this section includes his successors in interests.

46.15. *Recommendation—Amendments summed up*—As a result of the above discussion, we recommend that the following propositions[1] should be inserted in section 51:—

(a) "Good faith" in the section requires only honesty of purpose, and not proof of absence of negligence.[2]

(b) Invalid transfers, including invalid transfers by qualified owners, are covered.[3]

(c) The choice between the two modes of compensation is of the person evicting,[4] and not of the person evicted.

(d) The expression 'transferee' includes successors in interest.[5]

46.16. *Recommendation*—In the light of the above discussion, we recommend the addition of the following Explanations to section 51 :—

"Explanation 1.—In this section, "transferee' includes a person claiming under or through a transferee.

"Explanation 2.—In this section, the expression 'good faith' has the same meaning as in section 50.

Explanation 3.—A person who purports to derive title under a transfer which is not valid in law is a transferee within the meaning of this section.[6]

"Explanation 4.—A person causing the eviction has the option of deciding whether the transferee should be entitled to have the value of the improvements estimated and paid for, or whether the transferee shall be entitled to require that person to sell his interest in the property to the transferee, as provided in this section."

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1 For draft amendment, see para 46.16, *infra*.

2 Para 46.8, *supra*.

3 Para 46.9 and 46.10, *supra*.

4 Para 46.11, *supra*.

5 Para 46.14, *supra*.

6 Of course the other conditions of the section, including belief in good faith, must be satisfied.

CHAPTER 47

TRANSFER PENDING LITIGATION

SECTION 52

47.1. *Introductory*—Certain provisions of the Act are aimed not at giving effect to any specific doctrines of equity, but at effectively carrying out certain requirements of public policy. In the field of the law of procedure, we are familiar with the principle that there should be an end to litigation. The policy of the law to avoid unnecessary litigation and to avoid the same matter being litigated again is well known. A similar policy finds manifestation in the principle that litigation conducted without collusion and in a competent court, must be effective and the energy and money spent thereon must not be rendered futile by one party transferring the property in issue in the litigation.

47.2. *Principle*—Section 52 is an expression of the principle underlying the maxim *pendente lite nihil innovetur* (pending a litigation nothing new should be introduced). The section is intended to protect the parties, but there is a deeper consideration of public policy, namely, the act of Court must not be thwarted by private act.

47.3. *Section* 52—This is how the section reads—

"52. During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits, by the Central Government, of any suit or proceeding which is not collusive and in which any right to immovable 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.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

47.4. *History*—Lis pendens is a doctrine known to English law at least since the 17th century.[1] There was, however, some obscurity as to its rationale, since some persons thought that the doctrine rested on notice. In the leading case on the subject—***Bellamy*** v. ***Sabine***[2]—decided in the latter

1 (a) *Self* v. *Madox*, (1687) 23 E.R. 585;
(b) *Sorrell* v. *Carpenter*, (1788) 24 E.R. 325.
2 ***Bellamy*** v. ***Sabine***, (1857) 44 E.R. 842.

half of the 19th century, the Lord Chancellor (Lord Cranworth), observed :

> "It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party".

"where a litigation is pending between a Plaintiff and a Defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, *whether such alienees had or had not notice of the pending proceedings*. If this were not so, there would be no certainty that the litigation would ever come to an end."

Basis—After referring to certain cases which were to the effect that lis pendens was "implied notice" to all the world, Lord Cranworth continued :

"The language of the court in these cases, as well as in *Worsely* v. *The Earl of Scarborough*,[1] certainly is to the effect that lis pendens is implied notice to all the world. I confess, I think that is not a perfectly correct mode of stating the doctrine. What ought to be said is that pendente lite, neither party to the litigation can alienate the property in dispute so as to affect his opponent. The doctrine is not peculiar to courts of Equity."

Turner, L.J. in the same case observed that the doctrine rested not on any peculiar tenets as to implied or constructive notice, but upon this foundation that it would be plainly impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail.

47.5. *Analysis*—The section was analysed by R. B. Pal, J., of the Calcutta High Court as follows[2] :

"The requirements of the section are : (1) the pendency of a suit, (2) non-collusive character of the suit, (3) any right to immovable property being in question in that suit, being in question directly and specifically, (4) the other party (other than the party making the transfer *pendente lite*) having some right under the decree in, that suit. The consequence of the doctrine is that the transaction *pendente lite* shall not be allowed to affect the right under the decree."

The first and the third ingredients have been the most fruitful source of controversy. Some of the important points will be dealt with in due course.

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1 *Worsely* v. *The Earl of Scarborough*, (1746) 26 E.R. 1025, 1026.

2 *Haranya Bhushan* v. *Goura Dull*, A.I.R. 1943 Cal. 227, 230 (Judgment approved by the Privy Council in A.I.R. 1948. P.C.).

47.6. *Principle*—We have already stated[1] that the section intended to ensure that a private party does not defeat the authority of the court. The *status quo* is maintained unaffected by the act of a party to the litigation. In other words, the section takes away the subject of transfer of property pending litigation from the realm of volition of the parties, and places it in the domain of the court, so that successive alienations of property in dispute may not render nugatory judicial verdict on that dispute. It is for this reason that the emphasis is not on notice of pendency, but on pendency itself. It is sometimes stated that the law of lis pendens is an extension of the law of res judicata. This is true, if it is understood in the sense that res judicata is on the basis of parties whose names appear on record of the proceedings, and lis pendens binds all persons who purport to be transferees of the property in the suit. If he was a party, then he would be bound by reason of res judicata. If he was not a party, he would be bound by lis pendens. In this sense, lis pendens supplements *res judicata.*

47.7. *Decretal charge*—A pretty large number of judicial decisions on section 52 relate to the question of charge. Controversy used to arise in the past on the question whether the doctrine of *lis pendens* applies to claims for maintenance resulting in a charge. The correct position as now settled seems to be that if the claimant for maintenance has made a prayer for charge and the charge is ultimately incorporated in the decree, then the doctrine applies, so that, as the section says, "the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party to the suit under any decree which may be made therein".[2] Of course, there should be a prayer for a charge on a specific immovable property mentioned in the plaint and the decree must have been passed creating a charge on such property. We shall deal late[3] with a right which is created by the decree though not prayed for in the pleadings.

47.8. *Limony*—The emergence of matrimonial legislation and the increasing number of suits in that jurisdiction has lent new importance to the question of application of the doctrine of lis pendens to prayers for alimony and for a charge on specific immovable property. In one of the very early American cases,[4] the following observations were made :—

"In many cases where, in divorce proceedings the application is for alimony proper, that is, an allowance to be paid at regular periods for the wife's support, it was held that the rule of lis pendens does not apply where the suit is in personam, and did not relate to any specific part of the personal or real estate of the husband. If, however, the wife in her complaint specifically describes property which she asks the court to decree *to her for her support,* there seems to be no well founded reason why the rule of lis pendens should not apply..... In such a case, a purchaser *pendente lite,* with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects

1 Para 47.4. *supra.*

2 *Bose Chinamma Dhutta* v. *Krishna.* (1906) I.L.R. 29 Mad. 508.

3 Para 47.9, *infra.*

4 *Powell* v. *Campell,* 19 Am. St. Rep. 350 cited in *Seetharamanuja Charyulu* v. *Venkatsubbamma,* A.I.R. 1930 Mad. 824, 832.

of the suit is to obtain decree awarding such property to her; see section 284 of Hukam Chand's law of Res Judicata, pages 722 and 724, and Benndt on Lis Pendens, page 267, section 219".

This position is substantially true in India and elsewhere, today also.

47.9. *Charge created by decree but not prayed for in the pleading*—One situation arising out of the charges does not appear to have been dealt with in section 52. What happens if the charge is not prayed for in the plaint, but is granted by the decree and the transfer (now sought to be challenged) is made after the decree but before the decree is completely satisfied? Taking literally the language of the section, the matter is not covered in the main part, because when the suit was instituted, there was no right to immovable property directly and specifically 'in question'. In such a case, is it not just and fair that the doctrine of *lis pendens* should be extended? We are not, this time, concerned with the case where there is in the plaint itself a prayer for a charge. In such a case the lis involving immovable property commences from the date of the plaint. We are concerned with the question whether there could be a case where the lis, though not commencing from the date of the plaint, commences from the *date of the decree*. If the decree directs the sale of a certain property, and then, after the decree and before the sale, a private transfer is effected, should it be allowed to defeat the rights under the decree? As the law now stands, until the actual order is passed for the sale of the property, no priority is created, in such a situation.[1] Take another situation. An injunction is not prayed for in the plaint, but is ultimately granted by the decree—a rare but no an inconceivable case. After the injunction is granted, but before it is executed, property is transferred. Should the injunction not be executable against the transferee?

We are of the view that the section should be amplified in this regard, and we recommend accordingly.

47.10. *Charge created by decree*—It would appear that when a charge is created by a decree, the doctrine of lis pendens still applies,—unless the decree is merely declaratory.[2] If a person purchases property from a party after an order creating a charge is passed in an inter-pleader suit, the transfer is governed by *lis pendens*, according to some cases.[3] The Explanation to section 52, however, where it relates to the starting point, may give a different impression. This should be remedied. As to the point of substance, it is to be noted that while a charge, as such, can be enforced only against a person who purchases with notice or for value, the doctrine of lis pendens makes no exception in favour of a bona fide transferee for value without notice.

47.11. *Notice of suit—Registration of*—An amendment made by the erstwhile State of Bombay[4] has provided for the registration of notices of suit with reference to the Registration Act and has consequentially amended section 52 of the Transfer of Property Act so as to limit its operation

1 *Bepin Krishna* v. *Byamdesh Deb*, A.I.R. 1925 Cal. 395 (2).
2 *Mahesh Prasad* v. *Mt. Mundar*, A.I.R. 1951 All. 141, 151, 153 (F.B.).
3 *Kulanadaivelu* v. *Sowbagyammal*, A.I.R. 1945 Mad. 350, 351.
4 Bombay Act, 57 of 1959.

to cases where notice of the pendency of the suit or proceeding is registered under the Registration Act as amended in that State. We have considered the question whether such an amendment should be extended to the rest of India, but are not inclined to do so. Apart from the fact that it may involve an amendment of the Registration Act, and apart from the fact that such an amendment in that Act was not favoured by the Law Commission in its Report on that Act[1], we are not certain whether the amended procedure would be appropriate for all the territories to which the Transfer of Property Act extends.

47.12. *Meaning of Court*—Questions arise as to whether a particular authority is a "court" or not for the purpose of the section. Generally, a wide view is taken. We need not quote the case law.

47.13. *Competence of the Court*—An important ingredient which is usually read into the main paragraph of section 52 is not mentioned expressly in the section, namely, that the Court before which the proceeding is pending must be a court of competent jurisdiction. The words "having authority" which appear in the main paragraph are intended mainly to emphasise the fact that the Court must be an Indian Court. But it is not meant to indicate that, as amongst Indian Courts *inter se,* the court must be a competent court having regard to all the law that governs the jurisdiction of courts dealing with civil allied proceedings. This further requirement should find a place in the main paragraph. The idea is indirectly brought out by its mention in the definition of pendency of a suit as given in the Explanation. But it is important enough to deserve mention in the main section.

47.14. That the court must be competent is an aspect which may become material either where the suit was going on in a court which has no jurisdiction so that the plaint is ultimately rejected or the suit dismissed, or where the plaint was returned by the incompetent court for presentation to the competent court. In fact, the words "court of competent jurisdiction" in the Explanation which was inserted in 1929 make it clear that the court must be competent. The only point which is now sought to be emphasised is that this important requirement may usefully find a place in the main paragraph of the section.

Where the Court has no jurisdiction to try the suit, a transfer pending such suit cannot operate as lis pendens, and cannot affect any decrees or orders in such suit.[2] In an early Calcutta case[3], it was held that a suit filed on the equity side of the Supreme Court of Calcutta did not operate as lis pendens so as to affect a transfer of immovable property in the mofussil, inasmuch as the Supreme Court has no jurisdiction over property in the mofussil. The present High Courts have, under their Letters Patents, power to try suits relating to land partly within their jurisdiction and partly without it, provided the leave of the Court is obtained for doing so. When the High Court so acquires jurisdiction to determine the suit, the suit will operate as lis pendens.[4]

1 Law Commission's 34th Report on the Registration Act.
2 *Devassya* v. *Thommani*, A.I.R. 1953 Trav-Co. 573, 574.
3 (1869) 11 Suth W. R. 554, 555 (D.B.).
4 *Kiernanda* v. *Beni Madhab*, A.I.R. 1931 Cal. 763, 767.

47.15. *Recommendation*—It may be desirable to bring out the above aspect in the main paragraph and we recommend accordingly.

47.16. *Scope as to movable property*—Because of the setting in which the section appears, section 52 does not apply to movable property. Further, because the Act does not extend to certain territories, the section does not apply to those territories. Nevertheless, the principle of the section must also extend to the territories to which, strictly speaking, the Act does not apply. The same reasoning applies to execution sales. Although "transfer" and "dealing" are not expressions appropriate for execution sales, yet it is well established that the principle applies to execution sales as well[1].

47.17. *Meaning of "otherwise dealt with"*—The section is not confined to "transfers". The words "otherwise dealt with" will include the several other transactions which we need not enumerate.

47.18. *Recommendations for amendment*—As a result of the above discussion, we recommend two amendments in the section—

(i) insertion of the requirement of competence of the Court in the first paragraph;

(ii) amplification as regards a right[2]—particularly, a charge—created by a decree, though such right or charge was not prayed for in the plaint. Of course, in such a case the lis commences from the date of the decree and not from the date of plaint. But the expression "right ..... is ....in question" may require to be amplified.

47.19. *Illustrative situations*—In elucidiation of the second proposition, it may be stated that a suit or proceeding, in which, at its inception, no question as to right to any property is directly or specifically raised, may, at a subsequent stage thereof, become a suit or proceeding in which such question is involved. Thus, a suit for maintenance in which no charge is asked for against any property is not, at its inception, one in which any right to immovable property is in question. But, if the decree declares a charge on any particular property, the litigation thereafter becomes one in which such right is in question and a subsequent transfer of the property will be affected by lis pendens[3]. Similarly, where in a suit for mesne profits, the defendant furnishes security of specific immovable property for any amount that may be decreed in the suit, the litigation becomes, from the date the security is given, one in which a right to immovable property is in question. A transfer, therefore, of such property after the date on which it is given as security, will be affected by lis pendens[4]. In *Bazayet Hossein* v. *Dooli Chand*[5], there was a suit by the creditors of a deceased person against his heirs, for recovery of money

1 *Jayaram* v. *Ayyavam*, A.I.R. 1973, S.C. 569, 578.

2 Para 47.10, *supra*.

3 *Jagannatha* v. *Ram Chander*, A.I.R. 1936 Mad. 589, 592.

4 *Subramania* v. *Esakki Madan*, A.I.R. 1953 Trav-Co. 364, 366.

5 *Bazayet Hossein* v. *Dooli Chand*, (1879) I.L.R. 4 Cal. 402, 420; 5 Ind. App. 211 (P.C.).

from out of the assets. A decree was passed directing the defendants to account for the property. A transferee who took the property after the decree, was held affected by lis pendens.

A contrary view has, however, been taken by the Nagpur High Court[1], namely, that the doctrine of lis pendens will not apply *unless from the very beginning of the suit or proceeding* the right to the property was in question, and that, where in a suit for money, a charge *is declared* by the decree on certain property, a transfer of the property subsequent to the decree, is not affected by lis pendens. Reliance was placed upon the decision of the High Court of Patna in the undermentioned case[2]. In that case the plaintiff sued for the recovery of money and also claimed that certain properties should be charged for the amount that may be decreed, but the Court granted merely a money decree without giving any charge on any property. It was held that a transfer of the property pending the suit was not affected by lis pendens for two reasons, first, that the actual decree did not affect in any way the property transferred, and secondly, that the suit, *even though asking for a charge* in the plaint, was not one in which any right to immovable property was in question. We are, with respect, of the opinion that the Nagpur view is not correct.

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1 *Badri Das* v. *Raja Pratpgir*, A.I.R. 1940 Nag. 8, 13 (D.B.).

2 *Bhagwan Das* v. *Akbar Hussain Khan*, A.I.R. 1936 Pat. 571, 572.

CHAPTER 48

FRAUDULENT TRANSFERS

SECTION 53

48.1. *Introduction*—Ordinarily, the law does not, in determining questions of civil liability, take account of the motives of person. An act which is lawful does not, in general, become actionable merely because the motive is improper. But there are exceptions to this general rule. One such exception is created by section 53 in the interests of creditors of the transferor and subsequent transferee of the same property. It constitutes a qualification of the general rule that a person may do what he likes with his own property. The exception is created on the basis of the paramount policy of the law to check fraud. No one is permitted to effect a transfer with the object of defrauding his creditors or with the object of defrauding a subsequent transferee.

48.2. *Section* 53.—Section 53 reads—

"53. (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

48.3. *History*—The ancestry of the section is usually traced to two statutes of Elizabethan times. By 13 Eliz., Chap. 5 it was provided that convevances of any kind of property, whether land or goods, with intent to defraud creditors were voidable at the instance of the person thereby prejudiced, except where the transferee had taken the property for good consideration and without notice of the intent to defraud. By 27 Eliz. Chap. 4, it was provided that convevances of lands (not goods) with intent to defraud subsequent purchasers were void against such purchasers for value, except where the prior transferee had taken the property for good consideration and *bona fide*.

Before the 1882 Act was passed these two statutes were applicable to the Presidency Towns of India. The principles underlying them were also applied in the mofussil, as being in conformity with justice, equity and good conscience. In section 53 of this Act, the Legislature introduced with some modifications the above-mentioned provisions of the two statutes and thus codified what had been recognised as the law in this country. The two statutes were repealed by this Act. It was held in a Bombay case[1] that the above statutes may be accepted as guides to the law before the Act.

48.4. *Law in England*—In England, the law was altered by the Voluntary Conveyances Act, 1893. That Act, and the earlier statutes, are now replaced by sections 172-173, Law of Property Act, 1925. In India, in 1929, section 53 was amended in the light of the English statute of 1925.

48.5. *Scope*—Section 53, in its first sub-section, deals with transfers in fraud of creditors. In sub-section (2) it deals with transfers in fraud of subsequent transferees. Neither of these sub-sections deals with a transfer giving one creditor preference over the other. That is a matter dealt with by the Insolvency law under "Fraudulent preference[2]."

48.6. *Sub-section* (1)—*Evidence of intention*—We shall now consider a few points of detail concerning sub-section (1). The section as it stands after the 1929 amendment contains no presumption as to intent. There may be a fraudulent intent even though the transfer is for consideration. Conversely, the transfer may be without consideration and yet there may be bona fides. The principal object of the first sub-section is to ensure that the property of the debtor is applied in payment of the demands of the creditors and that there is no intention to defeat or delay them. Creditors may be prejudiced not only by a transfer without consideration, but also by a transfer with consideration whereunder the debtor reserves a substantial benefit for himself. Conversely, a transfer even without consideration may be bona fide—for example, a transfer to a charity in performance of a moral obligation undertaken in good faith at a time when the transferor was in financially comfortable circumstances.

48.7. *Law before* 1929—Before 1929, the section provided that a transfer may be presumed to have been made with a fraudulent intent if its effect was to defeat or delay creditors and it was made gratuitously or for a grossly inadequate consideration. The provision, however, created doubts as to whether it implied that in regard to a transfer for adequate consideration a conclusion of fraudulent intent could not be made. The paragraph has now been deleted. This does not, of course, mean that as a matter of policy a different view was taken. The Court is still free to make such a presumption, but it must have regard to the whole of the circumstances. The principle that every man ought to be just before he is generous[3] has not been given the go-bye. But it has to be applied on a consideration of all the circumstances. Regard will, therefore, have to

1 *Bhagwant* v. *Kedari*, (1901) I.L.R. 25 Bom. 202, 208, 209.

2 See para. 48.12, *infra*.

3 *Freeman* v. *Popa*, (1870) 5 Ch. D. 538.

be had to the extent of his indebtedness, on the one hand, and the circumstances leading to the voluntary transfer on the other hand. Thus when the transferor has no debts and is not in embarrassed circumstances, the execution of a voluntary transfer cannot be held in itself to be in fraud of subsequent creditors[1]. Even if he is under a debt, a transfer cannot be considered to be fraudulent only on that account, as otherwise a person of means, indebted in a trifling sum of money, may be prevented from making a transfer—let us say,—a mortgage of property to secure future advances for bona fide investments in a lawful business. Thus, in an Allahabad case[2], a mortgagor who had executed a mortgage, gifted non-mortgaged property. The gift was challenged as voidable under this section. It was, however, found that the mortgaged property was sufficient to satisfy the mortgage debt. It was held that the gift could not be said to be with a view to defeating the mortgagee. In contrast[3], where the mortgaged property is not sufficient to satisfy the mortgage debt, a transfer by the mortgagor of his other property can indicate a fraudulent intention. It is therefore legitimate to consider the value of the property sold and its proportion to the extent of the demands of the creditors at that time. In recommending the deletion of the relevant paragraph of section 53, the Special Committee of 1927 stated that its object was "to leave the determination of the question of intent to be determined by the ordinary rules of evidence[4].

48.8. *Transfer voidable under sub-section* (1)—It is obvious from the language of the section that the transfer hit by sub-section (1) is not absolutely void. It is voidable at the instance of the creditors, and the suit to set it aside must be a representative suit. This does not, of course, mean that there must necessarily be numerous creditors in every case. There may be only one creditor at the time of the transfer. If the intention of the transferor was to defraud that creditor who was the only creditor at that time, the section would be attracted. Of course, if, by the time, a suit is instituted, other debts also come into existence, the suit must be for the benefit of all.

48.9. *Suit not the only remedy*—If a suit is filed for a declaration that the transfer does not bind the body of creditors, then all creditors must be the beneficiaries. But this does not mean that a suit must be filed for the purpose of expressing a creditor's repudiation of the transfer. Judicial decisions[5] established the proposition that any act of the creditor showing an unequivocal repudiation of the transfer is enough.

48.10. *Benami transactions*—There appears to be a misconception as to the relationship between benami and fraudulent transactions. A benami transaction may or may not be fraudulent, and a fraudulent transaction may or may not be benami. This does not, of course, mean that against a benami transaction a creditor has no remedy. Rather, the opposite is the position in general. As a rule, a creditor of A can always prove that property standing in the name of B is held benami and that the real owner is A. If the creditor succeeds in proving it, the property becomes available to the creditor, not under section 53 but because of the

1 *Umar Sait* v. *Union of India*, A.I.R. 1965 Mad. 395, 397.

2 A.I.R. 1928 All. 476, 479.

3 *Raj Kuer* v. *Rajendra Bahadur*, A.I.R. 1951 All. 443, 447.

4 Report of the Special Committee (1927), discussion on section 53.

5 E.g., A.I.R. 1963 S.C. 1150, 1160.

position that the creditor of A has always available the property of A, *whoever be the ostensible owner*. This is subject, of course, to any transactions already entered into by the ostensible owner that are recognised by special rules of law.[1]

48.11. *Good faith*—Even where the other ingredients are satisfied, protection is given only to a transferee in good faith for consideration. This practically means that the transferee must have been party to the fraud if the section is to apply,—although the burden of proving good faith is on the transferee. There is a difference between good faith and proper inquiry, as we have pointed out under sections 50-51. The mere fact that the transferee has some reason to suspect[2] that there may be other creditors, or even his knowledge[3] that the transferor is in financial embarrassment, does not necessarily prove absence of good faith.

48.12. *Fraudulent preference*—The law of insolvency invalidates fraudulent preferences[4] in certain circumstances. The principles applicable for the operation of such provision are, however, different from those on which section 53 rests. The object of the prohibition in the Insolvency law is to secure rateable distribution of the assets amongst the creditors and to prevent discrimination *inter se*. The object of section 53, on the other hand, is to protect all creditors. The *lis* is between the body of creditors on the one hand and the transferee on the other. In the case of a fraudulent preference, the *lis* is between creditors *inter se*. That provision incidentally is applicable only to a transfer within two years before insolvency. The provision in the Transfer of Property Act, on the other hand, is applicable at all times.

48.13. *Subsequent transferees—Position under sub-section* (1)—Two further propositions are worth pointing out regarding sub-section (1) of section 53—

(a) Where the first transferee is a bona fide transferee for consideration, he gets a good title, and a subsequent transferee from that transferee, even if not *bona fide*, is protected[5].

(b) A bona fide transferee from a fraudulent transferee would also be protected[6].

48.14. *Sub-section* (2)—*Transfer in fraud of subsequent transferee*—This disposes of sub-section (1) of section 53. Under sub-section (2), a transfer can be set aside, if in fraud of subsequent transferee, but only if without consideration. Fraud must be proved. The last paragraph provides, in effect, that a transfer made without consideration shall not be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

48.15. *No change*—The above discussion discloses no need to change the section.

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1 E.g. section 41.

2 *Razina Khalun* v. *Abida Khalun*, A.I.R. 1937 All. 39, 41.

3 *Rajbari Bank* v. *Harshamukhi Sinha*, A.I.R. 1947 Cal. 154.

4 Section 54, Provincial Insolvency Act, 1920; Section 56, Presidency Towns Insolvency Act, 1909.

5 *Brandlyn* v. *Ord.*, (1738) 26 E.R. 359.

6 (a) *Firm Man Singh* v. *B. N. Sinha*, A.I.R. 1940 Lah. 198, 199;
(b) *Kunhu Pothu* v. *Raru Nair*, A.I.R. 1923 Mad. 558, 560;
(c) *Parthasarathy* v. *Subbaraya*, A.I.R. 1924 Mad. 67.

CHAPTER 49

PART PERFORMANCE AS A DEFENCE

SECTION 53-A

49.1. *Introductory*—The conflict between strict law and equity assumes a new form when the strict law is in the form of a *statutory provision* prescribing a particular formality for the transfer of property. When a situation presents itself where that formality has not been undergone but the intention to transfer has been implemented in fact, and the transferee, acting in performance of the contract, has taken possession and performed his part, the conflict becomes apparent. Is it, then, equitable that the transferor should be permitted to repudiate the transfer on the ground of a mere technicality? In some form or other, such conflict between strict law and equity arises daily. But the peculiarity this time is that there is a specific legislative mandate before the Court, and the Court has to decide the delicate question whether it should disregard the statute and if so, to what extent. In a situation not governed by statute, the solution would not be too difficult, because the Court has the whole jurisprudence of estoppel for its guidance. A person is not allowed to assert his legal rights where to do so would be to allow him to repudiate his own representation which has led a third party to act on it, to his prejudice.

Estoppel having evolved its own set of rules and propositions familiar to lawyers and founded on non-controversial moral postulates, Courts would, in general, find no difficulty in solving a problem by resorting to that doctrine where there is no possibility of a conflict with a specific legislative provision.

49.2. *Statutory provision*—Where, however, there is a statutory provision, the matter creates problems. Difficulty arises because the resort to estoppel is ordinarily not regarded as permissible where a *statutory provision* has to be complied with. How far can estoppel override a statute is the fundamental question to be considered. In answering this question, the Court must necessarily embark upon an investigation of the object of the particular statutory provision in question. This is the general pattern of the judicial process. In the context of statutory provisions requiring (i) registration of the instrument of transfer, or (ii) execution of an *instrument of transfer* (as distinguished from the contract), the specific question to be considered is—What is the object of such requirements?

49.3. *French*—English Courts, when faced with the problem, assumed that such requirements are primarily intended to prevent fraud. They started giving relief where strict enforcement of those provisions would itself effectuate a fraud. The English doctrine of part performance was evolved to counter the strict provisions of the Statute of Frauds. It may be that statutory language to some extent left scope for such benevolent construction. But that is not an essential aspect. As Lord Cranworth L.C observed[1]—

> "Though Courts of Equity have held themselves bound by this last enactment (the Statute of Frauds), they have yet in many cases,

1 *Caton* v. *Caton*, (1883) 8 App. Cas. 467, 475, 476.

felt themselves at liberty *to disregard it* where to insist on it would be to make it the means of effecting..... fraud."

49.4. *Equity*—It would be observed later that the other party is prevented from setting up the legal invalidity of the contract on the faith of which he intended or allowed the person contracting with him to act. This was a victory of equity over statute. At times, it was described as the result of a process of construction of statutes so as to limit its scope to avoid fraud. But, in substance, it amounted to clipping the wings of the statutory provisions prescribing technicalities. Such a victory is not achieved easily, since parallel sources of law are in competition. The history of the recognition of this doctrine—which we shall deal with later—shows how tiresome the process could be. In fact, in India, the long-drawn process culminated in a specific stautory provision in 1929 in the shape of section 53A, so that the movement has now turned a full circle. What began with a construction of statutory provisions has itself ended in another specific statutory provision.

49.5. *Estoppel*—Estoppel is the chief moral justification for the doctrine of part-performance. The Court of Equity felt themselves at liberty to receive parol evidence as to the terms of the contract and to grant relief to the parties on the basis of such contract, such as, by decreeing specific performance of the contract[1] or by granting an injunction preventing a party from acting in breach of the contract, because there was, in substance, action in reliance on a promise. In *Caton* v. *Caton*,[2] Lord Cranworth, LC, emphasised the aspect of preventive fraud. He observed :

> "This is the ground on which they decree specific performance of parol contracts for the sale or purchase of land, when the contract has been in part performed. The right to relief in such cases rests, not merely on the contract, but on "what has been done in pursuance of the contract. .... The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds, is, that when one of the two contracting parties has been *induced or allowed by the other*[3] to alter his position on the faith of the contract; as, for instance, by taking possession of land, expanding money in building, or by other like acts; there, it would be fraud in the other party to set up the legal invalidity of the contract, on the faith of which he induced or allowed the person contracting with him to act."

49.6. *Section 53A*—To come to the section proper, section 53A reads—

> "53A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

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1 *Lawson* v. *Laude*, (1761) 21 E.R. 303; 1 Dick 346;
Gunter v. *Halsey*, (1739) 27 E.R. 381; Amb. 586.
Lockey v. *Lockey*, (1719) 24 E.R. 232; Pre Ch. 518.

2 *Caton* v. *Caton*, (1866) 35 L.J. Ch. 292, 395.

3 Emphasis supplied.

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract :

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

49.7. *History in India*—The history of the doctrine of part performance in India is a history of fluctuation of views in the courts. Incidentally, it shows that where the law on a particular subject is codified incompletely, controversies are likely to arise on those topics which are left out of codification. It would be tedious to discuss here all the judicial decisions on the subject preceding the introduction of section 53A. It will suffice to refer to a few important judgments, representing the following stages—

(a) Before the passing of the Act, the doctrine of part performance was, speaking broadly, regarded as applicable in India, as would appear from cases decided before the Act[1] or cases decided after the Act relating to pre-Act transactions.[2]

(b) After the passing of the Act but before the insertion of section 53A in 1929, the position remained fluid. The applicability of the doctrine was recognised in a judgment of the Privy Council[3] of 1901, though on the facts, no valid contract was held to be established.

(c) There arose a conflict of views amongst the High Courts on the subject; the main reason for the conflict being the difference of approach on the basic question whether the express provisions of a statute can be overridden by equitable considerations. The doctrine was applied in *Mahomed Musa* v. *Aghora Kumar Ganguli*[4] by the Privy Council to a compromise by which certain mortgage debts were to be extinguished and certain property divided in specific shares. No conveyance was executed, but possession of their respective shares was taken by the parties who enjoyed them in accordance therewith. The observations of the Privy Council were, however, ambiguous. The same doctrine was applied[5] in 1916.

1 (1861) 9 M.I.A. 43, 65.

2 (1901) I.L.R. 28 Cal. 693, 705 (P.C.).

3 *Immudipatran Thiruganga* v. *Periya Doraisami*, (1901) I.L.R. 24 Mad. 377, 385 (P.C.).

4 *Mahomed Musa* v. *Aghore Kumar Ganguli*, A.I.R. 1914 P.C. 27, 30.

5 *Venkayyamma* v. *Appa Rao*, A.I.R. 1916 P.C. 9, 13.

(d) Conflict of decisions arose as to the exact scope of the doctrine in some of its aspects, namely, whether it was confined to use as a ground of defence, effect on limitation and so on.

(e) More serious doubt was thrown by a decision of the Privy Council on an appeal from Ceylon[1]. The relevant Ceylon Ordinance required that a contract for the transfer of immovable property should be made in writing and attested by a notary. In the absence of compliance with those formalities, the contract was "of no force or avail in law". On this statutory provision, the Privy Council held that the doctrine of part performance could not be invoked.

(f) In 1929, section 53A was introduced in the Indian Act, placing the law on a statutory footing. We need not refer to the controversy that arose as to its retrospective operation. But questions that have arisen with reference to some of the ingredients of the section will be discussed in due course.

49.8. *Ingredients*—It will be useful to draw attention to the important ingredients of the section. We are deliberately stating them below in language which does not purport to adhere necessarily to the actual wording of the section—

(1) There should be a contract for the transfer of immovable property.

(2) The contract should be in writing signed by the party sought to be charged therewith and from it the terms should be ascertainable with reasonable certainty.

(3) The transferee should, in part performance of the contract,
   (a) take possession, or
   (b) continue in possession and do some act in furtherance of the contract.

(4) The transferee should perform, or be willing to perform, his part of the bargain as contained in the writing.

(5) The application of the doctrine should not affect the right of a transferee for consideration without notice of the contract or of the part performance thereof.

Subject to these conditions and reservations, the effect of the section is that notwithstanding that the transaction has not been completed according to law, all rights and liabilities under the contract should arise and be enforceable as between the parties to the contract and persons claiming under them.

49.9. *Title*—The transferee, however, does not get a good title unless the transfer is completed according to law. Non-registration means that the title has not passed. Part performance means that certain equities have arisen, which the courts recognise. Such recognition of the equities, however, does not convert the contract into a conveyance. In order that the law of registration is not evaded, the section takes care to ensure that the transferee does not get a perfect title which he could have obtained by a registered transfer. This it ensures by protecting subsequent *bona fide* transferees for value.

1 *John H. Arseculeratue* v. *Pereira*, A.I.R. 1928 P.C. 273, 275.

49.10. *English law*—There are certain important differences between the English law and section 53A, which may be usefully noted at this stage—

(a) In England, the contract could be oral[1], in India, it must be in writing.

(b) In England, the doctrine can be used as a shield and also as a sword, inasmuch as both the parties can claim that the contract be carried into execution and each can resort to a suit claiming rights in violation of the contract.[2] In India, the section can be said to be ambiguous as some judicial decisions[3] seem to have taken a wider view in this regard. The section, as it now stands, is non-commital as to any positive rights arising in favour of the transferee.

(c) In England, the doctrine is uncodified in its content, though referred to in statute.[4] In India, it is codified.

49.11. *Position in England*—In England, the Statute of 1677 was intended to prevent fraud and perjury which is possible where a contract for transfer of the land could be alleged by the mere oral testimony. But this Statute opened a new and different avenue of fraud, namely, a person who had made a genuine contract might repudiate it on the ground that there was no proper memorandum as required by statute. In certain cases, the part performance was applied to check such fraud. This doctrine is not to be viewed in isolation, but only as one instance of the relief granted by equity against fraud. "In cases of fraud, equity should relieve even against the words of a statute." So observed Lord Parker, Lord Chancellor in 1720[5].

49.12. *Evolution*—The doctrine first appeared in England in 1686, and was established by a decision of the House of Lords in 1701[6]. Its found mental postulate is that a party performing a part of the contract on his side, in reliance on the promise which is made by the defendant, has a right to require the defendant to keep his promise[7]. The use of the expression "plaintiff or defendant" in some of the English cases incidentally shows that in England this doctrine is available to the plaintiff also. We shall revert to this aspect later.

It may be noted that section 40(2) of the Law of Property Act, 1925 has given statutory recognition to the doctrine. Sub-section (1) of that section requires writing, by providing that no action may be brought upon any contract for the sale or other deposition of land or any interest in land unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the parties or by some other person lawfully authorised. Sub-section (2) provides that the section shall not affect the law relating to part performance. In England, the effect of

1 *Caton* v. *Caton*, (1866) 35 L.J. Ch. 292, 295.
2 A.I.R. 1938 Cal. 97, 103.
3 See *infra*.
4 Section 40, Law of Property Act, 1925.
5 *Countess Mountacuta* v. *Crosswell*, (1720) 1 Williams 618, 620.
6 *Lester* v. *Foxcroft*, (1701) Colles P.C. 108.
7 *Mundy* v. *Joliffe*, (1839) 5 My & Cr. 167, 177.

the doctrine of part performance is to remove the barrier set up by statute and to open the door to parol evidence of the whole agreement for the grant of equitable relief.

But a long line of decisions has laid down certain ingredients and the following important conditions must be satisfied[1] :—

(1) Clear evidence of the contract is required.

(2) The plaintiff should establish a case for specific performance of the contract.

(3) The act of part performance must have been done by the plaintiff or on his behalf.

(4) Such act of part performance must be unequivocally referable to some such agreement as is alleged.

49.13. *Possession*—Taking possession on the land with the vendor's consent is an "act of part performance par excellence[2]". Continuing in possession, where such act is referable to the contract, is also good part perforamnce. But there may be other instances, for example, the making of expenses on alterations in the property, when carried out by someone who has no right of possession to the alleged property[3].

49.14. *Basis*—It is to be noted that the basis of the doctrine of part formance is, in general, specific performance. Of course, like all remeacquires an equity against the defendant[4].

The remedy of the person who has satisfied the condition of part-performance is, in general, specific performance. Of course, like all remedies of equity, this is discretionary, so that, if in a particular circumstance, the Court does not grant it, then he is without remedy. The plaintiff must adduce proof for his act of part performance. The plaintiff is also allowed by equity to give parol evidence of an agreement that would otherwise require a written evidence. If he satisfies the Court in these two aspects—proof of part performance and evidence of agreement though not in writing—he is entitled to a decree ordering the other party to execute a formal transfer to include the terms which have been agreed upon[5].

49.15. *Contracts to transfer and instrument of transfer*—A document of transfer which is not registered or not completed in the manner prescribed by law, may operate as a contract to transfer. Consequently, the section applies not only to contracts to transfer as such, but also to instruments of transfer. This is made clear by the words "or where there is an instrument of transfer" in the first paragraph of the section.

49.16. *Invalidity on other grounds*—The section has no application where the contract to transfer or the instrument of transfer is invalid on any ground other than that it was not completed in the manner prescribed by the law for the time being in force. Where the flaw in the transferee's position is not a defect of form or the absence of some formality, normally

1 Megarry and Wade, Real Property (1966), pages 571—573.
2 Williams, Statute of Frauds, page 256.
3 *Brouten* v. *Snook* (1928) Ch. 505.
4 Cheshire, Real Property (1972), page 382.
5 Cheshire, Real Property (1972), page 380.

necessary, but is one which, apart from form, renders the transaction unenforceable—e.g. minority,—the equitable doctrine of part performance is not applicable.

49.16A. *Rights provided by the Act*—The words "other than a right expressly provided by the terms of the contract" show that the transferor is not debarred from enforcing rights expressly provided by the terms of the contract.[1] Thus, the transferor can, where the transfer is by way of a lease, sue for damages for breach of an agreement as provided by the terms of the lease,[2] or sue for the rent due,[3] or enforce the terms of the lease entitling him to re-enter if there is default in payment of rent.[4] A contrary view has been held in some cases.[5] In those cases the transferor was held debarred from suing to enforce merely rights given by the contract of transfer. The expression "other than a right expressly provided by the terms of the contract" has not been adverted to in those said decisions. It is submitted that this view is not correct.

49.17. *Third person*—The section has no operation against third persons. In *S. N. Banerji* v. *Kuchwar Lime & Stone Co. Ltd.*[6] A leased property to B with the condition that if B transferred his interest, the lease would be forfeited. B transferred his interest to C, but without a registered instrument and gave him possession of the properties. Thereupon, 9 purported to forfeit the lease to B and granted a fresh lease to D who sued C for ejectment. It was held that the transfer by B to C was invalid for want of registered instrument, that the lease to B therefore subsisted, that D could not invoke the aid of section 53A and claim that by reason of that section B's transfer to C was valid and that he was entitled to claim possession from C. The Privy Council observed as follows :

> "The section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right. It merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons."

49.18. *Judgment creditor*—It has been held[7] in Madras that a judgment—creditor, who has attached the property of his judgment—debtor in execution of his decree, is a person "claiming under" the judgment—debtor, within the meaning of this section. A contrary view has been taken by the High Court of Orissa.[8]

The Bombay High Court[9] has held that an auction purchaser is not a person claiming under the judgment debtor.

We think that it is just and fair that effect should be given to the Madras view, and we recommend accordingly.

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1 *Lal Behari* v. *Kanak Kanti*, A.I.R. 1962 Cal. 502, 503.
2 A.I.R. 1950 Cal. 23, 28.
3 A.I.R. 1942 Oudh 231, 236.
4 A.I.R. 1953 Cal. 349, 352.
5 (a) *Ramarao* v. *Purnand*, A.I.R. 1954 Mad. 702, 704.
(b) *In the matter of Jambad Coal Syndicate Ltd.* A.I.R. 1940 Bom. 281, 282.
6 *S. N. Banerji* v. *Kuchwar Lime & Stone Co. Ltd.*, A.I.R. 1941 P.C. 128, 130,
7 *Audinarayudu* v. *Mangamma*, A.I.R. 1943 Mad. 706, 707.
8 *Padmalabha* v. *Appalanarasamma*, A.I.R. 1952 Orissa 143, 149.
9 *Maruti* v. *Krishna*, A.I.R. 1967 Bom. 34, 38, 39 (Naik J.) (reviews cases).

49.18A. *Onus*—The onus under the proviso is on the person claiming part performance to show that the transferee had notice of the contractor of the part performance thereof. The Court would expect that those who allege that the subsequent transferee had notice of the prior contract or of possession thereunder, would make it out, not by evidence of any casual conversation but by proof that the mind of the subsequent transferee had in some way been brought to an intelligent apprehension of the nature of the transaction in respect of the property so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it. Explanation II to section 3 provides that possession of a person is notice of the title of the person in adverse possession. The High Court of Patna has held that although section 53A does not confer full title to the property, it is nevertheless an interest sufficient to attract the provisions of Explanation II to section 3. The subsequent transferee will therefore be deemed to have notice of the title of the prior transferee and consequently it will be the duty of the subsequent transferee to make diligent enquiries regarding the nature of the equitable interest of the prior transferee in possession[1]. On this view with respect it is somewhat difficult to see what cases are contemplated by the proviso. For the applicability of the proviso it must be assumed that the title referred to in the said Explanation does not include the right of the transferee under a contract which has been partly performed.

49.19. *Title whether passes*—At this stage it may be convenient to discuss the question whether title passes under contract. In ordinary legal and juristic discussion, the word "title" is understood as meaning the source of a legal right, but the matter is not so simple in the context of section 53A, because section 54 (So far as sale of tangible immovable property of the value of rupees one hundred and upwards is concerned), provides expressly that the transfer can be made *only by a registered instrument.* If any other mode of transfer is not recognised, can it transfer an interest in the property ? And if not, can it pass title ? In general, if an unregistered deed of sale is executed where registration is required, there is no transfer and the property does not pass.[2]

49.20. The true position is that a contract does not pass any right *in rem.* A contract for the sale of such property is merely a document *which creates a right to obtain another document...* That, indeed, is the basis why it is not regarded for the purposes of the Registration Act, as creating declaring, assigning etc. any right in immovable property. The Patna judgment[3] under section 53A read with section 3, after noting the argument of counsel that title refers to a completed title and not a mere equitable interest rejected the argument on two grounds :—

(i) Counsel could not cite any authority in support of his contention;

(ii) in an English case,[4] it has been held that possession of a tenant is a notice to a purchaser of the actual interest which he may have either as tenant or, farther by an agreement *to purchase the premises.*

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1 *Rama Krishna* v. *Mahadevi,* A.I.R. 1965 Pat. 467, 469.

1 Mulla (1973), page 306.

2 *Ram Krishna* v. *Mahadevi,* A.I.R. 1965 Pat. 467 (Narasimhan, C.J. and G. N. Prasad, J.).

3 *Daniel* v. *Davison,* (1808) 33 English Reports 978.

With great respect, to Court, this judgment misses one important aspect, namely that an agreement for the sale of land does not, in India, create any interest in land; this is expressly provided by section 54 as already pointed out.

49.21. *Salmond's analysis*—Salmond[1] says that every right involves a title or source from which it is derived, title being the *de facto* antecedent of which the right is the *de jure* consequent. He adds that the titles are of two kinds : original and derivative. Original title is something which creates a right *de-novo*—the catching of fish is an original title of the right of fishing. A derivative title transfers an already existing right to a new owner—the purchase of fish is an illustration of a derivative title.

49.22. *Position in England*—In England, a contract for the sale of immovable property makes the promise the owner in equity of the estate.[2-3] But, in India, this is not the possition. Section 54 makes it very clear that the contract does not create any interest in the property. Even in the case of a decree for specific performance, it has been held[4] that the title passes with the execution and registration of a sale deed, and does not immediately flow from the decree.

49.23. *Perpetuities*—Again, it is for this reason that the rule against perpetuities does not affect a contract for the sale of property. Even for the purposes of section 24 of the Bombay Agriculturist Debtor's Relief Act, an agreement to sell does not create any "interest", in the land.[5]

49.24. *Interest and title*—Under section 55(2), there is an implied convenant that *the interest* which the seller professes to transfer subsists, and that he has power to transfer the same. This shows the connection between the concept of *title* and the concept of *interest.*

49.25. *Title deeds*—Again, section 58(f), which empowers the creation of a mortgage by deposit of "title deeds", obviously does not mean that a person can create a mortgage of this nature by merely depositing a contract for sale in his favour.

In general, in the Law of Real Property,[6] a document of title is a document which describes a land sufficiently to identify it, which shows a *disposition* of the whole legal interest and which contains nothing to throw any doubt on the title.

In India, a contract for sale of land, would hardly satisfy the last two conditions.

According to Cheshire[7] the usual way in which the vendor proves his title is to produce the deed or other document by which the land has been *disposed of,* in order to show that *the interest* which he has agreed to sell devolved upon him. In England, if the contract for sale is capable of specific performance, an immediate *equitable interest* in the land passes to

1 Salmond, Jurisprudence (1966), page 431.
2 A.I.R. 1916 P.C. 193.
3 A.I.R. 1967 S.C. 744, 748.
4 *Mrs. Christine* v. *Ugappa,* A.I.R. 1966 Mys. 299, 303.
5 *Gurappa* v. *Basawanappa,* A.I.R. 1957 Bom. 31, 32 (Shah, J.).
6 Megarry and Wade, Real Property (1966), page 586.
7 Cheshire, Real Property (1972), page 73.

the purchaser and the legal estate remains in the vendor until the conveyance has been executed. Specific performance of a contract for the sale of land is ordinarily available to a purchaser.[1] But, until specific performance is granted and a conveyance executed (thereunder, title does not pass. Even in England, the position regarding completion of the contract is[2] that after the purchaser has investigated the abstract of title, it is his duty either to accept or to reject the title offered to him. Again, completion means that the purchaser should prepare deed for conveyance which is to vest the interest in the purchaser, and which contains the usual convenants by the vendor.

49.26. As to the judicial decisions on section 3, definition of 'notice', Explanation II, the whole question depends on the meaning of the word 'title'. Reference has been already made to the Patna case. In an Orissa case,[3] it was held that assuming that mere occupation of property as a tenant would be notice of an agreement not connected with its occupation, the doctrine cannot be extended to cases where the tenant has also a contract to purchase in his favour.

It is to be noted that a contract for the sale of immovable property does not (in the scheme of the Act) confer any interest in the property. This is expressly enacted in section 54 of the Act. In the circumstances, it is difficult to see how the word "title" could apply to the equities recognised by section 53A.

49.27. *Position summed up as to passing of title under contract*—The above discussion as to the passing of title under contract may be thus summed up—

(i) No interest in the property passes under a contract. Section 54 is a specific on this point.

(ii) Since no interest passes, no 'derivative' title is created to borrow the phraseology used by Salmond. And the present is undoutedly not a case of original title.

(iii) That no interest passes, is a position further substantiated by the fact that the rule against perpetuity does not apply to a contract for sale.

(iv) English cases on equitable interest are inapplicable.

(v) A contract of sale cannot be appropriately described as a title deed.

(vi) Estoppel creates a bar and confers no title.

(vii) Where the law prescribes a mode of transfer, derivative title can be created only if that mode is followed.

(viii) This position remains unaffected by section 53A. It confers no title, though it creates certain bars between the parties and their successors in interest.

(ix) Such rights as are created, rest on estoppel. Eestoppel passes no title—See proposition (vi) above.

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1 Cheshire, Real Property (1972), page 75.

2 Cheshire, Real Property (1972), page 740.

3 A.I.R. 1962 Orissa 86, 89.

(x) That section 53A is available also against transferees with notice of part performance does not mean that the right amounts to title within section 3, definition of notice, Explanation 2. That Explanation invests possession with notice of "title".

If, on general principles as discussed above, no title is created, availability against transferees cannot modify the position.

49.28. In view of the above position we do not recommend any change in the law.

49.29. *Gifts*—We shall now consider the question whether gifts fall within the doctrine of part-performance. At a time when the law on the subject was not codified, it was held that the doctrine was applicable even to gifts. This was the Nagpur view.[1]

In a Rangoon case,[2] it was assumed that where a donee of property is in *bona fide* possession of it, the donor cannot evict the donee even though the gift had not been made by a registered instrument, but it was also held that the protection is not available to a subsequent donee from the donee whose deed of gift is not registered. In some cases before the amendment, however, it was held that the doctrine did not apply to gifts.[3]

So far as the present section is concerned, the case is clearly outside the section, because the section contemplates the existence of a 'contract' for the transfer of property. That part of the section which speaks of "an instrument of transfer" refers to an instrument executed in pursuance of the contract. In fact, the opening words "contract to transfer for consideration" put the matter beyond doubt.

49.30. *Need for amendment of the law*—The question now to be considered is whether this position requires to be altered as a matter of justice. Although it can be argued that there are no equities in favour of the donee, one must not overlook the fact that where the donee has taken possession, the position is different. On this basis, there is sufficient justification for extending the law to gifts with suitable amendments in the section.[4] We shall recommend the insertion of a suitable provision on the subject in the chapter on gifts.[5]

49.31. *Defendant*—We may now consider the nature of the right. The right conferred by this section is a right on the part of the transferee to take a plea that the transferor is debarred from en-forcing any right in respect of the property transferred.[6] Whether this means that the right is available

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1 A.I.R. 1927 Rangoon 128 *U. Sayainda* v. *Mngala*

2 A.I.R. 1927 Rangoon 128 *U. Sayainda* v. *Mngala.*

3 *Maung Hla Maung* v. *Maung PO Htai.*
a. A.I.R. 1929 Rangoon 316, 317;
b. A.I.R. 1928 All. 699, 703.

4 This recommendation is subject to reservation by Shri Dhawan and Shri Sen-Verma.

5 Chapter on gifts *infra.*

6 A.I.R. 1954. Mad. 702, 703.

only to a person who appears on the record *as defendant* is a difficult question.[1]

49.32 *Section 53A as a basis of suit*—Although it is often taken for granted that section 53A cannot be used *as a basis of a suit by the plaintiff*, the position requires to be considered at some length. Whether the transferee who claims part performance is a plaintiff or a defendant should be immaterial so long as he does not claim that he *has a title to the property* and so long as his only object is to prevent the transferor from "enforcing" against him any rights other than these flowing from the contrast. The law on the subject, however, is not in a very satisfactory condition. This will be apparent from a few judicial decisions on the High Courts to which we refer below, before coming to a decision of the Supreme Court which professes to leave the matter open.

49.33. *High Court cases*—First, we take the cases holding that the person claiming on the basis of part performance can, in appropirate cases be in the position of a plaintiff. This view is represented by a decision of the Allahabad High Court,[2] a Bombay case,[3] by a judgment of the Oudh Chief Court[4], and a judgment of the Andhra Pradesh High Court[5]. The judgment in the Andhra Pradesh's case was delivered by Subba Rao, C.J., and the pertinent observations are as follows :

> "Whether the transferee occupies the position of *a plaintiff or a defendant*,[6] he can resist the transferor's claim against the property. Conversely, whether the transferor is the plaintiff or the defendant, he cannot enforce his rights in respect of the property against the transferee. The utility of the section or the rights conferred thereunder should not be made to depend on the manoeuvring for positions in a court of law, otherwise a powerful transferor can always defeat the salutary provisions of the section by dispossessing the transferee by force and compelling him to go to a court as plaintiff. Dubtless, the right conveyed under the section can be relied upon only as a shield and not as a sword but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield".

49.34. Suppose a transferee under a contract of transfer takes possession of the property in part performance of the contract. The property is sought to be taken in execution of a decree for ejectment previously obtained by the transferor against a third person. The transferee raises objections in the execution proceedings, but does not succeed, and is deprived of possession. Then, he sues under Order 21, Rule 103, Civil Procedure Code, for getting rid of the order in execution proceedings and for recovering back possession of the property. Is he entitled to succeed, relying on the provisions of this section ? It was held by the Chief Court of Oudh

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1 (a) See A.I.R. 1959 A.P. 568, 570.
(b) A.I.R. 1959 Mad. 354, 355.
(c) A.I.R. 1956 Punj. 181, 185.
(d) A.I.R. 1950 Cal. 23, 27.
(e) A.I.R. 1966 Mys. 86, 89 and
(f) Cases in para 49.33 to 49.40 *infra*.

2 *Ram Chander* v. *Maharaja Kunwar*, A.I.R. 1939 All. 611.

3 See *infra*.

4 *Ewaz Ali* v. *Firdouz Jehan*, A.I.R. 1944 Oudh, 212, 319.

5 *Achayya* v. *Venkatasubbarao, A.I.R.* 1957 A.P. 854.

6 Emphasis applied.

in the undermentioned case[1] that the transferee can rely on this section in such a case, because he is only defending his possession. The decision proceeds on the ground that the words of the section do not warrant a conclusion that the *plaintiff as such* is necessarily debarred from the benefit of the rule. It was observed :

> "Where by the nature of the case, as disclosed by the pleadings or otherwise, it is apparent that the transferee comes to court to defend his possession against the invasion of it by the transferer he is entitled to invoke the equitable doctrine therein embodied. The present suit under O. 21, R. 103, Civil Procedure Code, is of that nature, being, in our opinion, practically a continuation of the proceedings before the execution court, wherein the transferor and his representative succeeded in ejecting Mt. Firdaus Jahan from possession which she had originally taken in pursuance of the contract of purchase".

49.35. *Acts of aggression*—The trend of remarks in the judgment of the Oudh Chief Court referred to above seems to imply that a transferee may come to Court to defend his possession against acts of aggression on the part of the transferor or his representative, whatever form such aggression may take. In *Ram Chandra* v. *Mahraj Kunwar*,[2] the transferor's acts of aggression were not in the form of any legal proceedings. The transferor was trying to disturb the transferee's possession otherwise *than in due course of law*, and the transferee brought a suit for an injunction restraining him from interfering with his possession. It was held that the suit was but a form of defence by the transferee to the invasion of his rights by the transferor, and as such, was competent under this section.

49.36. The Oudh and Allahabad view has been followed in the following cases,[3] but has been dissented from in the undermentioned decisions.[4]

49.37. *Mulla's view*—Mulla, in his commentary on the Act,[5] has commented that the true position was explained by Subba Rao, C.J., in the observations which we have also quoted above.

49.38. *Bombay case*—In the Bombay case,[6] the questions considered were whether (i) section 53A can be used by the plaintiff, and (ii) whether the transferee in possession of property in part performance of the contract for the sale of property can maintain a suit under Order 21, Rule 103 of the Civil Procedure Code against the auction purchaser of the same property. The first question was answered in the affirmative. However, on the basis that the auction purchaser was not "claiming under the transferor", the second question was answered in the negative. On the major question, *viz.*, whether section 53A can be used as a ground of attack in this particular case, the High Court took the view that in a suit under Order 21, Rule

1 1944 Oudh 212, 218, 219 (Affirming A.I.R. 1940 Oudh 1).
2 *Ram Chander* v. *Maharaj Kunwar*, A.I.R. 1939 All. 611, 613.
3 A.I.R. 1967 Bom. 34, 37; I.L.R. (1966) Bom. 291.
I.L.R. (1960) 2 All. 71. 90 (DB..).
A.I.R. 1957 A.P. 859, 861.
A.I.R.. 1956 Cal. 350, 351.
A.I.R. 1954 Mad. 702, 703.
4 A.I.R. 1964 Raj. 11, 13
A.I.R. 1952 Orissa 143, 145.
5 Mulla (1973), page 293
6 *Maruti* v. *Krishna*, A.I.R. 1967 Bom. 34, (Naik J.).

103, the plaintiff does not claim title but only a right to present possession. "In essence, such a suit is defensive in character." Therefore, it agreed with the decisions in Oudh. Allahabad and Andhra Pradesh already referred to.

49.39. *Madras view*—In Madras also, the view has been taken that in a suit under Order 21, Rule 63 or Rule 103, Civil Procedure Code, the plaintiff can rely on part performance since he is not using it as a weapon of offence.[1]

49.40. *Supreme Court judgment*—We come now to the judgment of the Supreme Court. In *Delhi Motor Company's case*,[2] it was held that the section is available only as a defence to a lessee, and not as conferring a right on the basis of which the lessee *can claim possession or other rights on an unregistered lease*. It observed that the section is available only as a defence to a lessee. In the Supreme Court case, the facts were as follows :

There was an unregistered sub-lease, purporting to have been executed by the respondents in favour of the appellants. Possession of the premises had been given to the appellants. After this, they were forcibly dispossessed by the respondents.

The first appellant, the Delhi Motor Company, was a partnership firm, of which the other four appellants were partners. The main respondent, the New Garage Ltd., was a private Limited company of which one of the respondents was the managing director and the others were members of the board of directors. According to the appellants, an agreement to sub-lease and an actual sub-lease in pursuance thereof was evidenced by three *unregistered documents* exhibited in the case. Appellant K. S. Bhatnagar on behalf of the Delhi Motors entered in correspondence for lease with U.A. Basrurkar, the Managing Director of the New Garage Ltd. They arrived at an agreement on February 22, 1950. The Managing Director had at that time no power to enter into such an agreement on behalf of the company, and so on March 22, 1950 a resolution was passed by the board of directors authorising the managing director to enter into the transaction. Thereafter, the first appellant came into possession of *two portions only*, out of the three actually sub-leased and commenced its business there with effect from April 1, 1950. Further, it was alleged that when Messrs Kanwar Brothers Ltd., vacated the other portion of the premises which was also included in the sub-lease, the respondents did not give possession of it to the appellants. On the contrary, they began to obstruct the appellants in their use of the two portions actually delivered to them and finally a stage came when they were completely dispossessed from them. The principal prayer in the suit was for delivery of possession in respect of all the three portions included in the sub-lease. The suit was decided in favour of the plaintiffs.

In appeal, the High Court of Punjab held that the three documents constituted either an agreement to sub-lease or a sub-lease falling within the provisions of section 2(7) of the Indian Registration Act, and since

1 *E. P. Uma*, v. *K. Kelandan*, A.I.R. 1954 Mad. 702, 703 (Ramaswami, J.).

2 *Delhi Motor Company* v. *Basrurkar* (Shah, Ramaswami and Bhargava, JJ.) (Judgment by Bhargava, J.).

the documents were unregistered, the plaintiffs were not entitled to a decree. The firm came in appeal to the Supreme Court by special leave.

The Supreme Court held that the suit was one for decree for possession on the basis of the *unregistered lease*, and such a suit did not fall within section 53A.

49.41. *Reasons given by to Supreme Court*—In the Supreme Court, the judgment of the Allahabad High Court[1] was referred to, but the Supreme Court did not express any opinion as to the correctness of the view taken by the High Court, since in the case before the Supreme Court, the firm was seeking to "enforce rights" under the unregistered case and to seek a decree for possession against the lessor. Unfortunately, the attention of the Supreme Court was not drawn to the Andhra and other cases. One may also be permitted to observe, with great respect, the Allahabad judgment is clearly based on the proposition that although, in form, the person before the Court was the plaintiff, in fact, he was merely seeking to debar the defendants from asserting certain rights, namely, he was seeking to debar them from interfering with the possession into which the plaintiff had entered with the consent of his transferor after the execution of a transfer in his favour.

49.42. *Need for clarification*—In the circumstances, the question remains to be considered whether a clarification on the subject under discussion would not be desirable. There hardly appears to be any reason why the beneficial object of preventing fraud—which was the main consideration which gave rise to the doctrine of part-performance—should be laid aside and the matter left to be determined by consideration of the accidents of litigation. So long as the person claiming part-performance does not claim title against third parties but merely seeks to compel the transferor (or his successors in interest) to adhere to the contract, the equities should be in his favour.

49.43. *Question whether possession should exist on the date of suit*—So far as the factual situation that was in issue before the Supreme Court is concerned, the essential question of law that arises is whether the section requires, or ought to require, that the transferee who obtains possession in part-performance *must also be in possession* at the time when he seeks relief. While the section speaks of a transferee who has obtained possession or has continued in possession, it does not make any commitment as to whether it should also be proved that the transferee was *in possession at the time of the suit*. One would have thought that once the transferee has obtained possession, his subsequent dispossession should not come in the way of claiming equities on the basis of part-performance, because he has done all that he could under the contract, and has acted on the representation made by the transferor. After all, there is no magic as such in the requirement that the transferee must have obtained possession. This requirement has been inserted only to *show unequivocally* that part-performance of the contract, so far as the transferee's side is concerned, has taken place. Change in the possession is an act of part-performance both of the person who gives and of the person who takes possession. In *Morphett* v. *Jones*,[2] Sir Thomas Plumber said—

1 A.I.R. 1939 All. 611.

2 *Morphett* v. *Jones* (1818) 1 Swans. 172, 181.

"The acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement and has, therefore, constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms; the court regarding what has been done as a consequence of contract or tenure."

Where the transferee has taken possession, this requirement is satisfied, and the fact that subsequently the transferor *illegally* dispossesses the transferee ought not to make a difference to the application of the doctrine. On a proper consideration of section 53A even as it now stands, it stands to reason that a transferee, who otherwise satisfies the section, cannot be debarred from claiming that possession, at least from the transferor or the person claiming under him, excluding of course, the case already stated by the proviso namely, the right of a transferee for consideration who has not notice of the contract or of the part-performance. There are no practical considerations which compel the insertion of a rigid requirement that the transferee must be in possession at the time of seeking relief. And considerations of justice seem to be in favour of the transferee, because on any other view a transferor can, by his unilateral act, defraud the transferee of a valuable protection given to him by the law on weighty considerations of justice.

49.44. *Privy Council Case*—There is a Privy Council case[1] in which there are dicta to the effect that section 53A is meant for defendant. The observation in that judgment, however, must be read with the facts of the case. It does not say that a person cannot claim part-performance otherwise than as a defendant in any case.

49.45. *Recommendation for change*—It is, therefore, proper to incorportate the liberal view on the subject. Such a wide view would not defeat the law of registration. The transferee claiming part-performance would still not be able to defeat the rights of *bona fide* transferees.

49.45. *Recommendation for change*—It is, therefore, proper to incorview would be to amend section 53-A by adding an Explanation somewhat on the following lines :—

"*Explanation.*—For the purposes of this section, it is immaterial whether the transferee or a person claiming under him is a plaintiff or a defendant."

The words "the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him" may also be revised as follows (in the fourth para of the section) :—

"The transferor or any person claiming under him shall be debarred from enforcing *or maintaining* against the transferee and persons claiming under him ....."

It should also be provided that a person who obtains or continues in possession, but is dispossessed otherwise than in due course of law, can claim the benefit of the section.

Amendment should also be made regarding the judgment creditor.[2]

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1 *Probodh Kumar Das* v. *Gantmeri Tea Company*, A.I.R. 1940 P.C. 1.

2 Para 49.18, *supra*.

CHAPTER 50

SALE OF IMMOVABLE PROPERTY : THE CONCEPT

50.1. *Introductory*—Having dealt with the general principles applicable to the transfer of property, the Act is now concerned with rules relating to specific kinds of transfers of immovable property. An interest in immovable property can be transferred by a variety of modes. Sale, mortgages, lease and gift are more particularly dealt with in the Act, though the Chapter on gifts is not confined to immovable property. The present Chapter is concerned with sale.

50.2. Section 54 defines "Sale" as follows :—

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

This definition, incidentally, does not, in terms, mention immovable property. The rest of the section does. The section proceeds to lay down the mode of transfer as follows :—

> "Such transfer, in the case of tangible immovable 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."
>
> "In the case of tangible immovable 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 immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property."

Lastly, the section deals with the contract for sale :

> "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.
>
> It does not, of itself, create any interest in or charge on such property."

50.3. *Statutory mode of transfer*—It is a general principle that where the law prescribes a mode of transfer, compliance with that mode is necessary before property can pass so as to confer title against third persons. Where, therefore, this section requires a registered instrument, title cannot pass by mere admission or by mere agreement of parties. There can, in other words, be no such thing in law as a *title by estoppel*, even though estoppel may create many precious rights.

A transfer under a decree or order of Court is outside the operation of section 54. The reason is, first, that such a transfer cannot be considered to be a transfer by act of parties and is, therefore, not a "transfer of property" at all;[1] and secondly, section 2, clause (d), provides that nothing in this Act shall be deemed to affect any transfer by operation of law or by, or in

1 *Poras Ram* vs. *Mebsai*, A.I.R. 1928 All. 67, 68.

execution of, a decree or order of a Court of competent jurisdiction. Such a transfer need not, therefore, be made by a registered instrument as is required by this section. Thus, a sale in execution of a decree need not fulfil the conditions of this section and need not be registered.[1] Similarly, the assignment of a security bond by the Court in favour of a party is not a sale within the Act. Nor is a transfer effected by a compromise decree, a sale, though such a compromise transfers property from one party to another for "price"[2].

50.4. *Insolvency*—There is a difference of opinion on the question whether a sale by the Official Receiver in insolvency with the sanction of the Court is a transfer by operation of law, or by or in execution of, a decree or order of Court. According to a Full Bench decision of the Madras High Court,[3] it is not. The same view has been held by the High Courts of Calcutta[4] and Allahabad.[5] A contrary view has been expressed by the Chief Court of Oudh[6] in a case decided by a single Judge, on the ground that it is in the nature of a Court sale and that its validity really depended on the order of the Insolvency Court vesting the property in the Official Receiver. But a later Division Bench of the same Court[7] has dissented from this view and has followed the view taken by the High Courts of Calcutta and Madras. Where no Receiver in insolvency is appointed and the Court, by virtue of the powers conferred on it by section 58 of the Provincial Insolvency Act, 1920, sells the property, the sale can be made by a registered instrument.

It appears to us that the Madras view is the correct one, since the Official Receiver, though functioning under statute, is really acting as a successor in interest of the insolvent. We do not think that the state of the case law necessitates any express amendment of the section.

50.5. *Transfer of ownership*—In order to constitute a sale there must be a transfer of ownership from one person to another. A "transfer of ownership" by a person means a transfer by such person of his rights and interests in the property in full and permanently. A transfer of a part only of such interests or for a particular period reserving the rest for the transferor himself is not a transfer of ownership. But it is not necessary that the transferor should be a full proprietor. He may be the owner of a partial interest in the property such as that of a mortgage or an occupancy tenant.

Where there is no transfer of ownership, the transaction, though in form a sale, cannot be considered to be a sale. Thus, a sham transaction, not intended to pass any title, is not a sale. A *bona fide* settlement of a disputed claim which is a mere recognition of each other's antecedent title is not a sale.

The question whether there has been a transfer of ownership in any particular case will depend upon the intention of the parties. This again, must be ascertained from the facts and circumstances of the particular case.

1. *Prem Nath* v. *Sundaranath*, A.I.R. 1960 Punj. 630, 632.
2. *Bindraban* v. *Rajpal Singh*, A.I.R. 1931 All. 389, 390 (F.B.).
3. *Sankara* v. *Narasimhulu*, A.I.R. 1927 Mad. 1, 3; I.L.R. 50 Mad. 135 (F.B.)
4. A.I.R. 1919 Cal. 193; I.L.R. 46 Cal. 887 (D.B.).
   (Per Full Bench; Krishnan, J., dissenting).
5. A.I.R. 1942 All. 39, 41.
6. *Waziray* v. *Mathura Prasad*, A.I.R. 1939 Oudh 55, 56.
7. A.I.R. 1942 Oudh 424, 425.

50.6. *Price*—It is an essential requisite of sale that the transfer of ownership must be for a consideration which is known in legal language as 'price'. Price is thus an essential ingredient in all sales, in the absence whereof the transfer is not a sale.

What, then, is the meaning of the expression 'price' ? It has been held by the Supreme Court[1] that this expression in section 54 must be construed in the same sense in which it is used in section 4, read with section 2(10) of the Sale of Goods Act. The substantial result of this position is that price means money only. Payment may not be immediate—section 54 expressly so provides. Payment need not even be in cash or current coin; it could be in any mode which represents money, such as a cheque or bank draft. But the transfer of ownership must bring, in return therefor, something which constitutes money or represents money according to legal concepts.

Difficult questions arise where the transfer is in lieu of a debt due to the purchaser from the seller. In general, such a transaction would be regarded as a sale[2] and not as an exchange or as any kind of residuary transaction, provided the amount of the debt can be definitely ascertained.[3]

This would appear to be the general position. The question assumes practical importance in the case of Muslim husbands who execute instruments of transfer in consideration of dower. Either the transfer is made expressly in substitution for the monetary dower, or the document might provide that as a result of the transfer the claim to the dower debt is relinquished. It would appear that in both cases the transaction should, in general, be regarded as a sale.[4]

Although there are a few judicial decisions taking the view that, where the husband is *released* from a dower debt, the transaction is not a sale,[5-6] we do not, with respect, agree with such construction. A determination of the matter depends on whether the consideration in such case is "price" within the meaning of section 54 or whether it is a "thing" within the meaning of section 118. We think that, in general, release of a debt should be treated as a price and not as a "thing".

50.7. *Payment of price*—It follows from the definition of "sale" that to constitute a sale the parties must intend to transfer the ownership of the property and that they must also intend that the price should be paid, whether in present or in future. Where there is no intention to pass the ownership, the transaction is a colourable one.

This does not, of course, mean that the non-payment of the price will necessarily prevent title from passing to the buyer. This depends on the terms of the bargain. If the conveyance has been executed, the mere fact that the price has not been paid will not prevent title from passing to the buyer unless the conveyance so provides.

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1 *I.T.C.* v. *M & G Stores*, A.I.R. 1968 S.C. 200, 202.
2 A.I.R. 1951 All. 86, 89, 90.
3 AI.R. 1935 P.C. 73, 78.
4 A.I.R. 1917 Pat. 18, 24;
A.I.R. 1915 Lah. 251, 253.
5 *Bashir Ahmad* v. *Mt. Zobadia*, A.I.R. 1926 Oudh 186, 189.
6 *Talib Ali* v. *Kaniz Fatima*, A.I.R. 1927 Oudh 204, 206.

This is for the reason that full payment of the price is not an essential requisite of sale as defined in section 54, and if the intention is that the sale deed should operate as a transfer, then it is immaterial whether the whole or part of the consideration remains unpaid.[1]

50.8. *Seller's right on non-payment*—Once the title has passed, the seller cannot, in the absence of an agreement to the contrary,—

(a) claim to retain possession as against the buyer of the property sold[2] or

(b) set aside the sale on the ground of non-payment of price. His remedy is—

(i) to sue the purchaser for the recovery of the purchase money, or

(ii) to enforce the seller's charge for the unpaid purchase money against the property sold and in the hands of the purchaser.[3]

The fact that price has not been paid may, show that the transaction was the result of undue influence, or that the transaction was a colourable one. But these are questions of evidence depending on the facts of the case, the burden of proof of which, in the ordinary run of cases, would lie upon the person alleging such special facts.

Conversely, once the execution of the instrument of sale is proved and it is found that the instrument contained a recital of payment of consideration, such a recital is *prima facie* proof of payment against the executant or person claiming under him.[4]

50.9. *Inadequacy of price*—Inadequacy of consideration does not, by itself, render a sale invalid.[5] Thus, the mere fact that the purchaser gets the property for one fourth of its market value cannot render the sale invalid, although, in an appropriate case, it must constitute evidence of one of the ingredients of the concept of undue influence. In the absence of proof of undue influence, however, such a transaction is regarded as one in which the doctrine of "lucky purchasers",[6] is applied.

On the same reasoning, the coverse is also true, *viz.*, the fact that the price, as stated in the sale deed, is an inflated one has no effect on the validity of the sale if it is otherwise valid.[7] Such devices are frequently adopted to defeat the right of pre-emption which is available to a third person under the ordinary law in some situations. On realising that the price is very high, the third person might feel disinclined to assert the right of pre-emption; that is the psychological reason operating in the minds of the parties in overstating the price in the sale deed. Of course, as between the parties, evidence is always admissible to show that the 'price' was not really the amount representing the consideration for the sale, but a security for a pre-existing

1 *Bhomi Lal* v. *Vincent*, A.I.R. 1922 Pat. 619, 641 (F.B.).
2 *Dhuri* v. *Kishun Prasad*, A.I.R. 1965 Pat. 29, 30.
3 Section 55(4)(b).
4 *Ramaswami* v. *Jagannadha Rao*, A.I.R. 1962 A.P. 94—97.
5 A.I.R. 1957 Mad. 630, 631.
6 A.I.R. 1957 Mad. 630, 631.
7 A.I.R. 1924 All. 938, 939.

debt. And even third persons can show that what is stated in the deed was not the price agreed upon. But these aspects do not affect the validity of the deed of sale.

50.10. *Meaning of reversion-Recommendation*—So much as regards the first paragraph of section 54. There occur, in the second paragraph, the words "in the case of a reversion or other intangible thing". The section provides that such a transfer, *i.e.*, a transfer by way of sale, can be made only by way of a registered instrument. Obviously, the expression "reversion" here is wide enough to apply to immovable property in the possession of a tenant.[1] Consequently, such transfer must be made only by a registered instrument, *irrespective of the value*.[2] There are, however, decisions of the Oudh Chief Court and the Nagpur High Court[3] holding that property in the possession of a tenant is tangible property and is not included in the expression "reversion or intangible thing". We are, with respect, of the opinion that this view is not correct. "Reversion" in ordinary parlance is undersood certainly as covering such a situation, whatever else it may or may not cover.

In order to avoid controversy on this point, we recommend that an Explanation may be added to the effect that where immovable property is in the possession of person other than the transferor, the transfer of that property is a transfer of the reversion, if the person in possession has an interest in the property by way of lease.[4]

50.11. *Intangible thing*—The expression "intangible thing" is, in the context, to be taken as confined to immovable property, and not as covering movable property.[5-6] It is for this reason that a licence to sell electricity,[7] a permission to plant trees on land and to enter the land to gather the fruits,[8] a copyright in books,[9] a money decree or a decree for possession of immovable property,[10] is not an "intangible thing" within section 54.

On the other hand, a right to rents and profits that may accrue in immovable property, or an interest under a deed of settlement by which a person is granted as income in future rents and profits in immovable property and also a share in the proceeds of the sale of the property in future, would be within the section,[11] since they relate to immovable property.

50.12. *Recommendation as to second paragraph*—It is proper to make it clear that in the second paragraph, when it speaks of reversion or other intangible thing, it is confined to immovable property as is shown by the

1 A.I.R. 1938 Lah. 304, 305;
A.I.R. 1916 Bom. 223.
2 A.I.R. 1938 Mad. 100, 101.
3 (1899) 2 Oudh Cases 754, 757;
A.I.R. 1954 Nag. 109, 113.
4 This is not a draft.
5 A.I.R. 1939 All. 305, 307;
A.I.R. 1935 Pat. 492, 493.
6 A.I.R. 1935 Pat. 492, 493.
7 A.I.R. 1940 All. 458, 460.
8 A.I.R. 1952 Nag. 321, 322.
9 A.I.R. 1939 All. 305, 307.
10 A.I.R. 1935 Pat. 492.
11 (a) A.I.R. 1935 Pat. 492, 493;
(b) A.I.R. 1936 P.C. 230, 233, 234.

decisions just now referred to.[1] We recommend that the second paragraph should be suitably amended to bring this out.

50.13. *Section 54, third mode, tangible and intangible property*—This takes us to the third paragraph of section 54. Under the third paragraph, different modes of delivery on the sale of immovable property are prescribed. The modes prescribed consist of two alternatives. In the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing (irrespective of value), such transfer can be made *only* by a registered instrument. The word 'only' here indicate that delivery is ruled out as a mode of transfer. In contrast, in the case of tangible immovable property of a value of less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. It follows, therefore, that the law is more restrictive in the case of (i) tangible immovable property exceeding the specified value and (ii) reversion or other intangible. thing, since only a registered instrument is permissible. We may state that this dichotomy between tangible and intangible immovable property becomes of basic importance where the mode of transfer adopted is not by a registered instrument, but by delivery. The question that arises in such case is whether delivery is sufficient as a mode of transfer. The answer would be in the negative if the case falls in the rst category which, as already stated, is governed by a restrictive provision. The answer would be in the affirmative in the second situation.

50.14. *Controversy caused where delivery is the mode adopted*—Since the second situation (tangible immovable property of less than one hundred rupees)[2] depends upon it being established that the property is tangible, controversies have arisen in particular cases where delivery was the only mode adopted. The adoption of a registered instrument raises no problems, since that mode is valid in both the cases, but the adoption of delivery raises problems, since it is permissible only in the second case.[3] Those who would like to challenge the transfer would naturally argue that the mode of transfer adopted—delivery—was not permissible, and that the property was not tangible immovable property. It is to be remembered that in the case of an "intangible thing", there is no question of value, minimum or maximum. Irrespective of value, the transfer can be made only by a registered instrument and not by delivery. Usually, this controversy[4] arises where the mortgagor sells the property to the mortgagee for less than rupees one hundred by delivery and the court is then called upon to consider the question whether what is transferred is tangible property or intangible property. The meaning of "tangible" thus becomes crucial.

50.14A. *Meaning of "tangible*—Grammatically, the word "tangible" means something that can be appreciated by the senses, that is to say, a material object. Strictly speaking, all rights are intangible things, since what one owns is not a thing, but a bundle of rights in a thing.

50.14B. *Meaning of "property and interest"*—Statutory language as employed in the Transfer of Property Act, however, does not go by this strict doctrine. Sometimes, it employs the expression "immovable property"

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1 Para 50.11. *supra.*

2 Parra 50.13, *supra.*

3 Para 50.13, *supra.*

4 See para 50.16, *infra.*

as covering the bundle of rights which one can have in that property and in this context, the Act seems to have in mind the expression "immovable property" as applicable to the object as appearing in the external world, as well as the legal concept of the totality of rights.

But occasionally the Act speaks of "interest in immovable property", which would seem to show that it is possible to conceive of two different categories,—"immovable property", being the wider and generic one, and "interest" in immovable property being the narrower and specific one. Thus, a person who has a lease in his favour has an interest, but he does not own the "property". Of course, section 6 uses the expression "property" in a wide sense, because it says "property of any kind may be transferred", but it cannot be denied that in ordinary language—and sometimes in the Act also —where the totality of rights is intended to be connoted, the expression "immovable property" is more often employed while where not the totality but a specific right is intended, the expression "interest" is more often employed.

50.15. *Privy Council case*—In *Moolla Sons* v. *Official Assignee,* Rangoon,[1] the Privy Council observed :

> "....for the reason that in the absence of registered instrument, delivery is to be required as a formality necessary to the completion of the transaction, section 54 "divides its provisions as to immovable property according as the immovable property is 'tangible or intangible'.

50.16. *Equity of redemption whether intangible thing*—There is no definition or explanation of the expression "tangible" and intangible". This has created certain problems. For example, there is a conflict of decisions on the question whether an equity of redemption vested in the mortgagor is or is not an "intangible thing".

(a) One view on the subject is that the equity of redemption vested in the mortgagor is "tangible immovable property", whatever may be the nature of the mortgage—simple[2] or usufructuary.[3]

(b) The second view is that in all cases the equity of redemption is an intangible thing.[4]

(c) The third view makes a distinction between various types of mortgages.[5]

50.17. *Juristic views examined*—A few juristic writings referred to in the Allahabad judgment may be referred to. Holland in his "Elements of Jurisprudence", says :[6]

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1 *Mools Sons* v. *Official Assignee, Rangoon,* A.I.R. 1936 P.C. 230, 232.

2 *Sohan Lal* v. *Mohan Lal,* A.I.R. 1928 All. 726, 728, 729 (Majority view).

3 *Sohon Lal* v. *Mohan Lal,* A.I.R. 1928 All. 726, 728, 729 (F.B.)
Suraj Prasad v. *Agu'a Devi,* A.I.R. 1959 Pat. 153, 155.
Venkatasubbamma v. *Subbayya,* A.I.R. 1964 A.P. 21, 22, 23 (Chandra Reddy C.J. & Chandra Sekhar J.).
Tukaram v. *Atmaram,* A.I.R. 1939 Bom. 31, 33 (Broomfield & Macklin, JJ.).

4 (a) *Sakharam* v. *Ramachandra,* A.I.R. 1917 Bom. 287 (Scott, C.J. & Shah J.);
(b) *Lachman Prasad* v. *Fida Husain,* A.I.R. 1915 Oudh 149, 150.

5 Para 50.21, *infra.*

6 *Holland, Elements of Jurisprudence* (1924 Ed.), pages 209, 223, 233, cited in *Sohan Lal* v. *Mohan Lal,* A.I.R. 1928 All. 726.

"It (ownership) may ..... continue to subsist although stripped of almost every attribute which makes it valuable....."

Later he says :

"One or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out while the residuary right or ownership ..... remains unimpaired."

The same author, further, talking of pledge, says :

"Probably the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor ..... and such is the English mortgage of lands or goods except in so far as its theory has been modified by the determination of the "Court of Chancery and of the legislature to continue, as long as possible, to regard the mortgagor as the owner of the property."

Similarly, Salmond in his Jurisprudence says[1] :

"The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet, he nonetheless remains the owner of the thing, while all others own nothing more than 'rights' over it, ... He, then, is the owner of a material object, who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

Poolock says[2]

"We must not suppose that all the powers of an owner need be exercisable at once or immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment and suspend his power of disposal, provided that he reserves for himself or his successors, the right of ultimately reclaiming the thing and being restored to his power."

These passages were relied upon by the majority judgment in the Allahabad case[3] in support of the proposition that mortgagor's right, even in a possessory mortgage, is tangible property.

50.18. The opinions of these distinguished jurists are, however, hardly of any relevance to the question under discussion. They merely deal with "ownership", and not with what is tangible property.

50.19 *Case law as to equity of redemption.*—Let us now examine a few cases as to equity of redemption. In a Madras case,[4] Bhashyam Ayyanagar, J., made the following observations :

"The equity of redemption in a usufructuary mortgage is only an intangible thing like a reversion which immediately precedes the expression 'or other intangible thing' (vide Williams on 'Real Property', 18th Edition,

1 Salmond, Jurisprudence (1924), page 280, cited in *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726.

2 Poolock, First Book of Jurisprudence (1923), pages 179, 180; cited in *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 728.

3 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 728, 729 (Majority view).

4 *Ramaswamy* v. *Chinna Asavi*, (1901) I.L.R. 24 Mad. 449, 463.

pages 30, 31, and it can be transferred by sale only by a registered instrument and not by delivery of the property. Equity of redemption in a simple mortgage may be tangible immovable property, and its sale can be effected, if its value be below Rs. 100/-, without registered instrument by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is in my opinion only an intangible think like a charge on immovable property within the meaning of section 54....."

In a Pata case,[1] it was held that the mortgagor, though not remaining in possession, yet transfers the tangible property when he sells it, because what passes to the mortgagee is not ownership and therefore the mortgagor remains the owner. The mortgagee, even though in possession, cannot transfer the property itself. He can only transfer the interest which he has acquired in the property. Whether the mortgagee is or is not in possession cannot according to this view make a distinction for the purpose of determining whether the property is tangible or intangible.

50.20 In a Bombay Full Bench decision,[2] Chagla, C.J., who delivered the judgment of the Court, was inclined to hold that a sale by mortgagor of immovable property in the possession of a mortgagee is a sale of tangible immovable property, but he left the question open and decided the case on another ground.

50.21. *Third view.*—We have referred to two views on the subject under discussion. There is yet a third view. The third view is that (i) where the property is subject to a simple mortgage, the equity of redemption is tangible immovable property, but (ii) where the mortgage is a usufructuary one, the mortgagor's interest is an "intangible thing" within the meaning of this section.[3-4-5-6] This view is based on the ground that "tangible property" means property capable of present possession, while "intangible property" would connote a right apart from a right to immediate possession.[7]

50.22. *Correct view.*—In our opinion, the last-mentioned view is to be preferred. As pointed out by Sulaiman, Ag. C.J. in *Sohan Lal* v. *Mohal Lal* (dissenting judgment)[8] :—

"According to its literal meaning, 'tangible' property would be one which is capable of being touched, and therefore capable of being possessed. It must accordingly be property which is capable of delivery of possession from one person to another. A mortgaged property itself is undoubtedly 'tangible', but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee, *including the right to remain in possession and appropriate the profits.* The interest which the mortgagor

1 *Suraj Prasad* v. *Aguta Devi*, A.I.R. 1959 Pat. 153. (V. Ramaswamy, C.J., R. K. Chowdhury & K. Sahai, JJ.).

2 *Bhikhabhai* v. *Chiman Lal*, A.I.R. 1953 Bom. 437, 439.

3 *Ramasami* v. *Chinnal Ansari* (1901) I.L.R. 24 Mad. 449, 463 (D.B.).

4 *Dhareshwar* v. *Lakhradhar*, A.I.R. 1950 Assam 107, 113 (per Ram Labheya, J.) (review).

5 A.I.R. 1936 Bom. 175.

6 A.I.R. 1921 Oudh 124.

7 *Kushwat* v. *Jamil*, A.I.R. 1919 Cal. 325, 326.

8 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 All. 726, 733 (F.B.) (dissenting judgment of Sulaiman, Ag. C.J.).

possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible, when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as 'tangible'. The subject matter of ownership is 'tangible', but the interest which the mortgagor can transfer is intangible'."

We find this reasoning logically convincing.

50.23. *Recommendation to add Explanation as to usufructuary mortgage.*—To avoid further controversy on the subject, we recommend that the third view,[1], which appears *to be a logical view*[2], should be codified by inserting a suitable Explanation[3] in section 54, namely, the mortgagor's interest in a usutructuary mortgage is an intangible thing.

50.24. *Mortgagee's right.*—This is as regards the *interest of the mortgagor.* As to the right of the *mortgagee,* where the mortgage is *simple one,* his right would be "intangible property",[4] and the right of a usufructuary mortgagee would be "tangible immovable" property.

The contrary view has, however, been expressed by the High Court of Allahabad in Sohan Lal's case,[5] namely that it is "intangible property" in the case of a usufructuary mortgage. We think that the amendment which we propose regarding the mortgagor[6] will indirectly settle the position regarding the mortgagee also.

50.25. *Delivery how effected in case of sale by mortgagor to mortgagee.*—Even if the mortgagor's interest is tangible property, some difficulty has been created on the question whether the 'delivery contemplated by section 54 is real delivery, or whether it can be constructive delivery. This question has normally arisen where a mortgagor sells the mortgaged property to a mortgagee in possession. Since the mortgagee is in possession, no real delivery can be given to him. Is symbolical delivery permissible then? Or, is it correct to say that the only way of obtaining transfer of ownership by the mortgagee in possession who purchases the property is by registered instrument? It would appear that on this point a conflict of views prevails. The case law on the subject is conveniently discussed in a Patna judgment.[7] There are, what may be called, two views—the narrower view and the wider view.

According to the narrower view, a registered instrument is the only mode of transfer and delivery is not *possible,* because the mortgagee being already in possession, no further possession can be given to him.[8] He must

1 Para 50.21, *supra.*

2 Para 50.22, *supra.*

3 For suggested re-draft, see para 50.37, *infra.*

4 (a) *Moola Sons* v. *O. A. Rangoon,* A.I.R. 1935 P.C. 230, 232;
(b) A.I.R. 1941 Nag. 5, 6.
(c) A.I.R. 1934 Nag. 13, 15.
(d) A.I.R. 1924 Rang. 267, 268.

5 *Sohan Lal* v. *Mohan Lal,* A.I.R. 1928 All. 726, 733 (Usufructuary Mortgage)

6 Para 50.23, *supra.*

7 *Suraj Prasad* v. *Aguta Devi,* A.I.R. 1959 Patna 153, 157, paragraphs 14 to 21.

8 *Bhika Bhai* v. *Chiman Lal,* A.I.R. 1953 Bom. 437, 439 and 440, paragraphs 4 and 10.

to deliver the property to the mortgagor and then obtain possession again, if delivery is the mode adopted. According to the wider view,[1] there is no reason why the mortgagee should be required to re-deliver the property and then to take back possession.

50.26. Where the vendee is a usufructuary mortgagee of the property sold and is in possession as such, the sale can only be of the equity of redemption. If, in such cases, it is regarded as intangible property, no question of a sale by delivery of such property can arise, whatever may be the value of property. Similarly, where the vendee is a lessee of the vendor, what is sold would only be a reversion which is also an intangible thing, and no question of a sale by delivery can arise in such cases.

But if it is regarded as tangible, there is, as already stated, a conflict of opinion among the High Courts on the question whether a sale in such cases should be only *by a registered* instrument or whether it might be by delivery of the property. This difficulty arises because of the word 'delivery'. What is transferred by the vendor may be tangible immovable property. According to the contrary view (which also proceeds on the assumption that what is transferred is tangible immovable property), the delivery of possession contemplated in such delivery as the nature of the property admits of, and where the vendor, by appropriate acts or declarations, converts the vendee's possession into that of an owner, it is sufficient delivery of property within the meaning of this section.

50.27. *Meaning of 'delivery'—Privy Council case.*—In *Mathura Prasad* v. *Chandra Narain,*[2] it was held by the Privy Council that for the purposes of this section there must be a real and not a constructive delivery of property. In that case the question was whether the delivery to vendee *of an unregistered instrument of transfer* was a delivery of the property for the purposes of this section. The Privy Council observed as follows :

> "Their Lordships cannot accept the suggestion made on behalf of the applicants that for the purposes of section 54 some sort of constructive possession resulting from the *delivery of the alleged instrument of transfer might* be sufficient For this purpose, their must be a real delivery of property." These observations were not made to rule out symbolical delivery. But they have created that impression in some courts.

50.28. *Other cases.*—The same view has been expressed in the undermentioned cases.[3]

50.29. *Scope of the problem.*—If our recommendation[4] to treat the mortgagor's right in a usufructuary mortgage as intangible property is carried out, the problem will not survive in this form, for that situation. But in regard to other situations, the practical question will still remain though their number will be limited.

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1 *Sohan Lal* v. *Mohan Lal,* A.I.R. 1928 All. 726 (Majority view).

2 Mathura Prasad v. Chandra Narain, A. I. R. 1921 PflC. 8, 9, 10.

3 (a) A.I.R. 1956 Hyd. 170, 171.
(b) A.I.R. 1953 Bom. 437, 438, I.L.R. (1953) Bom. 1071 (F.B.).
(c) A.I.R. 1938 All. 726, 728;
(d) A.I.R. 1933 Cal. 544, 545.
Sohan Lal v. *Mohan Lal*

4 Para 50.23 *supra.*

50.30. *Difficulty how can be removed.*—It appears that the difficulty would disappear if the distinction between two kinds of possession—a distinction which is recognised by the Legislature in the Code of Civil Procedure, 1908, in relation to execution proceedings—is borne in mind. To quote Mr. Justice Aikman,[1]—"if a person is wrongfully ousted from possession, he is entitled to a decree replacing him in such possession as he had, when his cause of action arose. If, at that time, he had a right to *immediate* or what is called in country *khas* possession, then he is entitled to a decree replacing him in such possession. If, on the other hand, his possession was only derived from the enjoyment of the rents and profits, then the possession to which he is entitled is that provided for by secion 264 of the Code (corresponding to present Order 21, Rule 35)."

50.31. *Symbolical delivery.*—We could introduce, on the analogy of Order 21, Rule 36, Code of Civil Procedure (symbolical possession), a provision to the effect that any formality which gives notice to all concerned that the interest has been transferred will suffice where the transferor is not in possession.

50.32. *Recommendation as to delivery.*—In our opinion the best course would be to define 'delivery' as above,[2] i.e. to cover both the modes of delivery—real and symbolical. We recommend that such an amendment be made.[3]

50.33 *Sale of possession. Mortgagor's interest to mortgagee in possession.*—As to the mortgagor's interest, it appears to us that, theoretically speaking, as already stated, there is much to be said in favour of the view that after the possession has been transferred to the mortgagee, the interest has already passed to the mortgagee, including the right to remain in possession and to appropriate the profits. Although the interest of the mortgagor survives and it would not be inaccurate to say that he remains to be the "owner"—a proposition which cannot be disputed—that interest is not *tangible property*. He remains the owner without possession. As Sulaiman, C.J., in his dissenting judgment, in the Allahabad case,[4] observed, tangible property, according to its literal meaning, would be one which is capable of being touched and therefore capable of being possessed.

"It must, accordingly, be property which is capable of delivery of possession from one person to another". A mortgaged property itself is tangible, but the interest of the mortgagor is not, because that interest is not identical with the property itself. The mortgagor's interest is not capable of being touched; and, therefore, it is not capable of being delivered by actual delivery.

50.34. *Possible solution.*—How, then, is a transfer to be effected when the mortgagor sells the property to the mortgagee already in possession? If the mortgagor's right to redeem is not tangible property, 'delivery' is, in the scheme of section 54, as it now stands, out of question. A registered instrument is, at present, the only way of effecting the transfer, if the property is to be regarded as intangible. What happens in practice is

1 *Sita Ram*, I.L.R. 18 All. 440, 453 (F.B.).

2 Para 50.31, *Supra*.

3 For suggested redraft, see para 50.37, *infra*.

4 *Sohan Lal* v. *Mohan Lal*, A.I.R. 1928 A.I.R. 1928 All. 726, 733.

that parties regard registration as an irksome and inconvenient formality in such cases. They try to effect the transfer by delivery, where the amount is small. Then difficulty arises. The remedy for this is not in an artifiical construction of the expression "tangible property", but in an amendment in the law as incorporated in section 54 as to the mode of transfer.

One possible way of dealing with this would be to provide for an additional mode of transfer, i.e., apart from registered instrument, we have to conceive of some other procedure where the sale is to a person in actual possession of the property.

50.35. *Recommendation as to sale to a person in possession.*— Having regard to practical considerations, we recommended[1] that in the case of sale to a person in possession, any act effective to make it known that the vendee has acquired the vendor's interest by purchase should be a permissible mode, in addition to registered instrument (which is already provided for) if the consideration does not exceed Rs. 100.

50.36. *Summary of recommendations.*—It will be convenient to summarise our recommendations for the amendment of section 54—

(i) It should be made clear[2] that where immovable property is in the possession of a person (other than the transferor) who has an interest by way of lease, transfer of that property is a transfer of the reversion.

(ii) It should be made clear[3] that the words "reversion or other intangible thing" occurring in the second paragraph are confined to immovable property.

(iii) In the case of a usufructuary mortgage, the mortgagor's interest is an intangible thing.[4]

(iv) It should be made clear that in the limited number of cases where property is in the possession of a person *who has no interest therein*, so that the property so far as the owner is concerned, still remains tangible immovable property, symbolical delivery is permissible.[5]

(v) Where a person in possession of immovable property purchases that property, any act effective to make it known that the purchaser has acquired the vendor's interest should be a permissible mode of transfer (in addition to registered instrument which is already provided for),[6] where the consideration does not exceed one hundred rupees.

50.37. *Re-draft.*—The following is a suggested re-draft of section 54 to implement the amendments recommended above:—

"54.(i) 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

1 For suggested redraft, see para 50.37, *infra.*
2 Para 50.10, *supra.*
3 Para 50.12, *supra.*
4 Para 50.23, *supra.*
5 Para 50.32, *supra.*
6 Para 50.35, *supra.*

(2) Such transfer,—

(a) in the case of tangible immovable property of the value of one hundred rupees and upwards, can be made only by a registered instrument;

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

(3) Such transfer in the case of a reversion *in immovable property of any other intangible thing constituting immovable can be made only by a registered instrument* :

Provided that where immovable property is transferred to a person in possession thereof, who has transfer of the property by its owner to that person may be effected—

(a) either by a registered instrument as provided in this sub-section, or

(b) if the consideration for the transfer does not exceed one hundred rupees, by any act effective to make it known that the ownership has been so transferred.

(4) Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

(5) and (6)—(Fifth and sixth paragraph as at present).

Explanation 1.—*Where immovable property is in the possession of a person other than the transferor, being a person who has an interest therein by way of lease, transfer of that property is a transfer of a reversion for the purposes of this section.*

Explanation 1.—Where immovable property is in the possession *of a mortgagee under an usufructuary mortgage as defined in section* 58, *the interest of the mortgagor is an intangible thing for the purposes of this section.*

Explanation 3.—*Where immovable property is in the possession of a person who has no interest therein—*

(a) *the transfer of the property by its owner is a transfer of tangible immovable property, for the purposes of this section.*

(b) *delivery thereof for the purposes of such transfer may be effected by any act intimating to the person in possession that its ownership has been transferred to the person specified in the intimation."*

CHAPTER 51

RIGHTS AND LIABILITIES OF SELLER AND PURCHASER

SECTION 55

51.1 *Introductory.*—The rights and liabilities of the seller and the buyer of immovable property are dealt with in a very elaborately worded section—section 55—which we now proceed to consider. These rights and liabilities vary according as the stage with which one is concerned is the stage before completion—that is, before the passing of title, or whether the stage is one after completion—that is, the stage after the title passes. This is not to say that conduct which took place before completion has no repercussions on the legal position after completion. The answer to that question depends on the nature of the right claimed or liability sought to be enforced.

51.2. *"Open contract".*—Much of the substance of the law enacted in the Act on the subject has been suggested by practical experience of the difficulties and problems that arose in England in conveyancing practice. English conveyancing practice makes a distinction between an open contract for sale and a formal contract. If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. Such a contract contains no other specific clauses dealing with the obligations of either partly in relation to completion or in relation to the stage after completion. When this form of contract is made, the parties are bound by certain obligations imposed by the law. Since these implied obligations impose in certain respects a burdensome duty of proof of title upon the vendor, and since the vendor, in addition to modifying this burden, is anxious to procure the insertion in the written agreement of special stipulations, the parties often incorporate into that contract such terms as they think fit,—of course, subject to those rules of law which prohibit certain stipulations. It would appear that in England, in practice, contracts for the sale of land are generally in standard form. There are available at least two sets of precedents, namely, (a) the Law Society's Contract and Conditions of Sale,[2] and (b) the National Conditions of Sale.[3]

51.3 *Special conditions.*—Matters which, in England, are commonly the subject of special conditions are—

(i) the root of title and the length of title;

(ii) date on which possession is to be given and the consequences if the possession is not given on the stipulated date;

(iii) interest to be payable by the purchaser on the purchase price, if the sale is not completed on the stipulated date;

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1 Cheshire. Real Property (1972), page 710.

2 See 121 New Law Journal pages 4, 28, 52, 87, 98, 122, 165.

3 Emmet on Title (15 Ed), pages 971-992;
Gibson, Conveyancing (20th Ed.), pages 125 to 148.

(iv) restrictions as regards the purchaser's remedies for minor misdescriptions;

(v) matters appurtenant thereto.[1]

It is apparent that the statutory provisions in section 55 are also to be elastic in this regard, inasmuch as they do not prohibit the parties from entering into their own stipulations, provided the terms are otherwise lawful. This is amply clear from the opening words of section 55.

51.4. *Contracts by correspondence.*—At this stage, mention should be made of an interesting provision in England in relation to "contracts by correspondence" in regard to which statute[2] provides that Statutory Forms of Conditions of Sale, 1925 made by the Lord Chancellor, shall govern the contract, subject to any modification or contrary intention expressed in the correspondence.

51.5. *Broad propositions in section* 55.— In order that the complexity of section 55 and its numerous provisions may no constitute a hindrance to a grasping of the gist of the provisions, it appear to be desirable to draw attention to certain basic propositions which constitute either the background in which section 55 operates or the basis of some of its very important propositions :—

(1) *Nature.*—A contract for the sale of immovable property of itself creates no interest in the property. This proposition enacted in section 54 needs to be emphasised again because, it is only when what is commonly known as a conveyance takes place that ownership passes, leaving aside the infrequent case of delivery. Since the passing of ownership is of the essence of the transaction of sale[3] the point of time at which ownership passes is of theoritical as well as practical importance. In England, the purchaser at once becomes an owner in equity.[4] In India, neither the ownership nor the risk passes until sale is effected by the mode of transfer legally provided. In this sense, a completed sale derives its law both from section 54 and from section 55.

(2) *Title.*—The vendor must show a good title. Proof of title is made by exhibiting to the purchaser the records of past transactions in the land and by proving other relevant events such as death.[6] Incidentally, such proof not only persuades the purchaser that the vendor owns the property, but also gives the purchaser an opportunity to enquire about the existence of equitable interests. In this sense, this step has its significance in regard to those other provisions of the Act which confer equities.

(3) *Vacant possession*—.The vendor must give vacant possession on completion. This has an important consequence on third parties.[6] In

1 Cheshire, Real Property (1972), page 741.

2 Sertion 46, Law of Property Art. 1925.

3 Per section 54.

4 William's Real Property (1966), page 582.

5 William's Real Property (1966), page 585.

6 The leading English case is *Cook* v. *Taylor,* (1942); Chancery 349; (1942) 2 All. E.R. 85.

the absence of a contract to the contrary, a person who sells land must evict other occupiers of the property and remove his own movables thereon[1].

(4) *Time.*—Stipulations as to time have theoretical and practical importance. Where time is of the essence, the contract can be avoided, even where time is not of the essence damages they be claimed. In an English case[2], the property was needed for professional purposes by a woman whose practice of her profession was injured by the vendor's delay in completion. She recovered damages and other expenses.

(5) *Discharge.*—Discharge of the contract takes place in regard to the principal obligations at completion, that is to say, when the title has been accepted, the conveyance executed and delivery (where necessary) made and the purchase money paid. Thereafter, regarding any defect of title which may appear though the obligation still subsists, it is now not in the realm of mere contract. The covenants can still be enforced, but the contract in general, and in the absence of fraud, cannot be avoided.

(6) *Remedies.*—Remedies about the effect of the contract will be available according to the nature of the dispute. These may be, a suit for damages, recission and consequential return of deposit, or specific performance or injunction or rectificaton.

51.6 Section 54 does not exhaust the relations which flow from a contract[3] for the sale of immovable property. Section 55 imposes many obligations on the vendor and gives corresponding rights to the purchaser with reference to the property contracted to be sold. Relief by way of specific relief, may in certain events be available. Thus, T a purchaser who has entered into a contract for sale can resist a suit for ejectment by the vendor so long as specific performance could have been enforced by him[4].

51.7. *Covenants—nature and effect.*—The obligations imposed by section 55 are in the nature of statutory obligations and are not implied "convenants".[5] They are not contractual. But they are duties imposed by law on the parties *in the performance of the contract.* Failure to perform them may entitle the other party to repudiate the contract in some cases or to claim damages in other.

Of course, every sale deed is necessarily based on contract. If such contract is void or voidable on the ground of an illegality, fraud, misrepresentation, coercion, undue influence, mutual mistake or want of consideration, the sale which is itself based upon such contract will also be vitiated to the same extent. Moreover, property which is not transferable[6] cannot be sold.

51.8. *Section* 55(1).—So much by way of introduction, we begin our discussion of section 55 by quoting sub-section (1)[7]—

1 This will be further discussed under section 55(1)(f).
2 *Phillips* v. *L.*, (1949) 2 K. B. 33.
3 *Bapu Apaji* v. *Kashinath.* A.I.R. 1916 Bom. 1, 2.
4 *Bapu Apaji* v. *Kashinath,* A.I.R. 1916 Bom. 1.2.
5 *Gange* v. *Govinda,* A.I.R. 1924 Mad. 544, 546.
6 Section 6.
7 For convenience, we call it a sub-section.

"55. In the absence of a contract to the contrary, the buyer and the seller of immovable 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 or in the seller's title thereto 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 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 propety 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 incumberances, to discharge all incumbrances on the property then existing."

51.9. *Section* 55(1)(*a*)—*defect.*—First, we take up clause (a). As to defect in property or title, the most important question to be considered is whether the defect is in the properly or is in the title[1], and whether it is a material defect.[2] The next important question to be considered is whether the defect was known to the purchaser.[3] If not, the last question to be considered is whether it was one which the purchaser could have discovered with ordinary care.[4]

51.9*A*. *Incumbrance*—The scope of the expression "defect in title" may be explained by illustrative cases. The existence of an incumbrance not known to the buyer, which he could not discover by the exercise of reasonable care, is a defect in title.[5]

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1 Para. 51.9 and para 51.10, *infra.*
2 Para. 51.10A, *infra.*
3 Para. 51.11, *infra.*
4 Para. 51.12, *infra.*
5 A.I.R. 1960 A.P. 405, 406.
A.I.R. 1950 E.P. 278, 280, 281.
A.I.R. 1925 Mad. 968, 969.

So also is the existence of a permanent lease[1] or the existence of a liability of the land being taken over by a company under a local Act,[2] the existence of a restrictive covenant attached to the property sold,[3] the existence of non-transferable permission to build to a buyer of agricultural land for construction purposes[4] or the existence of a public right of way over the property not discoverable with ordinary care.[5-a] The existence of a nuisance in the neighbourhood of the property sold is a defect in the property,[6] so also is the existence of an underground culvert running through the middle of the property, where the property is sold for residential purposes,[7] or the existence of an easement over the property.[8] But, on the purchase of an under-lease, it is not a valid objection to the title that the under-lease may be forfeited by the non-performance of the covenants in the original lease.[9]

51.10. *Awareness*—Where, at the time of the contract, the seller is himself not aware of the defect, he cannot obviously disclose it and is, therefore, not bound to disclose it.[10] But this is subject to a contract to the contrary. For instance, where the seller expressly undertakes to indemnify the buyer *if any defect is discovered,* he is liable in damages on the discovery of encumbrance, even though he (the seller) was not aware of it.[11]

51.10*A*. *Materiality*—The test of materiality is that the defect must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it, he might have entered into the contract at all. On this basis, a restrictive covenant by way of easement is a material defect. On the other hand, trifling errors in the description are not material defect.

51.11. *Actual knowledge*—Actual knowledge by the buyer of the defect dispenses with the obligation under section 55(2). Further, there is no such duty where the buyer could, with ordinary care, have discovered the defect.[12]

In a Madras case,[13] it was held that the fact that the particular area in a property which was sold was included in a Town Planning Scheme, was one which the buyer could have discovered with ordinary care, assuming that it was a material defect.

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1 (1913) I.L.R. 40 Cal. 140, 149.
2 *Ballard* v. *Way*, (1836) 150 E.R. 540, 544.
3 *Pemsal* v. *Tucker*, (1907) 2 Ch. 191, 199.
4 *Molyneux* v. *Hawtrey*, (903) 72 L.J.K.B. 873, 975; (1903) 2 K.B. 487, 491.
5 *a. Yandle & Sons* v. *Sutton*, 1922, 2 Ch. 199, 203.
6 *Lucas* v. *James*, (1849) 68 E.R. 173.
7 *In re Puckett & Smith's Contract*, (1902) 2 Ch. 258.
8 A.I.R. 1956 Bom. 175, 179, 180. A.I.R. 1935 Bom. 16, 19, 20.
9 *Hayford* v. *Griddle*, (1855) 52 E.R. 1192, 1193.
10 *Lucas* v. *James*, 1849) 68 E.R. 170, 173.
11 A.I.R. 1957 Trav. Co. 59 60 (D.B.).
12 A.I.R 1964 Orissa 269, 271
13 *Hussain Sahib* v. *Chethar*, A.I.R. 1953 Mad. 628, 639.

It is not, however, always easy to define ordinary care, as is apparent from the undermentioned decisions.[1-2-3]

51.12. *Discovery with care—Section* 55(1)(*a*) *obscurity as to registered instrument*—There appears to be a certain amount of obscurity as to the position of a person who, while selling property and knowing that the property is encumbered, either remains silent about that encumbrance, or expressly makes a false statement that the property is not encumbered. In such cases, can the seller argue that it is the buyer's duty to discover the encumbrances and that registration of the encumbrance amounts to notice by virtue of the definition of "notice" in section 3 ? According to a Madhya Pradest High Court judgement,[4] in which an earlier Nagpur ruling taking a contrary view does not seem to have been referred to, in such a case, the buyer should have known about the encumbrance by making enquiries in the office of the Registrar, and, therefore, section 55(1)(a) does not apply.

It was held that the remedy of the buyer in such case is to claim compensation by virtue of section 55(1)(g), according to which the seller is bound to discharge the encumbrance existing on the date of the sale even if the buyer was aware of the encumbrance. If the vendor fails to do so and the vendee is dispossessed by the mortgagee, the vendee is entitled to refund of the sale price as damages under section 55(2).

However, in the same judgment, the concept of fraud was considered and the following observations occur :—

> "The alternative argument that the care falls within the Exception to section 19 of the Indian Contract Act is, however, without any force. The express recital in the sale deed about the non-existence of the mortgage, as I have already said, was to the knowledge *of the vendor applicant false.* It was, therefore, not a case of mere misrepresentation but a case of 'fraud' as defined in section 17 of the Contract Act because it was a 'suggestion, as to a fact, of that which is not true, by one who does not believe it to be true' and 'active concealment of a fact by one having knowledge or belief of the fact'. It will "be observed that the Exception to section 19 applies only to 'misrepresentation' or to 'silence fraudulent within the meaning of section 17'. Thus, only one type of fraud falls within the Exception to section 19. An express statement about the existence of a fact by one having knowledge or belief of the fact does not fall within the Exception. Section 19 has, therefore, no application and the *contract is voidable at the instance of the vendee on account of the fraud committed by the vendor.*"

51.13. *Effect of section* 3, *Explanation*—We would, with respect, rather take the view that the fact that Explanation 2 to section 3, Transfer of Property Act, fastens notice of a registered instrument as from the date of registration on any person acquiring the property comprised in the registered instrument, does not preclude the buyer from contending that he had no notice *vis-a-vis* the seller when, in truth and in fact, he had no notice.

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1 A.I.R. 1945 Bom. 187, 192.
2 A.I.R. 1930 Cal. 561, 563.
3 A.I.R. 1944 Mad. 237, 238.
4 *Ganpat* v. *Mangilal,* A.I.R. 1962 M.P. 144, 145.

51.14. *Calcutta view*—On the question whether failure to disclose a registered mortgage is a breach of the vendor's obligation, the Calcutta High Court[1] has taken the following view :

> "Section 55(1)(a) casts upon the seller the duty of disclosing to the buyer all material defects in the property or in the seller (sic.) title thereto of which the seller is, and the buyer is not, aware and which the buyer could not with ordinary care discover".

It was contended on behalf of defendants 1 and 2 that in the instant case the auction purchaser could, with ordinary care, discover as to whether there were any material defects in the property by causing searches to be made on that behalf. The Court did not accept this contention for the following reasons :—

> "Because it is well settled that whether the sale is made by auction or by private treaty, the purchaser is under no obligation to make inquiry as to defects in the vendor's title, it is the duty of the vendor to disclose all that is necessary for his own protection. The vendor's disclosure should be frank and full; he sought to state that which, if it is not stated, makes what he does state ambiguous and misleading. If he desired to preclude a purchaser from objecting to a defect he must "do so in plain terms, stating clearly the exact nature of the defect to which the purchaser is not to make objection."

The Court held that defendants 1 and 2 had suppressed the prior assignment from the Notification and conditions of sale with intent to deceiving and inducing the auction purchasers to enter into the agreement of sale with full knowledge that the representations were not true and as such this suppression was fradulent with the meaning of sections 17 and 18 of the Contract Act.

In the circumstances, the sale was declared to be invalid and the plaintiffs were entitled to claim refund of their deposits.

51.15. *Nagpur view*—According to a Nagpur judgment[2] also, registration cannot dispense with the obligation under section 55(1)(a).

51.16. *True position*—The true position seems to be that clause (a) was primarily intended to exclude relief on the basis of defects in the *condition of the property* which the prospective buyer could have discovered on *inspection of the property*. There may, in exceptional cases, be a material defect in the title which could, with ordinary care, be discovered—for example, a person inspecting property and finding another person in possession would naturally be put on his guard, not because possession is constructive notice, but *because knowledge of possession means* that the said defect in title could have been discovered with ordinary care. The case of registration is, however, different. The law treats registration as constructive notice, not in order to encourage fraud as between the prospective buyer and the prospective seller, but in order to prevent fraud on the interests of a third person within the meaning of those sections of the Act which specifically speak of notice and use that expression. It is, with great

1 *Sk. Moula Buksh* v. *Dharmchand*, (1961) 65 C.W.N. 881, 895, 897 (U. C. Law J.).

2 *Sundera Bai* v. *Pandhari Nath*, A.I.R. 1933 Nag. 441, 442.

respect to the Madhya Pradesh High Court judgment, too much to hold that the purchaser should be disabled from taking advantage of the liability cast upon the seller by section 55(1)(a) merely because the encumbrance has been registered—certainly not where the seller makes deliberately a false statement that the property is not encumbered. If such non-disclosure is not fraudulent, one is unable to see what action on his part can be regarded as fraudulent. Once the seller makes the statement that the property is not encumbered, a person with ordinary care would rely upon that statement and would not go out of his way to inspect the registration records. We may also state that copies sent under section 30, Registration Act, take long time. The practice of investigating the registrar's record is one which is resorted to for the *buyer's protection* and not for the seller's immunity. That the material defect in the title is one which is confined to a defect having visible indication is correctly brought out in the illustration given by Mulla[1] which is as follows :

> "A sells to B an enclosed field. Before acceptance of the conveyance, B discovers that the public has a right of way across the field, of which there is no *visible indication on the land*. This is a defect both in the property and in the seller's title. A not having disclosed this defect, B may refuse to complete and claim damages. He can also resist a suit for specific performance."

Finally, it will be noted that the section does not use the expression "notice" which is the expression in regard to which registration has a bearing.

51.17. *Punjab case*—In this connection, it is also of interest to refer to a Punjab case.[2] In that case, Kuldip Singh had agreed to sell to Moti Prasad for Rs. 4000/- an area of land and had represented that this land was free from all encumbrances. Kuldip Singh was also paid a sum of Rs. 2000/-. The sale deed was later executed, and in that sale deed, Kuldip Singh again re-stated the fact that the land was free from all encumbrances. However, it subsequently turned out that the land was mortgaged to two mortgagees for very small sums and one of the mortgagees, after taking legal proceedings, realised his debt by selling the land. Moti Prasad then lost the land and brought a complaint against Kuldip Singh for cheating. The High Court was called upon to construe section 3 of the Transfer of Property Act.

It was the contention of the accused Kuldip Singh that both the previous mortgages were registered and that Moti Prasad had therefore notice. In rejecting this argument, the High Court made the following observations :

> *"The object of the Explanation to section 3 is to safeguard the interests of a third party who has acquired a good title*[3] *under previous registered instrument* but it does not in any way alter or modify the criminal liability of a person who deliberately suppresses certain facts or mis-states certain facts. If A has sold some property to B by a registered deed and he then sells it again to C, C cannot acquire a good title in the property because he must be deemed to have had

1 Mulla (1973), page 317.
2 *Kuldip Singh* v. *State*, A.I.R. 1954 Punj. 32, 33 (Khosla and Soni, JJ.).
3 Emphasis added.

notice of the previous registered sale deed in favour of B but nevertheless he was made to part with money on a misrepresentation made by A and therefore A is guilty of the offence of cheating. This is the case which is mentioned in illustration (i) to section 415, Penal Code. The doctrine of consructive notice cannot be imported into criminal law for the purpose of determining whether a person is guilty of the offence of cheating or not."

This was, no doubt, a criminal case, but we cite here to show what ought to be the correct approach.

51.18. *Position before* 1929—It may be noted that before 1929, the clause was confined to defects in the property—in regard to which the aspect of defects ordinarily discoverable has greater utility. While we do not say that these words have no utility for defects in title, we are of the view that mere registration should not dispense with the buyer's obligation. We recommend that this should be expressly provided.

51.19. *Position in England*—In England, section 24 of the Law of Property Act, 1969 provides in effect that in respect of contracts entered into after January 1st, 1970, *as against the vendor,* a purchaser will only be deemed to have notice of those registered land charges of which he has *actual or imputed knowledge* at the date of the contract.[1] Consequently, a purchaser will no longer be prevented from rescinding the contract on the ground of an undisclosed land charge merely because it has been registered. The owner of the registered land charge, however, remains protected : here registration still constitutes notice to all the world.[2]

51.20. *Recommendation*—Having taken into consideration all aspects of the matter, we are of the opinion that the view that a buyer can, with ordinary care, discover what is granted by a registered instrument and that therefore, the seller is not bound to disclose such documents, makes a confusion between the object of registration as notice of *third person's rights* and registration as dispensing with the *duty of the seller.* The provision for constructive notice is primarily meant to protect third person's interests. It should not be used so as to encourage fraud or indifference by the buyer. We *recommend* that the correct position should be incorporated in section 55(1)(a) by suitable amendment.

51.21. *Fraud*—With section 55(1)(a) must be read the last clause of section 55 which enacts that an omission to make the disclosure of the nature referred to in this clause is fraudulent. This fraud will entitle the buyer not only to avoid the contract, where the transaction has not passed beyond the stage of contract, but also to set aside the sale itself where the contract has been completed by the execution of the conveyance. Before the sale is set aside, the buyer can sue for return of the purchase-money. This remedy is independent of a suit for rescission of the sale deed, which the buyer may also bring if he so chooses. Where the buyer has suffered loss by reason of the fraud, he will, it is conceived, be entitled to claim damages from the seller, whether the fraud is discovered before or after conveyance.

1 The parties must not contract out of the section. Law of Property Act, 1969, section 24(2).

2 Cheshire, Real Property (1972), page 735.

51.22. *Section* 55(1) (a)—*Effect of non-disclosure discovered before or after conveyance*—The effect of non-disclosure of a material defect in title varies according as the discovery is before or after conveyance.

(a) If the buyer discovers a material defect which has not been disclosed and such discovery takes place before he has accepted the conveyance, then he may claim damages or rescind the contract for misrepresentation. He may also resist a suit for specific performance.

(b) If the buyer has accepted the conveyance, his remedy is in damages on the covenant for title[1] because the duty of disclosure merges in the conveyance,[2] in the absence of provision. The right to sue for damages remains unaffected by the fact that the buyer knew of the defect in the title.[3] This is because the remedy on the covenant is available irrespective of fraud or misrepresentation.

(c) However, non-disclosure of a material defect, *where fraudulent,* may be made the basis of a suit for setting aside the sale on the ground of fraud.[4]

51.23. *Section* 55(1)(*b*) *and section* 55(1)(*c*)—The obligations laid down in section 55(1)(b) and 55(1)(c)—production of documents of title and answering of questions—are intended to ensure to the satisfaction of the buyer that the seller has done his utmost to perform his obligations, particularly the obligation under clause (a) to disclose defects in the property or title.

51.24. *Section* 55(1)(*d*)—*Recommendation*—In section 55(1)(d), the duty of the seller to execute a proper conveyance on payment or tender of the price arises when the buyer tenders "it" to him for execution at the proper time and place. Here the pronoun "it" stands for "conveyance". There is no ambiguity, but opportunity could be taken of substituting the word "conveyance" for the word "it". This is a very minor change. Besides this, it is desirable to amplify the clause by providing that the conveyance should be executed in favour of the buyer or such person as the buyer directs. Compare the provision in section 55(1)(f) as to delivery. We recommend this amplification of section 55(1)(d).

51.25. *Section* 55(1)(*d*)—*Conveyance in whose favour*—In England, a buyer can always demand that the conveyance should be executed in his favour, or in favour of any person he may nominate.[5] The Act merely enacts that the seller shall execute a proper conveyance; it does not say that it should necessarily be in favour of the buyer. It has been held by the High Court of Bombay[6] that the rule of English law would apply here also, and that the buyer can, under section 55(1)(d), call upon the seller to execute a conveyance in favour of the buyer's nominee. This view has been followed by the Mysore High Court[7]. It is also the rule in England that the buyer may require the seller to convey the property in parcels

1 *Turner* v. *Moon* (1901) 2 Ch. 825.
2 Mulla (1973), page 317.
3 *Thammi Neni* v. *Dhavala Poli Naidu,* A.I.R. 1954 Mad. 205.
4 *Gajapathi* v. *Alagia,* (1886) I.L.R. 9 Mad. 89.
5 *Egmont* (*Earl*) v. *Smith,* (1887) 46 L.J. Ch. 356, 358; 6 Ch. D. 469, 474.
6 *Rahimlulla* v. *Official Assignee,* A.I.R. 1935 Bom. 340, 341, 343 (D.B.).
7 A.I.R 1954 Mys. 145, 147; I.L.R. (1954) Mys. 274 (D.B.).

on receipt of the whole purchase-money and the additional cost of the several conveyance, provided they are executed at the same time and not at various times.[1]

51.26. *Section* 55(1)(*e*)—Section 55(1)(e) deals with the duty of the seller to take care of the property and the documents of title between the date of contract of sale and delivery. This does not, of course, mean that the risk passes to the buyer on contract. That is not the law in India, and the buyer does not get any interest in the property by mere contract. Nevertheless, this duty seems to have been imposed in order to avoid any objections later being made by the buyer that the property or the documents are not in the original condition.

51.27. *Section* 55(1)(*f*)—The seller is, under clause (f), bound to give, on demand, such possession as the nature of the property admits of. The nature of the possession will vary according to the nature of the property and also its extent. Where an estate is a vast one, it is not required that buyer must walk over the whole land. Incidentally, clause (f) does not mean that in every case delivery is a sufficient step for transferring the ownership. That is a matter governed by section 54. Also, all liabilities under section 55(1) are governed by the opening words, "such of them as are applicable to the property sold".

51.28. *Section* 55(1)(*f*)—*Vacant possession*—Normally, it is an implicit term of the contract of sale that vacant possession shall be given to the purchaser on completion. This becomes of importance where the land is subject to a tenancy or has been lawfully requisitioned by a public authority.[2] In India, though section 55 does not expressly use the word "vacant", yet since section 55(1)(f) obliges the seller to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits, therefore, unless the buyer has been given notice of a lease or of a mortgage in possession, a seller is bound to give vacant possession, at least if the property professed to be sold is tangible immovable property. It is for this reason that where property is sold with all rights and free from incumbrances, the seller is bound to give vacant possession of property which is occupied by the trespassers.[3]

51.29. *Section* 55(1)(*g*)—Clause (g) deals with the payment of public charges on the property and nedes no comment.

51.30. *Section* 55(2)—The seller's covenant for title is found in subsection (2), which reads —

> "55. (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.

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1 *Egmonta (Earl)* v. *Smith,* (1877) 46 L.J. Ch. 356, 358; 6 Ch. D. 469. Farrand, Contract and Conveyance, pages 209 to 213.

2 *Cook* v. *Taylor,* (1942) 2 All. E.R. 85;

3 *Shashi Bhushan* v. *Rai Chand,* A.I.R. 1950 Cal. 333.

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".

51.31. *Common law*—Sub-section (2) corresponds to what is known as the covenan for tittle in England. At common law, no such covenant was implied in England.[1]

The maxim adopted by the common law was "let the purchaser beware *"Caveat emptor"*, which means that the buyer is bound by the law to look after his own interests. If people will not assist themselves, the law will not assist them; if a person chooses to buy a property without looking into the title, he does so at his own risk and the law will not help him to get rid of his bargain. This was the law as unmodified by statutes in England, which led to the practice of inserting express covenants so as to avoid the effect of the rule of *Caveat emptor*. In the absence of an express covenant, however, the common law rule would apply and the buyer could not hold the seller liable for any defect of title after the conveyance was executed.

51.32. *Statute*—Statutory modification of this common law rule took place in England, first in 1881 by the Conveyancing and Law of Property Act, section 7(1)(a), and then by the Law of Property Act, 1925, section 76.

In India, sub-section (2) now implies a warranty of title in all sales, whether or not such a warranty is expressed in the conveyance. In the absence of a contract to the contrary, the warranty is absolute and irrebuttable.[2] It also appears that the fact that the buyer knew of the defect is not material for the purpose of sub-section (2). In this sense, section 55(1)(a) is subordinated to section 55(2)[3-5]

51.33. *Quiet enjoyment*—In England, besides the covenant for title, there is implied a covenant for quiet enjoyment which means that the buyer shall not be disturbed in his possession and enjoyment of property. While the covenant for title relates to right to convey, covenant for quiet enjoyment relates to possession. Decisions of some High Courts take the view[6-8] that section 55(2) imports not only a covenant for title but also a covenant for quiet enjoyment. In some cases[9-10] the existence of the covenant seems to have been assumed.[11]

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1 *Gour Kishore* v. *Chander Kishore*, 25 South W.R. 45, 46.
2 *Deep Chandra* v. *Sajjad Ali Khan*, A.I.R. 1951 All. 114, 118 (Agarwala and Wanchoo, JJ.).
3 A.I.R. 1918 Mad. 1315, 1320.
4 *Avadesh Kumar* v. *Zakaul Hussain*, A.I.R. 1944 All. 243, 244.
5 A.I.R. 1957 A.P. 307, 325.
6 A.I.R. Nag. 382, 385
7 A.I.R. 1953 Mad. 529, 530.
8 A.I.R. 1916 Mad. 14, 15.
9 A.I.R. 1935 Mad. 636, 637.
10 A.I.R. 1950 Bom. 401, 404, 406.
11 Contra 1957 Ker L. T. 588, 591.

51.34. The distinction between covenant for title and covenant for quiet enjoyment is that the former, if broken, is necessarily broken immediately upon execution of the conveyance which contains it and the purchaser need not wait for his eviction. The latter covenant (quiet enjoyment) offers no immediate right.

51.35. *Section* 55(2)—*Good and Marketable Title*—A party in whose favour an agreement of sale of immovable property has been executed is entitled to have title made out for him. This broad proposition is the underlying principle in section 55(1)(b) and section 55(2). Questions would arise as to whether the title should be good title or absolute title or title free from encumbrances. Fortunately, the Act avoids these complications by using only the words "the interest which the seller professes to transfer". We find subtle distinctions made between good title and marketable title in a Calcutta case.[1]

This inclination was towards holding that the Act does not impose the obligation to pass the good title—an expression which seems to be nearer to absolute title. He seems to have assumed the existence of this distinction in England.

With great respect, we are not convinced that any such subtle distinction is recognised even in England. In England, "good title" in a contract for the sale of realty means such a title as will be forced on a purchaser in an action for specific performance and as would be an answer to an action of ejectment by any claimant.[2]

In *Curtis* v. *Maloney*,[3] the provision in the Bankruptcy and Deeds of Arrangement Act, 1914, section 15, to the effect that the purchaser shall acquire a "good title" was construed as a goo title against all the world. That statutory provision relates to sale by the official Assignee of goods of a third person which are in the "order and disposition" the bankrupt and which are in his "reputed ownership". The auction purchaser, it was held, acquires a good title against the true owner also. This decision does not make any distinction, *for the purpose of conveyancing,* between good title and title free from reasonable dtubt or marketable title.

In section 55(2), in any case, the words used are "the interest which the seller professes to transfer subsists". They do not define the quality of title.

51.36. *Title free from doubt*—The Specific Relief Act, in section 17(b), provides[4] that the vendor can sue for specific performation if he can show a title free from reasonable doubt. Where the vendor is not in such a position, the vendee is entitled to repudiate the agreement.[5-7] It is thus

1 A.I.R. 1966 Cal. 605, 610, Para 22 to 255.
2 Jeakes v. Write, 6 Ex. 873;
Stroud (1972), Vol. 2 page 1174.
3 *Curtis* v. *Maloney*, (1951) 1 K. B. 736; (1950) 2 All. E.R.
4 Section 17(b), Specific Relief Act, 1963.
5 A.I.R. 1964 Orissa 269, 273.
6 A.I.R. 1956 Bom. 175, 179
7 A.I.R. 1923 Bom. 148, 150, 152, 154.

clear that marketable title is one which can be enforced on an unwilling purchaser under a contract for sale.[1] This is very much like the English position.

This right is not one that grows out of the agreement between the parties, but is given by the law. In the leading English case,[2] Sir William Grant, M.R., observed that the defendant insists on having a good title. "not because it is stipulted for by the agreement, but on the general right of the purchaser to require it.".

51.37. *Section* 55(2)—*Proviso*—The proviso to sub-section (2) enacts that where a sale is made by a person in a *fiduciary character, he shall be deemed to contract that the seller has done* no act whereby the property is incumbered or whereby he is hindered from transferring it.

The liability under the proviso is not, according to an Allahabad judgment, enforceable against the person who has acted in a fiduciary character,[3] but only against the person on whose behalf the sale is executed, and that even this cannot be done if the sale is not *binding* upon the latter person. In that case a guardian executed a sale on behalf of a minor after obtaining permission from the District Judge, but the permission was found to be ineffective and consequently the sale was not valid as against the ward. It was held that the buyer was not entitled to recover any compensation from the guardian, as the sale had been made by him only in his capacity as guardian. The buyer would have been entiled to recover compensation from the property of the minor ward, if the sale had been binding upon him, but inasmuch as the sale was not valid against the ward, it could not be enforced against him also. In an Oudh case,[4] it was however, held that a breach of a warranty implied by law in respect of asale effected by a guardian could not result in a personal liability on the ward for damages, on the well settled principles of law, that a guardian cannot so contract in the name of his ward as to entail the imposition of a personal liability on the ward. In a later case,[5] it has been held by the High Court of Allahabad that where the Official Receiver purports to sell property to which the insolvent has ceased to have title, the sale cannot be said to have been made in a fiduciary character within the proviso to paragraph 2 of section 55.

Although the state of the case law leads to some want of clarity, it appears to us that the position is this —

(i) Where the person selling is a guardian, and he is not competent to do so, the minor's interests are not affected either by the sale or by the preceding contract. The remedy, if any, is against the guardian.

(ii) Where the person selling is a guardian and he is competent to do so, the minor's interests are affected by the sale. So far as the guardian is concerned, if he has done any act incumbering the property (say, by borrowing a loan), or any act whereby he is hindered from transferring the property, he must accept responsibility for that act.

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1 A.I.R. 1938 Bom. 175. 179.
2 *Agilvie* v. *Foliambe*, (1917) 36 Eng. Rep. 21, 25. 26.
3 *Mt. Maida* v. *Kishan Bahadur*. A.I.R. 1934 All. 645, 650. 651.
4 A.I.R. 1924 Oudh 99. 100
5 A.I.R. 1942 All. 39. 41.

Assuming that section 55(2), proviso, is included for guardians also, we do not think that the proviso makes a difference to the position that we have stated above.

51.38. *No change*—The above discussion does not disclose any need for amending section 55(2).

51.39. *Section* 55(3)—In addition to receiving the conveyance, the purchaser is entitled to receive *the title deeds*. This is more than a contractual right, for, the owner of land has a right to the title deeds under a general rule.[1] "The purchaser shall have all the charters, deeds and evidences, as incident to the lands.....for the evidences are, as it were, the sinews of the land.".[2]

Section 55(3) reads —

"55. (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, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident."

51.40. *Title deeds—Nature of*—The title deeds for the property sold belong to the buyer *as an incident of the property sold*, though not granted by express words. The buyer is entitled to every deed forming a step in his title in such a shape that he can, if necessary, give it in evidence. He is not bound to complete the contract until the title deeds are handed over.

51.41. *Section* 55(3)—*Importance*—How the obligation under section 55(3) may become of practical importance is illustrated by a case which went up to the Privy Council.[3] A vendor agreed to give a marketable title free from all reasonable doubt. There had been a mortgage by registered deed more than twenty years ago. The vendor produced a registered release executed by only one of the joint mortgagees, in which it was recited that the other mortgagee was dead and the executant of the release was also the heir of the other mortgagee and that the mortgage had been redeemed. However, the vendor did not produce one of the title deeds deposited

1 *Harrington* v. *Price*, (1832) 3 B & Ad 170;
Loosemore v. *Radford*, (1842) 9 M & W 657;
Cf. Re Knight's Question, (1958) Ch. 381.

2 Coke on Littleton. 6a.

3 I.L.R. 31 Bom. 300 (P.C.).

with the mortgages. It was held that the covenant as to title had not been satisfied and the purchaser was entitled to a refund of the deposit with interest thereon.

The recitals in the release deed were not evidence against the joint mortgagee or his heir. The court noticed the existence of a practice of conveyancers to provide in contracts for sale that recitals in deeds of a certain sale shall be sufficient to satisfy a purchaser of the facts recited. In this case, however, the deed was not very old. The deed of release was hardly ten years old, and the practice in question did not save the situation.

51.42. *Title deeds in England*—In England, the vendor must deliver to the purchaser all title deeds which relate solely to the property sold, though he may retain such documents where he retains any part of the land to which they relate, or where the document consists of a trust instrument creating a trust that is still subsisting.[1-2]

Where the documents which are necessary to show a good title remain in the vendor's possession, or where their custody belongs to some person other than the vendor, it is the vendor's duty to give a written acknowledgment of the purchaser's right to their production and to delivery of copies and a written undertaking for their safe custody. The effect of such acknowledgment is that the purchaser, or persons claiming under him, can, at their own expense, demand to see the documents, or claim to be furnished with copies.[3-4]

51.43. *Sale to different buyers*—The buyer of the lot of the greatest value is, under the proviso, entitled to the possession of the title deeds, and the seller has no right as against him to retain them even though he had covenated with the earlier buyers of other portions of the property that he would produce the title deeds when required. But, in such a case, according to the English practice, the purchaser of the greatest value must give a covenant to the seller that he will produce the deeds and indemnify the seller against his liability under the covenants in the prior sale deeds.[5] A purchased the largest lot *in value and* extent. But B purchased several lots whose aggregate value and extent exceeded those of A's lot. It was held that A was entitled to the custody of title deeds.[6] It is the purchaser of the lost greatest in value who is entitled to the custody of the title deeds. But if there is a condition that the purchaser of the "largest lot" shall have them, that must mean largest in superficial area.[7]

51.44. *No change*—The above discussion discloses no need to amend section 55(3).

51.45. *Section* 55(4)—Two economic factors—that property brings profit and money brings income—make it necessary that a provision should exist as to the right to the income of the property transferred and the

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1 Cheshire, Real Property (1972), page 740.
2 Law of Property Act, 1925, section 45(9).
3 Section 64, Law of Property Act, 1925.
4 Megarry & Wade, Real Property (1966), page 606.
5 A.I.R. 1941 Bom. 48, 49 (D.B.).
6 *Scott* v. *Jackman*, (1855) 52 E.R. 800, 801; 111 RR. 39.
7 *Griffiths* v. *Hatchard*, (1854) 69 E.R. 350, 351; 23 L.J. Ch. 957.

price to be paid, for the period during which actual transfer and actual payment respectively do not take place. By actual transfer in this context should really be meant delivery, and not the mere transfer of ownership. Until the transfer of ownership takes place, the question of rights to income has no importance. If the principal has not been transferred, income remains with the person with whom the principal remains Problems, however, arise either where the ownership has been transferred but not the delivery, or where both have been transferred, but the price remains unpaid. These problems have, in part, been attended to by section 55(4).

Section 55(4) provides —

"(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, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from date on which possession has been delivered."

51.46. *Charge and lien*—Before we proceed to discuss this provision in detail, let us state that though the expression used in clause (b) is "charge", we shall occasionally also refer to it as "lien", particularly when dealnig with the comparable position in England.

51.47. *Scope*—Section 55(4)(a) deals with the question of rents and profits and section 55(4)(b) deals with the question of interest. The interconnection between the two is now obscured by certain aspects to which we shall refer later. But the intention of the legislature is fairly clear, namely, that rents and profits of the property and interest on unpaid price both stand on the same footing and are substitutes for each other. That possession and interest are mutually exclusive, is a proposition which, as has been pointed out by Mulla,[1] was applied by the Privy Council in *Ratanlal's case*.[2] This is known as the rule in *Fleudyer* v. *Cocker*,[3] namely, the act of taking possession by the buyer gives rise to an obligation to pay the price and until it is paid, to pay interest thereon.

51.48. *Section 55(4)(a)—Rents and profits.*—The right to rents and profits of a property is an incident of the right of ownership and passes with the transfer of ownership. Until, therefore, the ownership passes to the buyer, the seller will be entitled to the rents and profits. But this provision has no application to a case where, in anticipation of the transfer of ownership, the prospective buyer is put in possession of the property. After the ownership passes to the buyer, the latter is the person entitled to such rents and profits If, by neglect of the seller, no rents and profits are received, he will be liable for what he might with reasonable care have received.

1 Mulla (1973), page 333.

2 *Ratanlal* v. *Municipal Commissioner*, I.L.R. 43 Bom. 181 (P.C.).

3 *Fleudyer* v. *Cocker*, (1805) 12 Ves. 25, 27.

51.49. *Liens*—Section 55(4)(b) brings us to the interesting topic of "liens". At common law, a lien was a right to possess and retain property until some charge attaching to it is paid or discharged; in equity, however, there are liens recognised whose existence is not known to common law. They are wholly independent of the possession of the thing to which they are attached. It is in this context that there evolved the well-known doctrine of the courts of equity,[2] that the vendor of land has a lien on the land for the amount of the purchase money, not only against the vendee himself and his heirs, but also against all subsequent purchasers having notice that the purchase money remains unpaid. This lien is independent of possession and attaches to the estate as a trust, equally whether it be actually conveyed or only be contracted to be conveyed.[3]

51.50. Story has thus stated the principle[4] underlying the unpaid vendor's lien :—

> "The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money. A third person, having full knowledge that the estate had been so obtained, ought not to be permitted to keep it without making such payment; for it attaches to him also, as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a position better than his own, with full notice of all the facts."[5]

Section 55(4)(b) thus ultimately owes its origin to the English law of Equitable Liens.

In fact, the word "lien" is not accurate, because the vendor's equitable lien in England and also the charge under section 55(4)(b) are both non-possessory. They do not empower the seller to take or retain the possession of the property for non-payment. This aspect has been considered more often than once in Indian case law.[6]

Whatever right the vendor may have to refuse to give delivery until consideration is paid, he cannot take it back after once having given delivery.

Lien—Earlier case—The earliest English case, which clearly laid down the rule of equity, is found in *Fludyer* v. *Cocker*.[7] There, in 1792, the defendant entered into contracts for the purchase of the estates of the Duke of Newcastle in three lots. Two of the lots were purchased by private contracts on the 7th of May and the 18th of July, the Duke of Newcastle convenanting to convey respectively on or before the 25th of June and the 18th of February following, the defendant convenanting to pay the purchase money at the time of executing the conveyance.

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1 Story, Equity Jurisprudence (1919), page 214, para 506.
2 Story, Equity Jurisprudence (1919), page 514, para 1217.
3 Story, Equity Jurisprudence (1919), page 514, para 1218.
4 Story, Equity Jurisprudence (1919), page 515, para 1219.
5 See *Mackreth* v. *Symmons*, 15 Ves. 339.
6 A.I.R. 1952 Mad. 821.
7 *Fludyer* v. *Cocker*, (1805) 33 E.R. 10.

The defendant was let into possession of the premises comprised in those lots at midsummer and Christmas 1792 respectively. The 3rd lot was purchased by the defendant in July. In 1798, in answer to an application for the residue of the purchase money with interest, the defendant offered to pay the residue of the purchase money but refused to pay interest. On those facts, the Master of the Rolls made the following observations :—

> "At law the purchaser could not have the right to the estate, nor the vendor to the money, until the conveyance was executed. But that has nothing to do with the mode in which this Court executes the agreement. The purchaser might have said, he would not have anything to do with the estate, until he got a conveyance. But that is not the course he took. He *enters into possession* : an act, that generally amounts to a waiver even of objection to title. He proceeds upon the supposition that the contract will be executed and therefore agrees, that from that day he will treat it as if it was executed."

51.51. *Origin in Roman law*—The true origin of the doctrine may, with high probability, be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England.[1] By the Roman law, the vendor of property sold had a privilege, or right of priority of payment, in the nature of a lien on the property, for the price for which it was sold, not only against the vendee and his representatives, but against his creditors, and also against subsequent purchasers from him. It was a rule of that law that although the sale passed the title and dominion in the thing sold; yet it also implied a condition, that the vendee should not be owner of the thing so sold, unless he had paid the price, or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction.

51.52. *English law*—The lien ordinarily attaches and in cases of doubt it is presumed to exist, the burden of proof being on the vendee to show that it is waived or lost. The principles so stated are simple. At some time, there was felt a difficulty in ascertaining what circumstances are sufficient "to repel or displace" the lien. Lord Eldon in *Mackreth's case*[2] did not hesitate to say "that it would have been better at once to have held that the lien should exist in no case and that the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way so distinctly that a purchaser might be able to know without the judgment of a Court in what cases it would or in what cases it would not exist." But the various matters of detail are now fairly well settled.

51.53. *Lien in England*—In England,[3] as soon as a binding contract of sale is made,[4] the vendor has a lien on the property for the purchase money and a right to retain the property until the money is paid. Even if the vendor executes an absolute conveyance and parts with possession both of the property and of the title deeds to the purchaser, he still has a lien on the property in equity in respect of any part of the purchase-money which may not have been paid; and the lien is not excluded by the fact that the purchase-deed contains a receipt for the purchase-money.

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1 Mackreth v. Symmons, 15 Ves. 329, 344, Story, Equity.
2 *Mackreth* v. *Symmons*, (1808-09) 15 Ves. 340.
3 Snell, Equity (1966), page 490.
4 *Re Birmingham*, (1959) Ch. 523.

51.54. *No right conferred to interest*—Section 55(4)(b) does not itself give a right to interest. It assumes that the interest is payable,[1] and defines the date of commencement of a right to interest. This interest is, in the context of section 55(4)(b), generally attributed to implied agreement. But the right does not exist in every case. Equitable considerations may point to the contrary.

51.55. *Notice of non-payment*—In section 55(4)(b), importance has been given to notice of non-payment. Thus, the mere fact that the transferee has notice of the *previous sale* will not be enough to fix him with the lien or make him liable on the lien. It will be ncessary to prove that he had notice of *the factum of non-payment.* This is a sensible provision because the non-payment of consideration is the fact that gives rise to the lien. It may be noted, incidentally, that this change was made in view of the comments received on the Bill.[2]

51.56. *Delayed delivery*—Where no delivery is given on the passing of ownership and no purchase-money is paid, the position is that the buyer will be entitled to the rents and profits from the date of conveyance, but the seller will not be entitled to a charge or interest on the unpaid purchase-money,[3] because, under section 55(4)(b), the charge for the interest is only from the *date of delivery* and not before.

51.57. *Equitable consideration*—It will also appear that the right of the seller to interest on the purchase-money being derived from equity, is not absolute and will depend on the circumstances of the case.[4] It would, however, appear that the Oudh Court has taken a different view.[5] So far as the presence of a contract to the contrary is concerned.[6] the position is obviously different, in view of the opening words of section 55; but, we feel that on the language of section 55(4)(b), as it now stands, one cannot take a positive view on either side. The case is outside the section. It is to be noted that while section 55(4)(b) provides for interest on the amount of the unpaid purchase-money, it does not directly deal with the question—"In what circumstances interest is allowable and what is the rate ?"

51.58. Some confusion has arisen with reference to section 55(4)(b) by reason of the fact that this clause mentions two events—passing of ownership and delivery of possession. Both are material for clause (b), because it begins with the words "where the ownership of the property" and further it ends with the words "from the date on which possession has been delivered". These words were inserted in 1929. The language of the clause is quite clear and the award of interest, before delivery, is not justified by the clause, whatever be any other source for the recognition of such right.

51.59. *Significance*—It is needless to state that the right of the vendor in a purchase deed does not, in any way, affect his personal right against

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1 I.L.R. 35 Mad. 625, 627.
2 See, eflg., note on the amendsng bill (1928) 54 M.L.J. 93, 99.
3 A.I.R. 1956 Andhra 113. 114.
4 A.I.R. 1952 Mad. 678, 679;
A.I.R. 1933 Rang. 401, 402.
5 A.I.R. 1933 Oudh 33, 34.
6 A.I.R. 1966 Mys. 86, 91.

the vendee.[1] Of course, such a right, that is to say, personal liability, cannot be enforced against a transferee of the property from the purchaser.[2] But the fact that there is a personal liability in the purchase, might become material, since unpaid purchase-money left with the purchaser is a "debt" due to the vendor, and can be attached in execution of a decree against the vendor.[3] Besides this, it is to be noted that if the buyer does not pay the purchase money at the time of the completion of sale, the seller can put an end to the contract.[4]

Advantage of the statutory charge created by clause (b) lies in this, that it can be enforced against the property in the hands of the specified persons.

51.60. *Date*—We must now address ourselves to an important question in respect of which section 55 requires to be revised. There is need for considering, in some detail, the date that should be properly mentioned in cluase (a) and clause(b). These clauses mention two dates—date of passing of ownership and date of delivery. What should be the crucial date ? Theoretically, there are several alternatives—the date of contract, the date of passing of property (usually the conveyance) and the date of delivery of possession. Of course, it is only if there is an interval of time between these dates that the question arises for the purpose of section 55(4). As to the date of contract, it has no relevance in India. Since no interest passes threunder, the question of adjustment of the income does not arise. Of course, if possession has also been delivered on execution of the contract and before conveyance without payment of price—an unlikely event though sometimes met with—the question of charge of the vendor for the unpaid vendor could arise. Such a question is outside section 55(4), but relief can be awarded on the ground of justice, equity and good conscience. The real competition is between the date of *transfer of ownership* and date of *delivery of possession.* Which should be the crucial starting point for commencement of the lien ?

51.61 *Delivery the crucial date*—It appears to us that delivery of possession ought to be regarded as the crucial date. The theory is that so long as the vendor can himself receive the income, he has no lien and no right to interest on the amuont of the price. If possession of the property is given, he must, in exchange, get something—and that something is interest on the unpaid price. Property corresponds to the price; rents and profits correspond to the interest. If deprived of the right to receive the income by having given delivery of possession, the vendor must have the right to interest on the unpaid money. In this sense, the time-lag between the *delivery of the property* to the purchaser and the payment of price by the purchaser plays a part, inasmuch as justice is done to both the parties by providing that after delivery, the purchaser gets the rents and profits, but before delivery, the vendor is entitled thereto; similarly, after delivery, the vendor gets a right to interest on unpaid purchase-money, but no right to rents and profits. The claim for interest

1 A.I.R. 1942 Lah. 275, 278.
2 A.I.R. 1945 All. 156, 158.
3 A.I.R. 1942 Lah. 275, 278, 279.
4 A.I.R. 1932 All. 454. 456.

proceeds on the assumption that when the owner loses possession, he is entitled to claim interest in place of the right to claim possession. Case law on acquisition of land presents numerous instances of the application of this principle.[1-2] The principle, however, is not different in the case of a private sale. In fact, even in land acquisition references, it is specifically held that so far as interest is concerned, it makes no difference whether the possession is taken under the Act or independently of it.[3]

61.62. In *Ratan Lal* v. *Municipal Commissioner for the City of Bombay*,[4] the principle was stated by the Privy Council as follows :—

> "The Board is of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date *when one party enters into possession of the property of another* is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use and fruits; on the other, the former owner, parting with these, has interest on the price. This is sound in principle, and authority fully warrants it : see especially Sir Wiliam Grant's judgement in *Fludyer* v. *Cocker*."[5]

55.63. *Need for altering the date in section* 55(4)(*a*) *and section* 55(4) (b), *opening words*—These are essential, though elementary, considerations, but are sometimes unfortunately lost sight of, by reason of the fact that in section 55(4)(a), which speaks of the right to rents and profits, it is provided that the seller is entitled to the rents and profits of the property *till the ownership thereof passes to the buyer*. The provision should have been framed in terms of the *period ending with the delivery of possession*. This aspect has, to some extent, been brought out in clause (b) after the 1929 Amendment, which added, as regards interest, the words "from the date on which possession has been delivered". But this Amendment also did not introduce total symmetry between the two clauses. Such a symmetry is desirable, since they are based on identical considerations, as explained above. Our point is that (i) the period of terminating of vendor's right to rents and profits, (ii) and the period of commencement of the unpaid vendor's charge and (iii) the period of commencement of the interest on such unpaid vendor's charge ought all to have been identical.

51.64. *Passing of ownership*—The query may be raised why the mention of passing of ownership should be retained in section 55(4), if the event to be regarded as crucial is delivery of possession. The answer is that "purchase money", the expression used in clause (b), is not appropriate if ownership has not passed. Moreover, ordinarily the price does not become due before passing of ownership. The passing of ownership is thus not unimportant, though it is not the only material factor.

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1 *Satinder Singh* v. *Umrao Singh*, A.I.R. 1950 S.C. 908.

2 *Thrift & Co.* v. *Board of Trade*, A.I.R. 1928 P.C. 287.

3 *Gangaram* v. *Raghubans* (1948) I.L.R. 27 Pat. 898.

4 *Ratan Lal* v. *Municipal Commissioner for the City of Bombay*, 1918 P.C. 129, 134; 45 Ind App. 233; 43 Bom. 181.

5 *Fludyer* v. *Cocker*, (1805) 33 E.R. 10, 11; 12 Ves. 25; 8 R.R. 275.

51.65. *Recommendation to revise section* 55(4)—We recommend that section 55(4) be revised in the light of what we have stated above. Our recommendation is given a concrete shape in the following suggested re-draft :—

"(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer *and the possession thereof is also delivered to the buyer;*

(b) where the ownership of the property has passed to the buyer *and the possession thereof has also been delivered to the buyer* before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of the non-payment,—

(i) for the amount of the purchase money, or any part thereof remaining unpaid, and

(ii) for interest on such amount or part from the date on which possession has been delivered".

51.66. *Section* 55(5)—The buyer's obligations are principally dealt with in sub-section (5) which reads—

"(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".

51.67. *Section* 55(5), *clause* (a)—Clause (a) imposes an obligation on the buyer 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 the seller is not aware and which materially increases the value of such interest. The words "nature or the extent of the seller's interest" have reference to the title of the seller to the property sold. Consequently,

apart from facts relating to title, the buyer is not bound to disclose to the seller any facts which may make it desirable for him to purchase the property.[1] It has been held in England that a purchaser is not bound to disclose to the seller a coal mine existing under the land sold of which he is, but the seller is not aware.[2] This would also be the law under this clause for, the fact of the existence of the coal mine, cannot be said to have reference to the title of the seller of the property.

51.68. But, though the non-disclosure of a fact not relating to title would not be a breach of the obligation under this paragraph, the same may nevertheless be a material factor in considering whether a court could enforce specific performance of the contract. In *Ellard* v. *Lord Landaff*,[3] a tenant obtained an agreement for lease in consideration of an old lease and suppressed the fact that the life on which the old lease depended was *in extremis*. In refusing specific performance of the contract, Lord Eldon, L.C. observed as follows :

> "All the material facts must be known to both parties; and is it not against all principles of equity, that one party, knowing the material ingredient in an agreement, shall be permitted to suppress it, and still call for specific performance" ?

The principle of *Ellard's case* appears to have been followed by the Indian Legislature in section 22 of the Specific Relief Act, 1877, illustration (a), which is based on the facts of that case (now section 20 of the Act of 1963 which however, has omitted the illustration).

51.69. *Section* 55(5) *clause* (b)—Where there is a contract for sale, it is the obligation of the buyer under the contract to pay the purchase money. The obligation of the seller is to execute the conveyance. Section 55(5)(b) enacts that this obligation to pay the purchase money, in cases not covered by the proviso, is to be discharged at the time and place of completing the sale, and that such payment must be made to the seller or to such person as he directs. In cases coming within the proviso, it is provided that the amount of any incumbrance existing at the date of the sale, may be retained by the buyer and paid to the person entitled thereto.

But the clause does not say anything as to when such payment is to be made. Under section 46 of the Contract Act, where no time for the performance of the contract is specified, the engagement must be performed within a reasonable time, the question "what is a reasonable time" being, in each particular case, a question of fact. In cases covered by the proviso, therefore, the buyer must pay the amount retained by him to the persons entitled to it within a reasonable time from the date of the sale. In some case,[4-6] however, it has been held that the payment must be made forthwith on the date of the sale deed. In the undermentioned cases,[7] it was held that there is no breach of contract until the payment by

1 *Dolman* v. *Nokes* (1856) III R.R. 414, 417, 4 W.R. (Eng.) Dig. 53.
2 *Fox* v. *Mackreth*, (1788) 29 E.R. 224, 234; 2, 55.
3 *Ellard* v. *Lord Landaff*, (1810) 12 R.R. 22, 27; 1 Ball & B. 341.
4 A.I.R. 1936 All. 598, 599 (D.B.).
5 A.I.R. 1929 All. 121, 123 (D.B.).
6 A.I.R. 1925 All. 488, 490.
7 A.I.R. 1927 Oudh 455, 456.

the buyer becomes impossible. The buyer is, however, in any case not bound to pay or tender the purchase money unless the seller is ready and willing to perform his part of the bargain by executing the conveyance.[1]

51.70. *Difference*—The position has been explained by Patnjali Sastri, J. in Subba Row v. Varadiah,[2] as follows :

> "On the sale of property subject to incumbrances, the bargain relates to the vendor's interest in the property such as it is, that is to say, his equity of redemption and the discharge of the incumbrances is the sole concern of the purchaser as between himself and the vendor who is only entitled to be indemnified against the incumbrances; while in the case of a sale free from incumbrances; the price is fixed with reference to the full value of the property, the liability to discharge all the incumbrances being thrown on the vendor, the vendee, however, being given the right to retain out of the price an amount sufficient to clear the incumbrances. But as the liability to pay them off is that of the vendor who has to implement his sale by providing a clear title, the vendee must be regarded as paying the amount retained to the incumbrancer on *behalf of the vendor* out of the purchase-money payable to the latter under the contract of sale. In other words, the vendee acts as the agent of the vendor as regards the disposal of the sum retained, although the agency is one which cannot be revoked as the vendee has himself an interest in the money being applied in the manner indicated. (see section 202, contract Act).
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> "If this is the position, as we apprehend it is, where immovable property *is sold free from incumbrances,* it follows that the vendor is entitled to call upon the buyer to account to him for any portion of the purchase money which it has become no longer necessary to apply *in accordance* with *the stipulation in that behalf*".

51.71. *Section* 55(5)(c)—Under clause (c) of section 55(5), the liability to bear any loss arising from the destruction, injury or decrease in value of property, not caused by the seller, is borne by the buyer where the ownership of the property has passed to the buyer. The crucial date is thus the transfer of ownership. For all accidental destruction or deterioration after the conveyance, the loss falls on the buyer, but as regards destruction or deterioration before conveyance, the loss falls on the seller. As has been pointed out by Mulla,[3] this is different from the English law, under which the contract for sale transfers an equitable estate and, with it, the liability for loss or destruction. In other words, if English law of property were to be codified, clause (c) would read that "where the property has been contracted to be sold".

There is, of course, no need to substitute delivery of possession in this clause, because after the passing of ownership, it is just and fair that the seller should not be saddled with an obligation to take care of the property. Of course, until payment of price, the seller would also be interested in the property, inasmuch as he has a charge for unpaid price.[4] It may be expected that until full payment of the price, the seller will in

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1 A.I.R. 1923 Sind 50, 52.

2 *Subba Row* v. *Varadiah,* A.I.R. 1943 Mad. 482, 484.

3 Mulla (1973), Commentary on section 55(5)(c).

4 Section 55(4)(b).

his own interests take care of the property so as to prevent any loss arising from destruction, injury or decrease in value. That, however, is not a legal obligation but a course which the seller may be expected to undertake in his own interest.

51.72. *Section* 55(5)(d)—Next is the provision in clause (d) relating to payment of (i) public charges, (ii) rent, (iii) principal moneys due on outstanding incumbrances, and (iv) the interest thereon which may later become due. Here again, the crucial date is the passing of the ownership of the property. After the date of the sale, it is the buyer who bears the public charges and rent under section 55(1)(g).

It is to be noted that this clause applies only where the property is sold subject to the incumbrances. Where it is sold free from incumbrances, the seller is not only bound to pay the interest etc. but is, in fact, bound to discharge the incumbrances themselves, because that is the obligation that he has undertaken by the contract.

51.73. *Invalid incumbrances*—Interesting questions arise when the incumbrances subject to which the property is sold are found to be invalid or less burden some than anticipated or are discharged by some unexpected event. It is well established that if incumbrances are later found to be invalid, the benefit will go to the purchaser, because the theory is that the seller gets the price of his interest,—whatever it may be,—together with an indemnity against the incumbrances affecting the property. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. If these incumbrances turn out to be invalid, the vendor has nothing to complain of. His indemnity is complete and, in that sense, he has bought that he had bargained for. The notion that after completion of the purchase, the purchaser is in some way a trustee for the vendor of the amount by which the existence or supposed existence of incumbrances led to a diminution of the price, has not been favoured.[1]

Occasions for the application of similar principles have arisen more than once before the High Courts in India. Thus, in a Punjab case,[2] there was a sale of property, and part of the purchase money was left with the purchaser for payment to a previous mortgagee. That mortgage, however, was extinguished as a result of the operation of the Punjab Restitution of Mortgaged Lands Act. It was held that the seller had no right to participate in the benefits which the purchaser might get by non-payment. A similar situation arose in a Madras case,[3] where immovable property was sold subject to a mortgage, and the mortgage debt was scaled down at the instance of the mortgagor agriculturist under the Madras Agriculturists Relief Act, 1928. It was held that the purchasers, although non-agriculturists themselves, were entitled to the benefit of the reduction and were liable on the mortgage only to the extent of the amount scaled down.

In a Kerala case,[4] there was a fidelity bond the amount whereof was charged on immovable property, which was sold. On retirement of the employee concerned, the bond was discharged. It was held that the

1 Izzat-un-nissa, (1909). I.L.R. 31 All. 683 (P.C.).
2 *Varain Singh* v. *Bachan Singh*, A.I.R. 1953 Punj. 110, 113.
3 *Vinai Kertha* v. *Krishnatha*, A.I.R. 1954 Mad. 506.
4 *Amma* v. *Janaki Amma*, A.I.R. 1957 Kar. 98. 99.

buyer and not the seller was entitled to the benefit, These judicial decisions all follow well established principles which were laid down in England as early as the eighteenth century.[1]

Finally, it would appear that if a mortgage becomes barred by time or the mortgagee gives up a right to a portion of the property, the benefit thereof will go only to the purchaser and not to the seller.[2]

It is not inconceivable that the buyer purchasing the property subject to incumbrance may have to pay more than what he estimated. Thus the buyer gets the benefit and bears the burden.

51.74. *Implications as to the aspect of unpaid price*—The fact that where the property is sold subject to encumbrances, it is the purchaser who gets the benefit and also bears the burden, has an important implication in regard to the vendor's statutory charge for unpaid price under section 55(4)(b). Sometimes, it is sought to be argued that where the vendor has left, with the purchaser money for redeeming the mortgage, the vendor has a charge for that amount until the money is realised. In general, however, *where what is sold is the equity of redemption,* then if the amount of encumbrance remains in the hands of the purchaser to be paid to the person entitled thereto, no part of the 'purchase money' remains unpaid for the purpose of section 55(4)(b), and no charge for it can, therefore, arise in favour of the seller.[3]

The position would, of course, be different if the property is sold free *from all encumbrances.* In such a case, until the money is utilised in discharge of the encumbrances, it retains its character of unpaid price.[4]

51.75. *Section* 55(6)(a)—Under section 55(6)(a), the buyer is entitled, 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 thereon. This clause really deals with two different rights, viz., (i) right to the benefit of improvement or increase, and (ii) right to the rents and profits. So far as the first right is concerned, the date of commencement mentioned in the clause, viz., passing of ownership, raises no questions, since this provisions is the converse of section 55(5)(c), under which, after the passing of ownership to the buyer, he is bound to bear any loss arising from the destruction, injury or decrease in the value of the property not caused by the seller. The principle is that risk passes on the passing of ownership; and the two provisions are in harmony with this principle.

51.76. *Right to rents and profits*—When, however, one comes to the second right mentioned in section 55(6)(a)—right to rents and profits of the property —one must turn back to section 55(4)(a), under which the seller is entitled to the rents and profits of the property till ownership thereof passes to the buyer. Here notice must be taken of the amendment which we are recommending in that clause,[5] so as to postpone the point of termination to the date of delivery of possession. The reasons for the

1 Aweedle v. Tweedle. (1787) 29 E.R. 87, 88.
2 *Vinayteetha* v. *Vishvanath*, A.I.R. 1954 Mad. 508, 511, 512, paragraphs 9 to 12.
3 *Ganga Ram* v *Raghubans* (1948) I.L.R. 27 Pat. 898.
4 *Rameshwar Dayal* v. *Hare Kishan*, A.I.R. 1940 All. 351, 352.
5 See discussion as to section 55(4)(a) *supra.*

change recommended by us need not be restated. If that amendment is accepted, then, in section 55(6)(a), latter half also, the crucial date should be delivery of possession. The theory is that the seller is entitled either to the rents and profits, or, in substitution therefore, a charge for the unpaid purchase money. The two alternative rights are in succession to each other, and the chronological dividing line between the two is, according to our recommendation the date of delivery of possession.

51.77. *Recommendation as to section* 55(6)(a)—On this reasoning, we recommend that section 55(6)(a) should be revised so as to read as follows :—

"(6)—The buyer is entitled—

(a) where the ownership of the property has passed to him,

(i) to the benefit of any improvement in, or increase in value of, the property and

(ii) *after delivery of possession to him,* to the rents and profits of the *property.*"

51.78. *Section* 55(7)(*b*)*-structural change recommended*—Under clause (b) of section 55(6), the buyer is given a charge for two amounts, viz., (i) first, the purchase money paid by the buyer *in anticipation of delivery* and interest thereon, and secondly (ii) the earnest paid by him and the costs awarded to him in a suit to compel specific performance of the contract or to obtain a decree for rescission of the contract. This is not the exact wording of the section. But we have tried to express it in a simple manner, so as to facilitate a discussion of the questions which we are going to deal with hereafter.

The first thing that strikes one on the reading of this clause is its combersome structure. It deals with two rights, as we have already stated, and in the interest of neatness, we think that the two rights should be dealt with distinctly. Apart from this structural change, there will be a few points of substance to be considered. Before that, it will be desirable to consider the English Law.

51.79. *English law*—In English law, a purchaser has a lien for the money paid by him when the contract goes off. In one of the English cases,[1] Kindersley, V.C., put the lien of the purchaser, (where the vendor is unable to make a title, or where, for any other reason, the vendor does not complete the contract) on the basis of natural justice and on the basis of principle. In regard to natural justice, he observed that if a purchaser has advanced money on the faith of the contract being completed, he has advanced it under circumstances which entitle him to say—"if you cannot complete, not only are you bound to give me back my money, but I have a right to a lien on the estate". With reference to the principle, he put it on the ground that such a lien *is analogous to the lien of* the vendor for unpaid purchase—money.

51.80. *Nature of lien*—Snell[2] has described it as a "lien which is somewhat analogous to the vendor's lien". This is a lien upon the property in the hands of the vendor for any deposit for instalment of his purchaser-money which the purchaser has paid to the vendor (and not merely to a stakeholder)[3] without obtaining a conveyance. The purchaser has this lien not

1 *Levy* v. *Stongdon.* (1898) 1 Ch. 478, 485.
2 Snell, Equity (1966) pages 492-493.
3 *Comic* v. *Swaything.* (1947) Ch. 625.

only when the contract goes off for want of title, but also where he rescinds the contract under a condition enabling him to do so,[1] though, if the contract *goes off through the purchaser's default, the lien is gone*.[2] The lien extends not only to the purchase-money actually paid, but also to interest thereon, and to money paid as interest on the unpaid purchase-money, and to the costs properly incurred by the purchaser.[3] The lien will prevail against all person, against whom a vendor's lien would prevail.[4]

51.81. *Expression improperly declined to accept delivery*—The next comment which we will like to make on section 55(6)(b) is that where it speaks of the purchaser improperly declining to accept delivery, it obviously has in mind some such elaborate notion as "accept the completion of the contract by the execution of the conveyance or the delivery of the property as the case may be". Acceptance of mere possession without the execution of a conveyance is not intended. For example, if under a contract for sale, the buyer is put in possession and the seller receives the purchase-money but the contract is not completed for no fault of the buyer, it cannot be said that the buyer has "accepted delivery". The charge must arise notwithstanding the acceptance of the delivery, if the other conditions of the section are satisfied.[5]

51.82. *Narrow construction*—With reference to the opening words of section 55(6)(b), it appears that some courts[6] have placed a somewhat narrow construction on these words. In the situation where the sale is not completed because the sale is void under any law, these decisions do not give the benefit of this section. Strictly speaking, in such a case, it cannot be asserted that the *purchaser* has improperly declined to accept delivery and the charge under section 55(6)(b) must arise. One can understand those decisions where the seller had no interest in the property,[7] because, if the seller has no interest in the property, and yet professes to sell it, the section becomes inapplicable by its very terms, since the lien can operate only on the 'interest' of the seller. But it is difficult to understand how, on the text of section 55(6)(b), it can be asserted that the buyer has improperly declined to accept delivery where the sale is void under any law. The general principle should be that the charge, which arises from the moment the buyer pays a part of the purchase-money, is lost only *if the buyer* has been guilty of subsequent default.[8] It may be that the seller is not at fault, in the sense that, but for the difficulty of the illegality of the transaction, he would be willing to compete the sale. But, neither is the buyer at fault. He has not 'improperly declined to accept the delivery".

With reference to the second part of clause (b), it has been stated by Mulla,[9] after referring to the words "improperly declines to accept delivery," that "This may occur when the sale goes off for default on the part of the

1 *Whitebread* v. *Watt.* (1901) 1 Ch. 911, 915, affffd. (1902) 1 Ch. 835.
2 *Dinn* v. *Grant*, (1852) 5 De G. & Sm. 451;
Ridout v. Powler (1904) 2 Ch. 93.
3 *Rose* v. *Watson*. (1864) 10 H.L.C. 672.
4 *Snell, Equity* (1966) pages 492-493.
5 A.I.R. 1957 Bom. 79. 81.
6 (a) 8 I.C. 1089 Madras (cited in the Digest).
(b) I.L.R. (1967) Guj. 3.
7 *Panchanan* v. *Nirode Kumar*, A.I.R. 1962 Cal. 12.
8 *Balvanta* v. *Vira*, (1899) I.L.R. 23 Bom. 56, 61.
9 Mulla (1973), page 344.

seller or on the default on either party". The wording of the earlier half, which is now under discussion is, if anything, even more strongly in favour of the purchaser.

In a Bombay case,[1] where performance of the contract became impossible because of the acquisition of the subject-matter by the State, the High Court held not only that section 55(6)(b) applied, but also that the buyer had a share in the compensation that became payable to the owner of the property. Of course, the buyer could not claim the 15 per cent solatium payable under section 23(2) of the Land Acquisition Act, 1894, since he has no "interest" in the land as such. But the decision shows the wide scope of the section.

51.83. *Enforceability of the charge*—It should be noted that while a charge is, in general, not enforceable against a purchaser for value without notice, the charge under section 55(6) (b) is intended to be enforceable *irrespective of any such restriction.* This may sound strange, but the history of section 55(6) shows that this was the intention.

51.84. *Bombay case*—The matter has been considered at length in a Bombay case,[2], holding that the charge given to the buyer under section 55(6)(b) is available to the buyer *irrespective of the question whether the purchaser under a seller has or has not notice of the charge.* The judgment points out that in 1929, section 55(6)(b) was amended; so too, section 100 was amended. By the amendment, the expression "with notice of the payment" which occurred in section 55(6)(b) was omitted, and in section 100, new words were added :—

> "And, *save as otherwise expressly provided by any law for the time being in force, no charge* shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

It is worthy of note that these changes were introduced by the same enactment and the change in the language was deliberate.

In an earlier Bombay case, Wassoodew, J., observed :—

> "The statutory charge on the property which a buyer gets under section 55(6)(b), Transfer of Property Act, 1882, for the purchase money paid by him to the seller is anticipation of the delivery of the property is not in regard to notice, subject to the provisions of section 100 of the same Act, and is operative against persons claiming bona fide under the seller even though they have no notice of the charge."[3]

51.85. *Recommendation as to section* 55(6)(b)—While we agree, with respect, with this view, we think that it would be better if the matter is expressed more clearly. We, therefore, recommend that section 55(6)(b) should be revised so as to add, after the words, "seller and all persons claiming under him", the words "*with or without notice of payment*".

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1 *M. A. Khan* v. *P. J. Surana,* A.I.R. 1972 Bom. 217, 222, 223, para 15.16 (Deshmukh and Deshpande JJ.).

2 *Abdul Hamid* v. *Mahoemd Ali,* A.I.R. 1952 Bom. 67, 69.

3 *Hari* v. *Bhagu,* 38 Bom. L.R. 1200.

51.86. *Section* 55(6)(*b*)—*Application to transferees*—Before 1929, the words "with notice of the payment" occurred in the section after the words "persons claiming under him". These were omitted by that Act. The buyer's charge could not, before the amendment, be enforced against transferees without notice.[1] Under the present section, i.e. after the omission of the above words, the charge can be enforced not only against the seller, but also against all persons claiming under him irrespective of notice, notwithstanding the restrictive provisions of section 100.[2] The reason for the amendment has been stated by the Special Committee as follows[3]:—

> "Sub-clause (b) of clause (6) of the same section relates to the buyer's lien and provides that it can be enforced against the seller and other persons claiming under him with notice of the payment. It also provides that the buyer's lien can only be enforced against a person claiming under the seller, if such person has notice of the payment of the purchase-money. The transferees and legal representatives of a seller are "thus enabled to escape any liability for the amount received by the seller by pleading that they had no notice of the payment of the purchase-money. The reasons for limiting the seller's lien against third persons who have notice of the sale do not hold good in the case of the buyer's lien against persons claiming under the original seller. The words 'with notice of the payment' in sub-clause (b) of clause (6) should, therefore, be omitted."

51.87. *Obscurity*—There has, however, resulted some obscurity on the question whether section 55(6)(b) applies against a subsequent purchaser from the defaulting vendor. It seems to have been held in an Allahabad case[4] that this provision is not applicable to a subsequent purchaser, In that case, the owner agreed to sell some plots of land and a house to the plaintiff. The plaintiff paid a major part of the price. Subsequently, the very property was sold to the defendant appellants, who claimed to be bona fide purchasers for value without notice of the prior agreement for sale. On the facts, both the lower courts held that they had notice, and this finding was accepted by the High Court on second appeal. While rejecting the claim for specific performance made by the plaintiff on the ground of acquiescence, the lower court awarded compensation against the subsequent purchasers (section 19, Specific Relief Act, 1877) and also awarded a decree for interest under section 55(6)(b) against the subsequent purchasers. With reference to this part of the decree, the High Court observed that:—

> "I do not see how this provision was applicable at all to the defendants appellants in this case. The provision deals with liabilities of a defaulting seller to a purchaser."

No further reasons were given, nor case law discussed.

51.88. Perhaps this was due to oversight, since the words "claiming under him" are clear.

51.89. *Earnest*—"Earnest" is the sum of money paid by the buyer of property under a contract for sale in order to bind the seller to the terms of the agreement for sale. In order words, it is a guarantee for the performance

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1 A.I.R. 1929 Mad. 189, 191.

2 (1962) 1962 Ker. L.T. 728, 729; A.I.R. 1959 Ker. 389, 390. A.I.R. 1937 Bom. 142, 144.

3 Report of the Special Committee, discusison on section 55.

4 *Jhandoo* v. *Ramesh Chandra,* A.I.R. 1971 All. 198, 191, para 2 (M. H. Beg, J.).

of a contract. When the transaction goes forward, the earnest, or as it is called in England "deposit", becomes part of the purchase-money. It is forfeited if the transaction falls through by reason of the fault or failure on the part of the buyer, and the buyer cannot get it back. As observed by Bowen, L.J., in *Howe* v. *Smith*[1], "it is quite certain that the purchaser cannot insist on abandoning his contract and yet recover his deposit, because that would be to enable him to take advantage of his own wrong." The test is whether the parties intended that the amount paid was to be treated, not merely as part payment, but as a guarantee for the due performance of the contract.

51.90. *Charge confined to seller's interest*—The charge under this clause attaches only to the seller's interest in the property[2]. The word "interest" means personal interest, and not the interest which a person may have in property as a trustee, according to the Calcutta High Court. Where, therefore, a trustee sells trust property and receives the earnest-money but refuses to complete the sale, the buyer cannot under this clause, have any charge on the trust property,[3] we are not, with respect, convinced that this was the legislative intention. When a guardian of a minor agrees to sell property of the minor for a purpose binding on the minor and receives purchase-money, but refuses to complete the contact, it has been held by the High Court of Nagpur that the buyer has a charge under this clause on the minor's property.[4] So also, where there is a charge under this clause in favour of a non-evacuee on the property belonging to an evacuee, the interest of the evacuee is the only property subject to the charge. The charge does not vest in the custodian, nor has he any power under the Administration of Exacuee Property Act, 1950, to determine the charge in favour of a non-exacuee.[5] In the English case of *Aberaman Iron Works Co.* v. *Wickness*,[6] A contracted to purchase certain property from B and then contracted to sell the same to C, who paid the purchase-money, to A. But A could not perform the contract with C. It was held that C had a lien on *A's equitable interest in the property*. This would not, however, be so in India, where a contract for purchase will not give him any equitable interest.

51.91. *Omission to make disclosures referred to in paragraph* 1, *clause* (*a*) *and paragraph* 5, *clause* (*a*)—The omission by the seller to make a disclosure under paragraph 1, clause (a)(1) and by the buyer under paragraph 5, Clause (a) is declared to be fraudulent by the last paragraph of the section. This was the law even before the Act was passed. A seller is not bound under sub-section (1), clause (a), to make a disclosure of a fact where either he himself has no knowledge of that fact or where the buyer himself could, with ordinary care, have discovered it. In such cases the seller cannot be considered to be guilty of fraud in not disclosing the fact. At the same time, the buyer can set aside even a completed sale on the ground of fraud by reason of a non-disclosure of a defect under sub-section (1), clause (a). The non-disclosure by the buyer under sub-section (5), clause (a) would similarly entitle the seller to set aside a completed sale on the ground of fraud.

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1 *Howe* v. *Smith*, (1884) 53 I. J. Ch. 1055, 1059.
2 *Panchanan* v. *Nirode*, A.I.R. 1962 Cal. 12, 16. (Mukherjee and Guha, JJ.).
3 *Sailendra* v. *Syed Hoode*, A.I.R. 1932 Cal. 356, 366.
4 A.I.R. 1939 Nag. 209, 310.
5 A.I.R. 1954 Raj. 48, 49; 13 Raj.
6 *Aberman Iron Works Co.* v. *Wiskness*, (1869) 17 W. R. (Eng.) 211, 215; Ch. 101

CHAPTER 52

MARSHALLING BETWEEN MORTGAGE AND PURCHASER

SECTION 56.

52.1. *Introductory*—The rights and liabilities of the seller and purchaser of immovable property having been dealt with, the Act deals with a special situation which may raise problems in connection with sale. The matter is dealt with in section 56, quoted below :—

> "56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties, creditor having two funds shall take to that which, paying him, will leave another fund for another creditor."

This is known as marshalling. The doctrine has been definitely in existence since the days of Lord Eldon. It cannot, however, be invoked if the interests of the creditor would be prejudicially affected by its application—as, for example, where the first creditor has not got equal rights over the two funds.[1] The doctrine cannot also be invoked where the interests of third parties are, in any way, involved, as for instance, of persons claiming under the mortgage for value. Many of the decisions relate to marshalling as ***between rival mortgagees***. But the principle is the same where occasion for equitable adjustment arises between the two competing claims of a subsequent purchaser and an earlier mortgagee. In the scheme of the Act, marshalling as between two or more mortgagees is dealt with in section 81, while marshalling as between the subsequent purchaser and the mortgagee is dealt with in section 56.

52.3. *Formulation*—The principle having been dealt with, let us go to the wording. The wording of section 56 is somewhat unhelpful inasmuch as the fact that there are *two or more properties*—as essential requisite—does not get the prominence which it deserves by reason of the use of the word "owner" in the forefront. The intention, however, is quite clear. The rule was stated by Dart[2] in these terms :

> "If *two estates X and Y are* subject to a common charge and estate X be sold to A, A will, as against his vendor and his representatives, have a prima facie equity in the absence of express agreement and whether or not he had notice of the charge, to throw it primarily on estate Y in exoneration of estate X."

52.4. *History*—The section as originally enacted was in these terms :—

> "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."

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1 Ghose, Law of Mortgages in India (1902), page 416.
2 Dart, Vendor and Purchaser, cited by Mulla (1973), pagt 355.

In 1929, several amendments were made in the section. Of these, three are worth mentioning. In the first place, before 1929 the section was confined to the case of two properties, while it has now been widened to cover cases where there are more than two properties. In the second place, the word "charge" has been replaced by the word "mortgage". This change was, in part, faithful to the general scheme of the Act, which makes a distinction between mortgages and charges. But the amendment has created its own complications[1]. Thirdly—and this also is an important change—the words "as against the seller" have been omitted, to show that the right can be enforced against the mortgagee also. Under the section as it stood before 1929, *the mortgagee* had a right to proceed as against whatever property he chose, and could not be compelled to select a security[2]. Under the amendment section, the purchaser can insist upon marshalling, as of right, even *against the mortgagee*. It is not necessary now—as was the position previously,—to invoke the discretion of the Court[3] under Order 34, Rule 5, Code of Civil Procedure, 1908, to adjust the equities by requiring the mortgagee to proceed against the unsold property.[4]

52.5. *Notice not condition precedent.*—The right given to the purchaser by section 56 is independent of notice.[5] In regard to marshalling between two or more mortgagees—section 81—the legislature has, by the amendment of 1929, by removing the pre-existing words "who has not notice of the former mortgage", substantially made it clear that section 81 applies irrespective of notice.[6] Since the requirement of the notice did not occur in section 56 even before 1929, there was no question of deleting any words.

52.6. *Contract to the contrary—Recommendation.*—The words "contract to the contrary" in section 56 seems to have raised questions as to whether they are restricted to a contract *between a mortgagor and a mortgagee only*, or whether they cover a contract between the *mortgagor and the purchaser also*. The latter view, that is to say, the wider view, has been taken in a Madras case.[7] Since this aspect of the matter is not very apparent from the language of the section, we think that it would be worthwhile to make it clear and put the matter beyond doubt. For this reason, we recommend that in section 56, after word "in the absence of a contract to the contrary" the words "between the mortgagor and the buyer" should be added.

52.7 *Successive sales.*—Section 56 does not deal with the complex situation where there are successive sales by the mortgagor. In England, it would seem that a contributory fund must be so marshalled as to make the remaining porperty of the debtor applicable in the first instance and if that be insufficient, the property of a portion of the last purchaser must be applied before that of any prior purchaser.[8] English books on vendor and purchaser deal with the subject more elaborately than the section. It

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1 See para 52.8, *infra*.
2 *Narayanaswamy* v. *Valiyya*, A.I.R. 1924 Mad. 366.
3 *Appayya* v. *Rangayya*, (1908) I.L.R. 31 Mad. 419 (F.B.).
4 *Sumbaandam* v. *Ramaswamy*, A.I.R. 1964 Mad. 547.
5 Mulla (1973), page 356.
6 *Karam Singh* v. *Shuklabedi*, A.I.R. 1952 Punj. 477.
7 *Mangayya* v. *Achchayamma*, A.I.R. 1950 Mad. 224.
8 *Hertley* v. *O'Flahertey*, (1828) 1 Beat 79, cited by Ghose, Mortgage (1902), page 441.

is not very clear whether the section may literally apply in such a situation. Even if the section does not apply, it would seem that relief substantially on the same lines may be available in such cases on general equitable considerations. We are not proposing any amendment in this regard.

52.8. *Charges—Recommendation.*—There seems to be some difficulty as to the applicability of section 56 to charges. Before the amendment of 1929, the word used in section 56 was "charges", while, after the amendment, the word used is "mortgage". The change was made, so far as can be gathered, not with the intention of excluding charges from the section, but in view of the fact that the expression used in the scheme of the Act is "mortgage". The word "charge" was apparently used at that time in the section in view of the proposition enunciated in an English test book where "charge" is used to cover *all encumbrances* securing pecuniary liabilities. After the amendment, a conflict of decisions has arisen. The Chief Court of Oudh has held[1] that the object of the amendment was to widen and not to narrow down the Section as the section still applies to charges. On the other hand, the High Court of Nagpur has held[2] that the omission of the word "charge" from section 56 indicates that the section is intended only for cases of mortgage.

The section does not, therefore, at present, apply to charges, though its principle may be availed of in suitable circumstances. The High Court relied upon Order 34, Rule 15 of the Code of Civil Procedure, for applying the principle of section 56 to charges.

While substantial justice was achieved in the Nagpur case by applying the principle, it seems to us that there is no reason why the section itself should not apply to charges. The verbal change made in 1929 was considered necessary because, under section 100, the expression "charge" would not include a mortgage. It was, however, overlooked that the substitution of "mortgage" would rule out the case of charge. We are of the view that the best course would be to insert an Explanation to the effect that the provisions of this section apply, as far as may be, to charges as they apply to mortgages. We recommend that the section should be so amended.

52.9. *Revised draft.*—In the light of the above discussion, we recommend that section 56 should be revised as under :—

> "56. (1) Where *there is a mortgage* of two or more properties to one person and the owner then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary *between the owner and the buyer or the mortgagor and the mortgagee,*[3] entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, *whether or not he has notice of the mortgage* but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.
>
> (2) *The provisions of this section apply, as far as* may be, to charges as they apply to mortgages."[4]

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1 *Mohammed Yunus Khan* v. *Special Manager Court of Wards,* A.I.R. 1937 Oudh 301, 311 (Nanavatty & Smith, JJ.).
2 *Nilkanthrao* v. *Satvabhama Rai,* A.I.R. 1944 Nag. 25, 27, 28 (Grille, C.J. & Puranik, J.).
3 See para 52.6, *supra.*
4 See para 52.8, *supra.*

CHAPTER 53

DISCHARGE OF INCUMBRANCES ON SALE

SECTION 57

53.1. *Introductory.*—Section 57, which we now proceed to consider, is one of the least used section in the Act. Its principal object is to enable a prospective seller to apply for the discharge of incumbrances on sale so that the property can be conveniently sold.

This is how the section reads :—

"57. (a) Where immovable 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 chargded on a determinable interest in the property,—of such amount as, when invested in securities of the Central Government, 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 extra-ordinary 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 State Government may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section."

53.2. *Scope.*—This section has been borrowed from section 5 of the Conveyancing and Law of Property Act, 1881, now replaced by section 50 of the Law of Property Act, 1925.

Where the subject of a sale is property subject to an incumbrance, this section empowers the Court to provide for the discharge of the incumbrances, and then to declare the property free from sum incumbrances,[1] It is a remedial enactment for facilitating the sale of land[2] The object of section 5 of the Conveyancing and Law of Property Act, 1881, was stated by Sargent, J., in the following terms in the case of *Wilberforce*[3] :—

> "*Prima facie,* the object of the whole of section 5 is not to disturb any vested or other rights more than is necessary, but to enable a sale to be effected and the property to be transferred to the purchaser notwithstanding there may be on the land a liability for payment of a future sum which would, but for the provisions of the section, clearly have prevented the sale of the land free from incumbrance. Of course, a purchaser might think fit to take the land subject to the incumbrance, but the purchase of land subject to an incumbrance is not usually a desirable investment, and the object of the section was to enable the land to be conveyed to the purchaser so that he might get a full and complete title to it."

53.3. *Analogous provisions.*—Section 83 provides for the discharge of a mortgage on property after it has become due. Section 57 provides for declaring an incumbered property free of the incumbrance (which is not confined to mortgage), where such property is the subject-matter of a sale. Under section 83, the Court cannot compel the mortgagee to accept the deposit in discharge of the mortgage, while, under section 57, the Court can declare the property free of incumbrance *even against the will of the incumbrancer.*

Order 34, Rule 12 of the Code of Civil Procedure, 1908, provides that where any property, the sale of which is directed by that Order, is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the

1 A.I.R. 1916 Pat. 113, 114; 2 Pat. L. Jour. 118 (D.B.).
(See also A.I.R. 1937 Nag. 36. If appropriate procedure is taken under section 57 the charge may be wiped out).

2 *In re Wilberforce, Wilberforce* v. *Wilberforce,* (1915) 1 Ch. 94, 101; 84 L. J. Ch. 252, 256.

3 *In re Wilberforce; Wilberforce* v. *Wilberforce,* (1915) 1 Ch. 94, 102; 84 L.J. Ch. 252.

property sold. This section is wider than the said rule, and applies to sales by the Court or in execution of a decree or out of Court, and not merely to a sale directed by Order 34 of the Code.

53.4. *Incumbrance.*—An "incumbrance" is not defined in the section. It is "a claim, lien or liability attached to property" according to Wharton. Bouvier, in his Law Dictionary, defines an "incumbrance" as "any right to, or any interest in, land which may subsist in a third person to the diminution of the value of the land and not inconsistent with the passing of the fee in it by a deed of conveyance". The word has also been defined in section 2 of the Conveyancing and Law of Property Act, 1881 (now replaced by section 205 of the Law of Property Act, 1925), as follows :—

> "Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof."

Since section 57 has been borrowed from section 5 of the Conveyancing and Law of Property Act, 1881, the word "incumbrance" may also, appropriately, be taken to have the same meaning as it has in that Act. Thus, maintenance charged on property would be included.[1]

53.5. *First alternative.*—The first alternative provided by the section in regard to annual or monthly sums charged on the property or in regard to capital sums charged on a determinable interest in the property, is to allow payment into court of the appropriate amount, that is to say, an amount which, when invested, will provide for the charge by means of the interest. Here, the straightaway payment of the entire sum is out of question, because the sum charged is to be paid at intervals, or is charged on a determinable interest in the property.

53.6. *Second alternative.*—The second alternative provided by the section provides that in any other case of a capital sum charged on the property, the Court may direct or allow payment into Court of "the amount sufficient to meet the incumbrance and any interest due thereon". The "amount sufficient" to be paid into Court is the amount which, in the opinion of the Court, is sufficient when invested in Government securities, to meet the incumbrance and any interest thereon.

In coming to this conclusion Mr. Justice Sargent observed in *In re Wilberforce*[2], as follows :—

> "Then comes the other alternative—'In any other case of capital money charged on the land', when the payment into Court is to be 'of the amount sufficient to meet the incumbrance and interest thereon'. Does that merely mean the actual amount of the capital money, or does it mean the amount which is considered by the Court sufficient, when invested in Government securities, to meet the incumbrance and any interest thereon;—that is to say, are the words in the first alternative reflected in the second alternative, so that, by the words 'the

1 *Seth Ghasiram* v. *Mt. Acharaj Kaur,* A.I.R. 1937 Nag. 38.
2 *In re Wilberforce,* (1915) 1 Ch. 84, 102, 103.

amount' I am to understand the Legislature as meaning the sufficient amount as set out in the earlier part of sub-section (1), i.e., clause (a), or am I to take 'the amount' as meaning merely the bare amount of the capital charge? In my opinion, the former is the truer construction. It seems to me that there is no reason why, in the second part of the sub-section, the Court should not have the same discretion that it has in the first part of the sub-section or be limited to directing payment into Court of the bare amount of the charge itself.....

It seems to me that the amount which is to be paid into Court, is the amount which in the opinion of the Court is sufficient, when invested in Government securities, to meet the incumberance and any interest thereon."

53.7. *Specified Courts.*—The reasons for limiting the exercise of the powers given by section 57 to the specified Courts are stated in Whitley Stoke's Anglo-Indian Codes[1] as follows :

"The corresponding section in 44 & 45 Vic., C. 41 has been hailed in England as likely to effect one of the greatest reforms ever made in the law of real property, and there is reason to believe that it will be equally beneficial in India. But to prevent any chance of error in the exercise of a novel jurisdiction, the India Legislature has taken two precautions; first, it has confined the jurisdiction to the High Courts, the District Courts, and any other Courts specially empowered by the Local Government; and, secondly, it has declared that an appeal shall lie from all directions and orders given under this section."

53.8 *Recommendation to extend section 57 to all courts.*—While the above reasoning was valid at the time when Stokes wrote, we do not think it retains its force today. Courts other than district Courts have been vested with many important powers, and there is every reason why the beneficial provision in section 57 should apply to all Courts competent to try a suit for redemption of the mortgage. We recommend accordingly.

1 Whitlay Stokes, The Anglo-Indian Codes, Vol. I, 1892, Edn., Introduction to the Transfer of Property Act, page 731.

CHAPTER 54

MORTGAGES OF IMMOVABLE PROPERTY:

SECTION 58

54.1. *Introductory*.—After sale of immovable property, the next transaction to be considered is mortgage. The subject is, in the Act, spread over more than forty sections. A mortgage, as is well-known, is a transfer by way of security. Unlike other transfers, such as sale, lease, exchange or gift, a mortgage has no independent existence of its own. There can be no mortgage without a debt—we are using the expression "debt" in a wide sense as including money or money's worth or—to borrow a part of the phraseology used in the Transfer of Property Act and the Stamp Act—an engagement which may give rise to a pecuniary liability. It is only in conjunction with an actual or future debt that a mortgage is created. There may or may not be a personal liability on the mortgagor to pay the debt. But the existence or anticipation of a debt is a condition precedent to the creation of a mortgage. If the debt is discharged with the period of limitation, the mortgage cannot survive. In this sense, a mortgage creates a right which is ancillary to another right, or at least connected with another right. It is this dual charactor of the transaction that gives rise to a part of the complexity of the law, and brings in the doctrine of equity of redemption wherein lies much of the romance of the law of morgages.

A creditor may be willing to rely solely on the debtor's personal credit for the repayment of the debt, but often he would like something proprietary and not merely contractual. This desire of the creditor is normally achieved by his taking a security. Security itself could be non-proprietary, in the sense that there is a personal security—the contract of guarantee—whereby another person (called the guarantor or surety) promises to answer for the obligation of the debtor in the case of the default by the debtor. But this security merely gives another contractual remedy, while we are concerned with proprietary rights.

54.2. *History*—The subject has a very interesting history, both in India and elsewhere. In the West, it goes back to Roman times. In India, it goes back to a period earlier than Manu. The economic necessities of agriculturists seem to have led to the creation and evolution of rules on the subject in the legal system in ancient India. The financial needs of businessmen led to the evolution of rules as to mortgages of movables. There are, in fact, instances of mortgages of ships and cargo in ancient Indian literature.

54.3. *Evolution*—The Hindu Law—as also the Roman Law—evolved from the stage of the possessory security to the stage of a non-possessory security. Just as hypothecation found a place in the Roman Jurisprudence at a later stage, and the first pledges were possessory, similarly, possessory pledges arose first in Hindu law (known by the name of *adhi*), to be later replaced by the non-possessory mortgages which came to be known as *bandhak*.

That the emergence of non-possessory pledge represents a later stage is illustrated, though incidentally, by the discussion in a judgment of the Supreme Court of Calcutta.[1-2] In that case the principal question involved was whether a pledge unaccompanied by possession was valid according to Hindu law. Conflicting texts were cited (Vrihaspati and others) from Colebrook's Digest. Vrihaspati's text, so far as is material appears to have been non-committal, because it stated—

> "Of him who does not enjoy a pledge, *nor possess it, nor claim it on evidence,* the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased."

According to another text—"by the acceptance of actual possession of a pledge the validity of the contract is maintained.[3]"

According to a text of Vyasa—

> "Pledges are declared to be of two sorts, immovable and moveable and both are valid, when there is the actual enjoyment, and *not otherwise.*"

On an examination of the text and on a consideration of usages, the majority of the Supreme Court Judges held that later Hindu law clearly recognised non-possessory pledge.

54.4. *Possession.*—That in all system of law, at least in the earlier stages, possession is an important element in the acquisition of rights, cannot be disputed. There is an elaborate discussion of the matter in a judgment of Markby, J.[4] But the inconvenience of the requirement of change of possession might have led to the Gradual relaxation—In Rome, this relaxation was affected by the Roman Praetors when they recognised the validity of hypothecation. It must have been in India also at a late stage that non-possessory mortgages came to be recognised, whatever may be the actual process of evolution in its details. According to Sir William Jones,[5] the distinction between pledging when possession is transferred to the creditor and hypothecation where possession remains with the debtor was originally derived from the Attic Law.

54.5. Thus, in the later stages of Hindu Law, if the debtor committed a default, the property in the pledge was liable to pass to the creditor who might, however, in his discretion sell the pledge, but, in the case of pledge *for custody.*

Where there was an express stipulation against forfeiture, the creditor could not foreclose, but could exercise only the right of sale. There was to be sale or foreclosure where the pledge was of a description known as

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1 *Shiv Chandra Ghose* v. *Russick Chandra Neoghy,* (1842) Ful. 36.
2 Ghose, Law of mortgage in India (1902), page 42, footnote 1.
3 Colebook's Digest, Vol. 1, page 205, para. 126, and page 161, para. 96.
4 (1869) 3 Bengal Law Reports App. Civil Jurisdiction Appeal No. 2.
5 *William Jones,* cited *Shiv Chandra Ghose* v. *Russick Chandra Neoghy,* (1842) Ful. 36, 43, 44.

"beneficial pledge". By a beneficial pledge is meant a pledge *for use* where there was no express agreement that the property should be forfeited or foreclosed.[1]

54.6. *Sale.*—As to sale, non-judicial sale was not recognised, at least in the case of immovable property, but sale through the judicial process was recognised. There is a text[2] of Katyayana under which, when the pledgor is missing, the creditor may produce his pledge before the king and it may then be sold with the permission of the king.

That the law of mortgages must have attained a certain degree of sophistication in Hindu law in its later stages, is obvious from the fact that there are to be found in the texts, rules relating to the mortgages of property not in existence, priority of incumbrances, effect of destruction of the pledge, personal liability of the pledgor, liability of the pledges to take care of the property, right of the mortgagor (now described as the equity of redemption) and the transfer of the right to redeem the mortgage. Sir Thomas Strange[3] thought that hypothecation which is usually traced to Greece might have travelled from India.

54.7. *Classes of mortgages under Hindu law.*—The enumeration of various classes of mortgages in section 58 reminds one of the elaborate classification made by Brihaspati, viz., (1) movable, (2) immovable, (3) for Custody, (4) for use, (5) discretionary (that is, without a time limit), (6) with a fixed time limit, (7) evidenced by a document, (8) evidenced merely by witnesses.

Although the classification by Brihaspati is, in form, eight-fold, in substance it is four-fold,[4] the principles of classification being, (i) nature of the property pledged, (ii) form of the pledge, (iii) time relation, and (iv) nature of the evidence by which the pledge is supported.

In section 58 of the Act also, the differentia are—the nature of the obligation, viz., whether or not there is a personal liability, the nature of the right transferred to the mortgagee (possession or right to sell or conditional ownership), and the formality adopted, viz., deposit of title deeds or other formality. The actual types of mortgages specifically enumerated in section 58 represent transfer of a variety of rights—limited ownership, possession or sale. Some of these had counterparts in Hindu law.

Recognising that the enumerated species may not exhaust the entire scope of mortgage which can be conceived in theory or which may be created in practice, section 58, clause (g), leaves scope for a residuary category under the heading of "anomalous mortgage". Incidentally, this category will also cover combinations of one or more of the enumerated types, which may more appropriately be called composite mortgages. Whenever any specific immovable property is made answerable for the repayment of a debt or the performance of any other engagement which may give rise to a pecuniary liability, a mortgage is created in favour of the creditor. If

1 *Mitakshara*, Chapter 6, Section 6, para. 58.

2 Katyayana, cited in Colebrooke's Digest, Vol. 1, para. 122; Ghose, Law of Mortgage in India (1902), page 57, footnote 1.

3 Sir Thomas Strange, Hindu Law, Vol. 1, page 282.

4 P. N. Sen, Hindu Jurisprudence, (1918) page 177.

the mortgage does not fall under one or other of the enumerated species, it must be treated as an anomalous mortgage.[1] In the case of anomalous mortgages, the rights and liabilities are regulated by the terms of the contract and, where the contract is silent, by the local usage. Anomalous mortgages have considerable juristic interest from at least two aspects. They are regulated primarily by contract or custom and, in that sense, they are more elastic than mortgages governed by the rigid provisions of the law. Secondly, they reflect, more intimately than the other mortgages, practices; this is particularly true of the various kinds of local mortgages possessing well-known-incidents derived from custom, of which the familiar instances in South India are the Otti, the Kanom and the Illudwara.[2] It appears that in the Punjab also, there are various forms of mortgage recognised by custom, some of which may not, in all respect, fit into the scheme of classification given in section 58. In some of these mortgages, the mortgagee is even made to pay a token part of the produce to the mortgagor by way of acknowledgment of the mortgagor's title to the land.[3]

Anomalous mortgages, thus, constitute a living link with ancient Hindu law and usage.

54.8. *History in England*—In England, the pledges of land are found in Anglo-Saxon times and in the Domes day Book.[4] The rules relating to "gage" or pledge are dealt with in Glanville (1187), as for movables, and then applied by *reference* to immovable property.[5] Possession would usually be given to the mortgagee, but he had only a special sort of seisin, which the law did not protect.[6] Such a pledge giving possession was called (i) a mortgage *mortuum vadium,* when the fruits or the rents received did not tend to reduce the debt; (ii) a *vivum vadium* when the fruits or rents proceeds were applied in reduction of the debt.

The property became the mortgagee's on default of repayment on the appointed day if it was so agreed, or if mortgagor failed to redeem within a reasonable time after the court had ordered him to do so.[7]

54.9. Later, this form of mortgage of land was succeeded by the form in which the mortgagee took an *ordinary estate in the land,* entitling him to the usual remedies for recovery of possession. The interest of the mortgagee seems to have fluctuated between an interest regarded as for a term of years though capable of being enlarged automatically into the fee simple on default and a more rigid position, namely, absolute interest. This distinction was important in the context of the rule then prevailing, namely, that "livery of seisin", was essential for the creation of a fee simple and since there was no livery on the grant of the *term,* a freehold estate would not arise afterwards. Later, an alternative was evolved to comply with this rule, whereby a mortgage was made by a conveyance *of the land in fee*

1 Ghose, Law of Mortgage in India (1902), page 140.
2 Ghose, Law of Mortgage in India, (1902), page 141, 917—919.
3 Ghose, Law of Mortgage in India (1902), page 143.
4 Plucknett, Concise History of the Common Law, (5th Ed.) pages 603—608.
5 Holdsworth, History of English Law, Vol. 2 page 188.
6 Holdsworth, History of English Law, Vol. 3, page 128, Pollock & Maithland, History of English Law, Vol., 2, page 120.
7 I.L. Bartin in 83 I.R. 229.

simple, subject to the condition either that the mortgagor might re-enter, or that the conveyance should be void if the debt was unpaid by the appointed day.[1] The form of conveyance was again modified, whereby a more convenient covenant *for re-conveyance* by the mortgagee on default in repayment by the mortgagor by the appointed time was substituted.[2] One merit of this form of covenant was that proof of title was simplified thereby, because title then depended on execution of the re-conveyance.[3] It was this form of mortgage by conveyance which became the usual form of legal mortgage of freehold till the Law of Property Act, 1925, was enacted.

54.10. The evolution of real security—as it is called in England—is vitally linked up with the law of bankruptcy. Real security gives the creditor certain rights over property which has been appropriated to meet the debt or other obligation.[4] Its attraction for the creditor is that, if the debtor should become insolvent, the creditor may exercise his rights over the security in priority to the claims of the general creditors. The property may be real or personal.

54.11. *Classes*—Real security may be created by contract or may arise by operation of law. In the former case, the security takes the form of mortgage, pledge or charges; in the latter, it is called a lien.

Real securities fall into three classes : First those by which the creditor obtains proprietary rights over the subject matter of the security but which do not depend on the creditor obtaining possession of such property,[5] secondly, those by which the creditor does not obtain proprietary rights over the property, and which depend on his obtaining possession of the property,[6] and, thirdly, those which do not depend on the creditor obtaining either proprietary rights over, or the possession, of the property.[7]

To each of the kinds of real security is incident a right in the creditor to make the property which is subject to the security answerable for the debt or other obligation, a right in the debtor to redeem the property by paying the debt or performing the obligation, and a liability on the part of the creditor upon such payment or performance to restore the property to the owner.[8]

54.12. *Various classes of security*—This is perhaps a convenient place for dealing briefly with the principal types of securities on property in England.[9]

The classic description of a mortgage was given by Lindley, M.R., in *Santley* v. *Wilde,*[10] in the following terms : "A mortgage is a conveyance of land or an assignment of chattles as a security for the payment of a debt

1 Holdsworth, History of English Law, Vol. 3, pages 129-130.
2 Vol. 5, pages 330-331.
3 *Derham Brothers* v. *Robertson,* (1898) 1 Q. B. 765, 772 (Court of Appeal).
4 Pisher & Lightwood, Law of Mortgage (1969), page 3.
5 I.e., mortgage securities.
6 I.e., pledge and the possessory lien.
7 I.e., charges and non-possessory liens. This three-fold classification is given by Willes, J., in *Halliday* v. *Holgate,* (1868), L. R. 3 Exch. 229, at page 302.
8 Fisher & Lightwood, Law of Mortgage (1969), page 3.
9 Fisher and Lightwood, Law of Mortgage (1969), pages 4—6.
10 *Santlay* v. *Wilde,* (1899) 2 Ch. 474 (C.A.).

or the discharge of some other obligation for which it is given." In *London Country and Westminister Bank Ltd,*. v. *Tompkins*.[1] the terms "mortgage" and "equitable charge" are discussed.

Mortgage—A mortgage is a form of security created by contract, conferring an interest in property defeasible (i.e. annullable) upon performing the condition of paying a given sum of money, with or without interest, or of performing some other condition. Realty or personalty may be mortgaged. Mortgages of cattles are generally effected by bills of sale. A mortgage may be either legal or equitable.

A charge by way of legal mortgage of land has the same effect as a mortgage[2] without any legal estate being conferred on the mortgagee.

Pledge—A pledge or pawn is a security created by a contract and effected by a bailment of a chattel to the creditor to be kept by him until the debt is discharged. It is incomplete without actual or constructive delivery of the goods to the pledgee. The general property in the goods remains in the pledgor.

Charge and hypothecation—A charge is the appropriation of real or personal property for the discharge of a debt or other obligation, without giving the creditor either a general or special property in, or possession of, the subject of the security, e.g., an order upon a third party to apply money in his hands to the discharge of a debt, or a charge on reality for the payment of a specified amount. The creditor has a right of realisation by judicial process in case of non-payment of the debt. Where goods are so appropriated the transaction is called hypothecation. And in most cases the documents used in connection with the transaction will require registration under the Bills of Sale Acts. The document setting out the terms of a pledge of documents of title is sometimes referred to as a letter of hypothecation, but, nevertheless, the transaction is pledge. Marine hypothecation may be way of bottomry or respondent.

54.13. *Roman law*—Let us now discuss briefly the history of Roman Law. In early Roman Law, a pledge or mortgage in the sense of a mere security was altogether unknown, and was only very gradually evolved in three well-defined stages. The oldest conception of a pledge seems to have been a *forfeiture*,[3] and it appears that the same root originally served for the expression of idea which were afterwards specialised as pledge, promise and bet or forfeit. Credit, as we all know, is the tardy growth of civilization and in primitive times a mere promise to pay, we may take, it counted for very little.[4] The borrower, therefore had to give something in exchange for the loan to the creditor, to be restored to the debtor on repayment of the debt. The transaction would be closed for the time being, and only a right to redeem would be left, in modern legal language, to the debtor. In a word, the formula 'no debt' no mortgage' had no place in ancient law, as a promise to pay constituted no part of the transaction, which merely involved the surrender by the debtor of his property as a "gage" to be creditor.

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1 *London County and Westminister Bank Ltd.* v. *Tompking*, (1918) 1 K.B. 515 (C.A.).

2 Law of Property Act, 1925, section 81(1).

3 Ghose, Law of Mortgage in India (1902), page 7.

4 Ghose. Law of Mortgage in India (1902), page 7.

If the pledger failed to fulfil his engagement the pledge was forfeited, but the pledger was not personally liable for the debt.

54.14. *Modern notion of pledge*—The progress from the earlier idea of a forfeiture to the modern notion of a collateral security marks the difference between ancient and mature jurisprudence.[1] In advanced systems of law a pledge merely creates a right *intrem*[1] enforceable by a sale of the property which is given to creditor by way of accessory security to a right *in personam; and,* as Professor Holland points out, the right does not extend further than is necessary for the sale of the pledge.[2]

54.15. *Fiducia—Transfer of ownership*—The oldest type of security known to the Romans was the Fiducia, which consisted in the formal transfer by the debtor *of the ownership of his property to the creditor.* The transfer was, however, subject to the condition that the creditor should reconvey the property on due payment of the debt. In this transaction not only was the debtor liable to forfeit his property however valuable, on nonpayment of the debt however small, at the appointed time, but also he placed himself completely at the mercy of his creditor, who might sell or otherwise alienate the property to a stranger, in which case the debtor had only the right to bring an action for damages against the mortgagee. In this form of security the borrower incurred no personal liability.

54.16. *Transfer of possession*—But these were not the only drawbacks[3]. There were certain kinds of property which could not be transferred by mancipation or *cessio in jure*—the only modes by which a Fiducia could be created in Roman law, and this constituted a serious defect. A new mode of giving security, therefore, came into use in Rome. The Pignus, by which name the transaction was known, was a transfer not of the ownership but simply of the possession of the thing by the debtor to his creditor and thus came into existence. In this form of security the debtor who retained his ownership was, no doubt, protected against any fraud or dishonesty on the part of the creditor, but the creditor could only detain the property for the purpose of compelling satisfaction. He could neither sell the pledge for the purpose of realising his dues, nor become the owner if the debt was not repaid. The pledgee could only put a pressure on the will of the pledgor, who could not get back the property into his possession without fulfilling his engagement.

To summarise what is stated above, the Fiducia in which the debtor conveys his property conditionally to the creditor is the earliest type of a security. The next in order of time is the Pignus in which the debtor simply makes over possession of the pledge to the creditor. This form of security is followed by Hypothecation, in which the debtor does not part with ownership or possession, though the creditor acquires a real right in the nature of a servitude over the pledge. The law, however, is not yet fully developed. It has yet to receive its crowing distinction, the power of sale which is now of the very essence of a security. This, too, came in time, though it was one of the tardiest endowments of Roman law : so that if the real purpose of a security is to enable the creditor to turn it into

1 Ghose, Law of Mortgage in India (1902), pages 8, 9.
2 *Holland Jurisprudence,* p. 188.
3 Ghose, Law of Mortgage in India (1902), p. 9.

money even as against third persons without disturbing the possession of the pledgor before his title is determined by a sale of the pledge, that purpose was undoubtedly now attained in the Roman law in a manner which may be said to be almost perfect.

54.17. *Section* 58(a)—*Definition of 'mortgage'*.—We shall now consider the definition of "mortgage" as given in the Act, section 58(a). A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

This is the principal definition, followed by a definition of four other expressions. The transferor is called a 'mortgagor' and the transferee, a 'mortgagee'. The principal money and interest, of which payment is secured for the time being, are called the 'mortgage money'. The instrument (if any) by which the transfer is effected is called a "mortgage deed".

The essential characteristics of a mortgage under this section, are three—viz.,—

(a) there must be a transfer of an interest;
(b) the interest must be in specific immovable property; and
(c) the transfer must secure the payment of a loan, an existing or future debt or the performance of an engagement which may given rise to a pecuniary liability.

As to the first requirement, where there is no transfer of an interest, a transaction is not a mortgage. This is one reason why charges are not regarded as mortgages, there being no transfer of an interest in property.[1] In this connection, it is of interest to draw attention to "floating charge" or "floating security," commonly used in mercantile circles. A floating charge is a charge which affects all the assets of a going concern expressed to be included in it, but not specifically affecting any item until some event occurs which causes it to crystallise into a fixed security. After the creation of the charge and until it crystallises as mentioned above, the person creating the charge carries on his business as usual, and can dispose of the assets in the ordinary course of business.[2]

It is not our intention to discuss in detail this type of charge, which is usually—but not exclusively—created by debentures of companies. The point to be made is that while there is an *agreement of transfer* of interest in property when a certain contingency arises, the difference between the fixed charge and a floating charge is that while the charge is floating, it is not fixed *on any particular property,* but it is secured on such asset as may be available when the contigency arises.[3] This aspect has been brought out more often than nce in the judicial decisions, of which it is enough to quote one in which Lord McNaghten observed :[4]

> "A floating charge ..... it ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property,

1 *Lilingworth* v. *Houldsworth,* (1904) A.C. 355, 357;
Cf. Section 125, Companies Act, 1948 and section 95, (English) Companies Act, 1948.

2 *Union of India* v. *Coorg Estates Ltd.,* A.I.R. 1963, Kerala 301, 304.

3 *Mansood A. G.* v. *Hunter,* A.I.R. 1943 Oudh 338, 353.

4 *Illingworth* v. *Houldsworth,* (1904) A.C. 357, 358.

which it is intended to affect later, until some event occurs, or some act is done, which causes it to sit on the subject of the charge within its reach and grasp."

Ordinarily, where the debenture-holders appoint a receiver who takes possession of the assets of the mortgagor company comprised in the floating charge, it becomes crystallised and fixed on those assets.[1]

54.18. *Debenture*—An ordinary form of debenture of a company contains a covenant by the company to pay the registered holder, or sometimes, the buyer of the debenture, a sum named, on a certain date, with interest. Then, there is a charge of such payment of the company's undertaking on all its property, present and future. The conditions usually provide that the money secured should become payable in a certain contingency. A floating security is an immediate equitable charge on an asset of the company for the time being,[2] but it remains in no particular property, and the company is at liberty to deal with the property in the ordinary course of business, until it crystallises :—

(a) by the appointment of a receiver;

(b) by winding up;

(c) the happening of some agreed event.

In any of these three contingencies, the charge becomes fixed to the assets and effective, and gives the debenture holder priority over the general creditors.[3]

54.19. *Property outside India*—We have stated above[4] that a mortgage bears a dual character. It is a *transfer of property*, though the transfer is ancillary to a debt. Now, when the question arises whether the Act applies to a mortgage relating to property situated outside India, an interesting aspect arises for consideration. Should the transaction be regarded purely as a security, or should the "transfer" aspect of the transaction be regarded as material for the purpose ? On principle, there can hardly be any doubt that the latter is the correct view.

54.20. This controversy was referred to by Ghose[5] :—

"The double aspect, so to speak, of a debt secured by a mortgage on land has given rise to a great deal of controversy. It was, for instance, at one time a very debatable point by what law the validity of mortgage of land *situated abroad* should be governed; but it is now settled that it is governed by the law of the *situs*, no distinction between recognised between an actual transfer and a mere executory contract, though continental jurists are still divided in opinion on the question. In some systems, however, the validity of a mortgage made "in a foreign country is not admitted without considerable reservations. Article 2128 of the Code Napoleon, for example, says : "contracts made in a foreign country cannot give a mortgage upon

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1 *Saha Madho Das* v. *Mukand Ram*, A.I.R. 1955 Mad. 331, 339; (1955) 2 M.L.J.I.
2 Fisher and Lightwood, Law of Mortgage (1969); page 110.
3 *Re Panama New Zealand and Australian Royal Company*, (1807) 5 Ch. Appeals 318.
4 Para 54.1. *supra*.
5 Ghose, Law of Mortgage in India (1902), pages 82, 83.

property in France unless there be stipulations contrary to this principle in the political laws, or in treaties." The reasons for this limitation will be readily intelligible to all students of French history. But for many purposes a mortgage is regarded only as personal property and if it is assigned, the formalities are regulated by the law of the country where the assignment is made.[1]

"It should here be noticed that though a contract, entered into with the object of creating a charge upon land in a foreign country, may not be executed according to the law of that country, the English Court of Chancery will enforce the charge if the defendant resides within the jurisdiction.[2] But the practice, although sanctioned by the municipal law of England, rests upon a very doubtful basis in "private international law.[3] I must, however, reserve a fuller discussion of this rather difficult question for the concluding lecture."

54.21. However, it is not very clear whether the Act contemplates a mortgage of property situated outside the territories to which the Act extends. On principle, it is still doubtful whether it contemplates such a mortgage at all. In general, in private international law, immovable property is governed by the substantive law of the country of *situs*—barring the special case of equitable jurisdiction employed to enforce a personal obligation. As a general proposition, rights over immovables are determined by the *lex situs*.[4] In private international law as administered in England, it is specifically held[5] that the interest of a mortgagee is an interest in immovable property for the purposes of the rules of conflict of laws. Notwithstanding the contrary view taken in Australia,[6] our Courts are more likely to follow the English decisions. Since the general rule is that *lex situs* is the governing law for questions which arise with regard to immovable property,[7] and since this general rule is accepted in India also,[8] all provisions of the Act dealing with immovable property—should be considered as confined to immovable property in India.

54.22. *Debt*—Viewing the matter from another angle, Ghose says[9]—

"Another problem which has arisen out of the double obligation created by a mortgage is the *situs* of a secured debt. Is the debt to be regarded as situated in the country where the parties reside, or where the land is situated if it is secured by a mortgage on land in a foreign country? The question was recently discussed before the Privy Council in a colonial appeal, in which it was contended that the securities were merely accessory to the debts which were payable elsewhere and could not have an independent locality, but their Lordships overruled the contention as it is idle to say that a debt covered

1 Story's Conflict of Laws, section 436, note (a).
Jones, section 823

2 (1840) Exp. Pollard, Mont. & Ch. 239; (1874) Ex parte Holthausen L.R., 9 Ch. 772; *Mercantile Investment Co.* v. *River Plate Trust Co.*, (1892) 2 Ch. 303.

3 (1750) *Penn* v. *Lord Baltimore*, Ves., section 444, 454; but see Story's Conduct of Laws, section 544; (1864) *Norris* v. *Chambers*, 29, Beav., 346.

4 Cheshire, Private International Law (1970), page 469.

5 *Re Hoyles*, (1911) 1 Ch. 179.

6 *Haque* v. *Haque* No. 2, (1965) 114 Commonwealth Law Reports 98.

7 Cheshire, Private International Law (1970), page 475.

8 *Bonnaund* v. *Cherker*, (1905) I.L.R. 32 Cal. 631.

9 Ghose, Law of Mortgage in India (1902), pages 83-84.

by a security is in the same position with one depending solely on the personal obligation of the debtor. I told you in the introductory lecture of the difficulty which has been felt by eminent judges in attempting to define the precise relation between a mortgagor and a mortgagee in English law. Their Lordships of the Privy Council did not pretend to be wiser than Baron Parke or Lord Denman. But while abstaining from any attempt to define the relation in which a mortgagee stands to the subject of his security, they point out that the mortgagee has not merely a *jus ad Rem* but a present interest in the pledge, which is preferable to the interest of the mortgagor."[1]

54.23. *True position.*—It appears to us that the true position is that the Act was not, in general, intended to apply to immovable property situated outside the territories of its application. We are not sure if the special case of mortgage by deposit of title deeds—section 58(f)—was intended to be, or can be dealtwith, on a special footing in this context. It was held by Kania, J. in a Bombay case[2] that the Transfer of Property Act is to be construed irrespective of the fact whether the property is inside or outside British India or whether the property is situate in a province to which the Act applies or not. The Court must judge the transaction according to the provisions contained in the Act, unless the contrary is proved. It was held that a valid equitable mortgage can be made in (British) India of property outside British India by persons residing in British India.

This position having been established about forty years ago, we do not consider it proper to disturb it so far as section 58(f) is concerned. But we believe that the general position is as we have stated above.

54.24. *Covenant by owner against alienation*—Since a mortgage must be a *transfer* of an interest, the question arises whether a particular transaction amounts to a transfer. The question arises where there is no express formula used to transfer an interest. For example, a mere undertaking by the borrower of money that he will not alienate his property until the loan is paid, does not transfer any interest in the property to the creditor. Hence a document merely having such undertaking (undertaking against alienation) is not a mortgage.[3] But where a covenant not to alienate is associated with words expressly making a property a security for the debt, there may be a transfer of an interest constituting a mortgage.[4]

Whether there is a transfer of an interest depends upon the intention of the parties gathered from the document as a whole. It is not necessary that there should be a formal transfer of interest in so many words.

54.24A. *Transfer of mortgagee's interest*—Since a mortgage is a transfer of an interest in immovable property, such interest is capable of transfer by way of assignment, mortgage, etc. and is heritable. But the assignee of the mortgage without privity of the mortgagor takes it subject to the state of account between the mortgagor and the mortgagee at the date of the transfer.[5] Further, a payment by the mortgagor to the mortgagee without notice of the assignment is binding on the mortgagee.[6] And

1 *Walsh* v. *Queen*, (1894) A.C. 144 (P.C.).
2 *Central Bank of India* v. *Nusserwanji H. Bharucha*, A.I.R. 1932 Bom. 642, 643 (Kania, J.).
3 *Mohun Lal* v. *Indomati*, A.I.R. 1917 All. 4, 5, 6.
4 *Anand Ram* v. *Dhanpat*, A.I.R. 1916 Pat. 11, 13.
5 *Mathews* v. *Wallwyn*, (1798) 31 E.R. 62, 66; 4 Ves. 118.
6 *William* v. *Scrrell*, (1799) 31 E.R. 198, 199; 4 Ves. 389.

the result of the principle that a mortgage is a transfer of an interest in immovable property is that from the time of lending his money, the mortgagee, whether he be in or out of possession, acquires the right to have the mortgaged property *secured from deterioration* in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior.[1]

54.25. *Section* 58(b)— *Simple mortgage*—We have now done with the definition of "mortgage" in section 58(a). Let us now proceed to section 58(b) relating to simple mortgage.

Under section 58(b), a simple mortgage is created where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the moregage 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 a may be necessary, in payment of the mortgage money. The essence of a simple mortgage is the obligation to re-pay the loan coupled with the power of sale. Ghose[2] has pointed out that this type of mortgage corresponds to the hypothecation of the civil law and the systems which are founded upon it. The mortgagee is not put into possession, he does not acquire the absolute ownership of property nor has he the right to satisfy the debt out of the rents and profits. In this sense, it is properly called a "simple mortgage", since the remedy of the mortgagee is one and only one. The addition of any other remedy would take it out of clause (b) and bring it under the category of anomalous mortgages.

54.26. *Previous Law*—It would appear that before the Act such kinds of transactions were known in Madras and Bombay under the classical name of hypothecation,[3] or the more modern designation of equitable liens or charges.[4]

54.27 *Analysis*—A simple mortgage is one of those mortgages which is nearest to a charge, inasmuch as both create a security on property and both confer a power of sale. Of course, there are many differences between a mortgage and a charge, which we need not state here. The point to be made is that a power to sell the property is of the essence of a charge, as also of a simple mortgage.

That the land is given only as a collateral security is another aspect which ought to be borne in mind in the context of simple mortgages. In order to make his security available, a simple mortgagee should, except in cases specifically provided in the Act,[5] obtain an order of a civil court directing a sale.[6] That the mortgagee has a two-fold security, namely, the personal obligation and the property, is, of course, undisputed. The mortgagee in the case of a simple mortgage had, in the event of default being made in the payment of the debt, two causes of action, the one arising out of the contract of hypothecation.[1] He is free to put both these causes of

1 *Alyappa Reddi* v. *Kuppuswami Reddi,* (1905 I.L.R. 28 Mad. 208, 209 (D.B.).

2 Ghose, Law of Mortgage in India (1902), page 100.

3 Aliba v. Nanu, (1885) I.L.R. 9 Mad. 218.

4 *Khemji* v. *Rama,* I.L.R. 10 Bom. 519; See Ghose, Law of Mortgage in India (1902), page 100.

5 Section 69.

6 *Khub Chand* v. *Kalyan Das,* (1876) I.L.R. 1 All. 240, 244.

contract of hypothecation.[1] He is free to put both these causes of action in suit at once, or he may pursue the one remedy at one time and the other at another time. Subject, however, to the right created by the mortgage, the mortgagor remains the owner of the property

54.28. *Power of sale whether express or implied*—It is not necessary that the power of sale should be in express words. The agreement may be implied. Words of hypothecation generally import the right to sell the property, but controversy does arise sometimes as to whether the right to sell can be implied from the language of the instrument. Thus, in an Allahabad case,[2] there was a personal covenant to pay and no express covenant to cause the property to be sold. It was held that there was no right to sell the property. On the other hand, in a Nagpur case,[3] the terms of the document ran as follows :—

> "I mortgage my field; the same shall stand mortgaged so long as the money is not paid off. If repayment is not made within time, I shall pay compound interest until liquidation."

It was held that an agreement that the creditor may get the lands sold was implied. Indian words such as *rehan, arh* and similar expressions, have been held to import a power of sale.[4] On the other hand, the words *tamassh* or *makhuza* do not imply such a power.[5-6] One wonders whether such controversies as to the right of the mortgagee should be allowed to continue on such an important matter and whether some machinery cannot be devised where by such controversies, if they could not be totally eliminated, could at least be reduced to the minimum. A practical solution would be to provide that where a mortgage deed creates a security with a personal covenant (express or implied), under which the mortgagor undertakes to pay the mortgage money on the due date, the personal covenant carries with it a power of sale, unless the contrary is necessarily implied. Such a provision would not, it is hoped, create any rigidity, because the parties can always contract to the contrary. The importance of such a provision lies in this, that it will make it easy to work out the rights and liabilities of the mortgagor and the mortgagee, which sometimes depend on the particular category to which the mortgage belongs. It will not, in any way, prejudice the right of the mortgagor in general, for two reasons; the equity of redemption is not affected, and a decree that the property be sold is even now available unless the mortgage is a usufructuary mortgage or a mortgage by conditional sale. A clarification as proposed will, in fact, prevent the mortgage from falling within the category of mortgage by conditional sale.

54.29. *Recommendation*—In the light of the above discussion, we recommended that a suitable Explanation as indicated above[7] should be added to section 58(a).

54.30. In a Madras case[8] a deed recited that—"in default, I shall, on the security of the house cited belonging to me, pay and make good the

1 *Khub Chand* v. *Kalvan Das,* (1876) I.L.R. 1 All. 240, 244.
2 *Kanhaiya Prasad* v. *Mt. Hamidan.* A.I.R. 1938 All. 418, 421.
3 *Khem Chand* v. *Mallo.* A.I.R. 1914 Nag. 32, 35.
4 *Kishan Lal* v. *Ganga Ram,* (1891) I.L.R. 13 All. 28, 41, 43.
5 *Khurshed Ali* v. *Abdul,* A.I.R. 1917 All. 439, 440, 441.
6 *Dalip Singh* v. *Bahadur Ram,* (1912) I.L.R. 34 All. 446, 449.
7 Para 54.28, *supra.*
8 21 M.L.J. 562.

principal and interest". It was held that this was simple mortgage and the instrument need not expressly state that the mortgagee *shall recover his money* by sale. The amendment which we are recommending will incorporate a similar approach.

54.31. *Agreement to mortgage*—Since a mortgage requires a *present* transfer of property—this is implicit in the use of the word "transfer" and its meaning as elaborated by section 5—it follows that a mere *agreement to mortgage* cannot create a mortgage. It creates merely a right to obtain another document creating a mortgage.[1] Ordinarily, such an agreement will not be specifically enforced.[2]

54.32. *Section* 58(*c*) defines a mortgage by conditional sale. We shall come to the text of the definition later. But, at this stage, it is enough to mention that, in form, this mortgage is a sale upon a condition, as is obvious from its very name. The origin of this form of mortgage *as given in the Act* could be traced to the form of mortgage as it existed in England in the seventeenth and eighteenth centuries—in fact, until the passage of the Law of Property, 1925. This is not, of course, to say that such a mortgage was totally unknown to the people of India. We do come across such forms of mortgage even now in India amongst persons who could not have adopted it from West. The point to be made is that *so far as the text of clause* (*c*) is concerned, its genesis can be traced to Western influence rather than to Indian practice.

54.33. *Section* 58(*c*) *text.*—Under clause (C), where the mortgagor "ostensibly" sells the mortgaged property on condition that, on default of payment of the mortgage money on a certain date, the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale. This is a more complex definition than the earlier one in Regulation 17 of 1806, in which a mortgage by conditional sale was said to be "a codnitional conveyance of land as a securi'y for the erpayment of a loan on the stipulation that, if the money borrowed be not paid, with or without interest, by a certain date, the sale shall become abolute."[3]

54.34. *English usage*—It should be noted that the expression "mortgage by conditional sale" is not now current in England, and it is not very definite whether this particular expression was current at any earlier period in England. But the concept of a mortgage as an estate upon condition was, of course, very much prevalent in common law. By the old common law,[4] the ordinary mortgage was strictly an estate upon condition. There was a feoffment of the land, with a condition providing that on payment by the feoffer of a given sum at a time and place certain, it should be lawful for him to re-enter immediately on delivery of season being made. The feoffee became the legal owner of the land, subject to the condition. If the condition was performed, the feoffor will re-enter; otherwise, the estate of the feoffee became absolute and indivisible as *from the time of the feoffment,* the legal right of redemption being then lost for ever.[5]

1 *Hukam Chand* v. *Radha Kishan,* A.I.R. 1930 P.C. 76, 78.
2 *Waman Mahadeo* v. *Janardan,* A.I.R. 1938 Bom. 357, 358.
3 Ghose, Law of Mortgage in India (1902), page 109.
4 Snell, Equity (1966), page 416.
5 Snell, Equity (1966), page 416.

It was this very contingency against which equity gave relief. Although the mortgagor lost his legal right to redeem, equity recognised such a right on payment within a reasonable time of the principal, interest and costs.[1] At first, this right to redeem was regarded as a mere right, but later, it came to be recognised as an equitable *estate in the land,* as this equitable estate amounted to ownership of the property subject to the mortgage.[2] The "equitable right to redeem" and the "equity of redemption" are not identical concepts. The equitable right to redeem did not exist until the stage for exercising the legal right for redemption had passed.[3] The equity of redemption, on the other hand, existed as soon as the mortgage was made.[4] This distinction is based on the somewhat refined notion that uptil the appointed day, it is the legal or contractual right to redeem, and after that, it is the equitable right to redeem which arises only after the contractual right of redemption has passed. The equity of redemption, on the other hand, is an interest inherent in the land so that, even though the mortgagor had, *at law,* conveyed his ownership to the mortgagee, yet he was, in equity, considered as the owner of the land, subject only to the mortgage.[5]

54.35. *Probable origin of mortgage by conditional sale.*—There is considerable obscurity as to why the practice of expressing a mortgage in the form of conditional sale arose in those countries where the feudal system of England did not prevail. The original reluctance of the people of India *to sell their immovable property* might have led to this practice. The *Mitakshara,* it will be noted, approves of mortgages, but reprobates sales.[6] This does not, of course, mean that the sale was invalid in law, but there seems to have been a social disapproval of sale of land. The fact that land was regarded as impartible in the beginning—there are texts of usuans[7] and of Prajapati[8] to that effect,—shows the deep-seated antipathy of the Hindus to any transaction approaching a sale of land. Urgent necessity might have given rise to the practice of creating a mortgage. One cannot express very definite views in the matter.

54.36. *History.*—Indigenous mortgages like *bye bill wafa* and *kutkubala,* which were expressed in the form of sale, were referred to in Macpherson's treatise written with reference to Bengal and the then existing North West Province.[9]

54.37. Mortgages by conditional sale under various names, such as, *bai-bil-wafa, kutkubala* and *lahangahan* have been a very common form of mortgage in India from very early times. It is not necessary in such mortgages that the mortgagor should make himself liable for the repayment of the loan.[10] Nor is the mortgagee entitled to possession in such cases, though

1 Snell, Equity (1966), page 417.
2 *Re Wells Swinburn—Hanham* v. *Howard,* (1933) Ch. 29, 32.
3 *Brown Cole,* (1845) 14 Sim. 427.
4 *Kreglinger* v. *New Patogonia Meat & Cold Storage Co. Ltd.* (1914) A.C. 25, 48.
5 Fisher & Lightwood, Law of Mortgage (1969), page 460.
6 Mitakshara, Chapter 1, Section Verse 32, referred to in *Bapuji* v. *Senavaraji,* (1877) I.L.R. 2 Bom. 231, 240 (Westropp, C.J.).
7 Usanas, quoted in the Mitakshara, Chapter 1, section 4, verse 26.
8 Prajapati, quoted by Devanda Bhatta in the Srimati Chandrika, Chapter 7, verse 49.
9 *Bapuji* v. *Senavaraji,* (1877) I.L.R. 2 Bom. 231, 238.
10 (1900) I.L.R. 22 All. 149, 159.

generally possession also is transferred.[1] Essence of *lahangahan* mortgage, for example, is foreclosure, whether or not there is a personal covenant.[2] Where the mortgagee is put in possession under the terms of the deed, he is entitled, if wrongfully dispossessed, to recover possession,[3] but such possession is only that of a mortgagee.

When a mortgage by conditional sale is effected without delivery of possession, subsequently with the consent of the mortgagee, he can convert it into a usufructuary mortgage.[4] But that does not destroy its character as a mortgage.

54.38. The nature of a mortgage by conditional sale, as it was common in India (before the Act) was described by Macpherson in his work on Mortgages as follows :

> "The mortgage by conditional sale, 'kathubala' or 'bai-bil-wafa' is that in which the borrower, nor making himself personally liable for the repayment of the loan, covenants that on default of repayment of the principal and interest on a certain date, the land pledged shall pass to the mortgagee."

In *Thumbuswamy* v. *Hossain Rowthen*,[5] the Privy Council, after referring to the above passage in Macpherson on Mortgages, observed :

> "Such a mortgage might or might not be usufructuray. If usufructuary, it usually contained a stipulation that the usufruct should be in lieu of interest..... The essential characteristic of a mortgage by conditional sale was that, on the breach of the condition, the contract executed itself, and the transaction was closed and became one of absolute sale without any further act of the parties or accountability between them.[6]

54.39. *Equity of redemption.*—It should also be pointed out at this stage that in the ancient law of India, there was no equity of redemption in case of a moregage by conditional sale, any mere that in an out and out asle with a condition of re-purchase.[7]

In fact, before the passing of the Act, there arose an acute controversy on the question whether the judges could engraft upon the contract of the parties the equitable rules of redemption which had been established by the Court of Chancery in England. The Bombay High Court consistently followed the practice of allowing the equity of redemption even in a case of a mortgage in the form of a conditional sale. The judgment of Westropp, C.J., in the case of *Bapuji* v. *Senavaraji*,[8] confirmed the position, so far as that High Court is concerned. In the other High Courts, however, there prevailed some uncertainty, the more so because the Privy Council had, in two

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1 (1893) I.L.R. 16 Mad. 64, 65 (D.B.).
2 A.I.R. 1949 Nag. 34, 36 (D.B.).
3 *Ganpat* v. *Hanamgonda*, A.I.R. 1933 Bom. 439, 442, 443.
4 *Afsar Shaik* v. *Saurava Sundari*, A.I.R. 1917 Cal. 217, 218.
5 *Thumbuswamy* v. *Hossain Rowthen*, (1875) I.L.R. 1 Mad. 1.
6 See A.I.R. 1926 All. 493, 486.
7 Mulla (1973) page 382, citing the following cases :
(a) (1875) I.L.R. 1 Mad. 1 (P.C.);
(b) (1880) I.L.R. 2 All. 63.
(c) (1885) I.L.R. 8 Mad. 185.
8 *Bapuji Apaji* v. *Senavaraji*, (1877) I.L.R. 2 Bom. 231.

decisions,[2] made observations which threw doubt on the subject. No final view was expressed by the Privy Council in its judgments, but in one of the judgments,[2] it did suggest that an Act affirming the right of the mortgagor might be useful alongwith certain other provisions of a consequential nature This suggestion was made in a judgment rendered in 1875 by the Privy Council and seems to have been very promptly adopted by the legislature when it passed the present Act.

54.40. *Comparison with English mortgage.*—In form, a mortgage by conditional sale resembles very closely an English mortgage, since, in both cases, there is an ostensible transfer of ownership of the property on default of payment. For this reason, both are treated as analogous.[3] One distinction, however, between the two is that in a mortgage by conditional sale, there is no need to have an express covenant to repay the mortgage money, while in an English mortgage, there is such a covenant. This is obvious from the opening words of section 58(e) defining an English mortgage—

> "Where the mortgagor binds himself to pay the mortgage money on a certain date.....".

54.41. *Section 58(c) proviso.*—We have yet to deal with the proviso to section 58(c), under which a transaction (of ostensible sale) shall not be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale. The proviso was added in 1929. The result thereof is that an ostensible sale shall not be regarded as a mortgage unless the stipulation for repurchase is contained in the very document which effects the sale. It is well-known that the object of the proviso was to make it certain that a sale does not take the character of a mortgage when, in a separate document, there is a provision for re-transfer. On this question, there was an acute controversy in India[4] before the amendment. Several tests were evolved in the judicial decisions. Many of these decisions were based on a passage in Butler's preface to Coke on littleton. Some of these judicial decisions have lost their relevance after the enactment of the proviso, in so far as they permitted oral evidence or separate documentary evidence to prove that there was a stipulation for re-purchase. The proviso does not, however, mean that where the same document contains a stipulation for re-transfer, the transaction must necessarily be deemed to be a mortgage. There may be an out and out sale—"ostensible", as the section says—and in the same document, there might be an undertaking to re-transfer. If the question arises whether it is a real sale or a mortgage, the stipulation is not conclusive. Every such case is not necessarily a case of mortgage, notwithstanding the view expressed to the contrary in some commentaries.[5] In this sense, the previous judicial decisions still retain some of their utility. As the provision for re-conveyance is not necessarily conclusive,[6] and according to the better

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1 (a) *Pattabhiramaier* v. *Vankatrao*, (1871) 13 M.I.A. 560 (P.C.).
(b) *Thumbaswamy* v. *Hossain*, (1875) I.L.R. 1 Mad. 1 (P.C.).

2 *Thumbaswamy* v. *Hossain*, (1875) I.L.R. 1 Mad. (P.C.).

3 *Surnovee* v. *Srinath*, (1885) I.L.R. 12 Cal. 614, affirmed on another point by the Privy Council in Srinath v. Khetter, (1888) I.L.R. 16 Cal. 693.

4 *Kasturi Venkata Subbarao* v. *Bikkrine Veeraswami*, A.I.R. 1946 Mad. 456, 457.

5 Mookerjee, Law of Transfer of Property, para 125, referred to by Gour, Transfer of Property Act (1972), Vol. 2, page 2033, footnote 7.

6 *Bishan Lal* v. *Banwari Lal*, A.I.R. 1937 All. 724, 726 (Harries J.).

opinion, not even a presumptive evidence the question is one of fact. Primarily, it is the intention of the parties at the time of the transaction which must be regarded[1] and in determining the existence of such intention, the tests provisions laid down may be helpful, provided the stipulation for retransfer is not contained in a separate document.

54.42. *Case law*—One would have thought that this position is clear enough. But arguments to the contrary are often expressed. It would appear from the undermentioned cases that[2-6] questions arise even now whether a particular document creates or does not create a mortgage by conditional sale. We do not wish to say that any of the judgments gave a wrong decision. However, they show the nature of the arguments addressed,—even if unsuccessfully—to the Court. It is desirable that the picture should be more clear than at present.

54.43. *Supreme Court decisions*—In this connection, we may refer to a few of the Supreme Court decisions relevant to section 58(c). In a case[7] reported in 1954, Bose, J., had occasion to consider the question whether the document was a sale or a mortgage by conditional sale. It was stated in the judgment that persons who, after the amendment of 1929, choose to use only one document, may be presumed to have intended a mortgage.

In a case reported in 1960,[8] in which Shah, J., delivered the judgment of the Court, the earlier case of 1954 was not referred to, but it was pointed out that it does not follow that if the condition for re-purchase is incorporated in the deed effecting or purporting to effect a sale, then a mortgage must, of necessity, have been intended. The question is still one of the intention of the parties, interpreted in the light of the surrounding circumstances.

That the question is one of intention was reiterated by the Supreme Court in a case reported in 1966.[9]

54.44. *Patna case as showing need for amendment*—Some obscurity still seems to persist, particularly on the question whether the fact that the sale deed contains a stipulation for repurchase is presumptive evidence of mortgage. The following extract from a Patna judgment[10] shows the need for clarification :—

"But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a transaction a mortgage transaction must of necessity be deemed to have been intended. But from this a ***reasonable inference can be drawn***[11] with respect to the intention of the parties and *unless that presumption is* displaced by *other circumstances by*

1 Bishambhar etc. A.I.R. 1923 All. 586.
2 *Shyam Lal* v. *Shyam Narain*, A.I.R. 1973 All. 234, 235 para 4.
3 *P. Coayya* v. *A. C. Venkatappa*, A.I.R. 1974 A.P. 232, 234, para 3.
4 *Chodhari Madhaji* v. *Patel Nagandas*, A.I.R. 1973 Guj. 190, 191, para 6, 7.
5 *A. B. Abharam* v. *R. M. Parbhatsing*, A.I.R. 1974 Guj. 19, 22, para 12.
6 *Patel Atmaram* v. *Patel Babubhai*, A.I.R. 1975 Guj. 120, 12, para 4.
7 *Chunchun Jha* v. *Ebadat Ali*, A.I.R. 1954 S.C. 345; (1955) S.C.R. 174.
8 *Bhaskar* v. *Shrinarayan*, A.I.R. 1960 S.C. 301; (1960) 2 S.C.R. 117.
9 *P. L. Bapuswami* v. *N. Pattay Gounder*, A.I.R. 1966 S.C. 902; (1966) 2 S.C.R. 918.
10 *Janki Devi* v. *Murta Kuer*, A.I.R. 1974 Pat. 246, 247 (H. L. Agarwala, J.).
11 Emphasis added.

clear cut and in express words and if the condition of section 58(c) of the Transfer of Property Act is fulfilled, then the deed should be construed as a deed of mortgage by conditional sale."

These observations would seem to reflect a view that the stipulation is presumptive evidence of a mortgage. We are, with respect, of the view that the proviso inserted in 1929 did not wish to suggest any such presumption. Otherwise, a buyer can never enter into a stipulation for re-sale without incurring the risk of it being held that the transaction is a mortgage. A presumption, even if rebuttable and discretionary, must create this risk.

54.45. *Recommendation to revise section* 58(*c*)—The undermentioned decisions would further show that the matter requires clarification.[1-3] In view of this position, we must address ourselves to the question whether the present obscurity should be allowed to continue. So far as the adducing of oral evidence is concerned, the matter is really governed by section 92 of the Evidence Act. But, in regard to a stipulation in writing for repurchase, it may be worthwhile making it clear in section 58(c) that the mere fact that the condition for re-transfer is embodied in the same document is not, by itself, sufficient evidence of the mortgage. We recommend that section 58(c) should be amended on the above lines. We have reached this conclusion after full consideration and after a detailed study of the case law.

54.46. The above amendment will not dispense with the need to apply the usual test for determining the intention of the parties, but it will leave the matter elastic. These tests have been referred to more than once in Indian decisions. In an Andhra Pradesh case,[4] for example, it was stated that the reported decisions of the Indian Courts have indicated the following tests, though these tests must be taken to be merely illustrative, and not exhaustive. They are, in general—

"1. The existence of relationship of a creditor and debtor between the parties as on the date of the transaction.

2. The period of repayment, a short period being indicative of a sale and a long period of a mortgage. The fact that time was made the essence of the contract to repurchase is not decisive.

3. The continuance of the seller in possession indicates a mortgage.

4. If there is a stipulation for payment of interest, on repayment it indicates a mortgage.

5. A price below the true value indicates a mortgage; a fair market value is strong evidence that the transaction is a sale."

In the Code Napoleon,[5] a mortgage is defined "to be a real right over immovables charged with the acquittance of an obligation". Further, "it is,

1 *N. Pattay Gounder* v. *P. L. Bapuswami*, A.I.R. 1961 Mad. 276, 279 (reversed on another point in A.I.R. 1966 S.C. 982).

2 *Daitari Delai* v. *Jagannath*, A.I.R. 1968 Orissa 65, 66.

3 *Debnath* v. *Bhoju Mandal*, A.I.R. 1958 Pat. 371, 373.

4 *P. Obayya* v. *A. C. Venkatappa*, A.I.R. 1974 A.P. 232, 235, paragraph 8 (Krishna Rao, J.).

5 Code Nepoleon Articles 2114 to 2116, cited in Gour, Law of Transfer (1972), Vol. 2, pages 1977, 1978.

in its nature, indivisible and subsists over all the immovables affected by it,—each and every portion of the immovables to which it pertains, into whatever hands they may pass."

54.47. *Remedies*—This disposes of section 58, clause (c). Before we proceed to the next clause of section 58, we would like to make a few observations about the remedies available to a mortgagee. According to Snell,[1] mortgagees have five means of enforcing payment : an action on the covenant for payment; sale, foreclosure; taking possession; and appointing a receiver. The first three remedies secure repayment of the loan, and so put an end to the transaction; the other two are interim measures that leave the mortgage afoot, although in most cases, a mortgagee who takes possession does so only in order to be able to exercise his power of sale effectually.[2] Of course, not all the remedies are available to every mortgagee.

A mortgagee by conditional sale has available to him the rather drastic remedy of foreclosure under secion 67. Whether this remedy should be preserved in modern times, is a matter which may require consideration when we discuss that section.[3]

54.48. *Section* 58(*d*)—A usufructuary mortgage is defined in section 58(d). In simplified terms, a usufructuary mortgage is one in which the mortgagor delivers, or agrees to deliver, possession of the mortgaged property to the mortgagee, it being agreed that the rents and profits shall be received by the mortgagee in lieu of interest or principal or partly in lieu of interest or partly in lieu of principal. The characteristics of a usufructuary mortgage may be thus enumerated —

(1) the possession of the mortgaged property is delivered or agreed to be delivered to the mortgagee;

(2) the mortgagee is to appropriate the rents and profits in lieu of interest or of principal or of both;

(3) the mortgagor does not incur any personal liability to repay the money; and

(4) there being no personal liability to pay, there is no 'forfeiture' and, therefore, the remedies by way of foreclosure or sale are not open to the mortgagee.

54.49. *Muslim Law*—This was the form of mortgage most familiar to Muslim law. Early Mohammedan law did not recognise any other kind of security than the "Rahn". A pledge in Mohammedan law, as signified by its name (Rahn), is defined in the Hedaya as "the detention of a thing on account of a claim which may be answered by means of that thing, as in the case of debts."[4] There is a good deal of discussion in the books as to the necessity of possession for the valdity of a pledge, but the weight of authority seems to be in favour of the position that a pledge is not valid unless it is that "until the seisin actually takes place, the pawnor is at full

1 Snell, Equity (1966), page 437.

2 Snell, Equity (1966), page 437.

3 Foreclosure to be considered under section 67.

4 Hamilton's Hedaya, Vol. IV, page 189, cited in Ghose, Law of Mortgage in India, 1902, p. 67, 68.

liberty either to adhere to, or recede from the agreement, as the validity of it rests entirely upon the seisin, without which the end and intention of a pledge cannot be answered."[1]

54.50. *Things incapable of seisin cannot be pledged*—Possession being thus essential to the validity of a pledge, it follows as a corollary that things of which there could be no delivery of possession according to Mahommedan notions, could not be given in pledge. Thus, an undivided share in any property, whether movable or immovable, could not be lawfully pledged.

54.50*A*. *Delivery of possession*—Under the Act, delivery of possession is the most important feature of a usufructuary mortgage. The word "delivers" does not necessarily imply immediate delivery. Where the mortgagor is not in a position to give immediate possession, it is sufficient if he gives the right to possession. In *Maina Bibi* v. *Chaudhri Vakil Ahmad*[2] the Privy Council observed :

> "The difference between a usufructuary mortgage and an ordinary mortgage is not so much a difference in the kind of security created, as in the method of enjoying it. In each case, the property of the mortgagor is pledged to secure the debt, and when the amount secured is paid, the property pledged must be returned to the owner. The main difference between a usufructuary mortgage and an ordinary mortgage is that in the former it is part of the initial agreement by which the security is created that the mortgagee shall at once go into possession of the mortgaged property and apply the proceeds he may derive from the use and occupation of it to discharge the mortgaged debt; while in the case of an ordinary mortgage of the usual sort, it is, in general, not the initial intention of the parties that the mortgagee should go into possession of the property pledged immediately or at all—although he is empowered to do so if the interest on the mortgage money be not paid."

54.51. *Rents and profits*—Next is the question of profits. The mortgagor in a usufructuary mortgage authorises the mortgagee to receive the rents and profits.[3]—

(a) in lieu of interest, or

(b) in payment of the mortgage-money, or

(c) party in lieu of interest,[4] or

(d) partly in payment of the mortgage money.

It is not, therefore, necessary for the validity of a usufructuary mortgage that some amount should remain outstanding as principal. Where, however, the rents and profits are not to be taken in lieu of interest or principal, the mortgage is not a usufructuary one.[5]

54.52. *Essence*—The right to retain possession *until the debt is* repaid is of the essence of the usufructuary mortgage. A mere provision for

1 Hamilton's Hedaya, Vol. IV, p. 190.

2 *Maina Bibi* v. *Chaudhri Vakil Ahmad*, A.I.R. 1925 P.C. 63, 65.

3 A.I.R. 1938 All. 565, 566.

4 The word now is "or" instead of "and".

5 A.I.R. 1923 Mad. 71, 72 (D.B.).

adjustment of the profits towards the payment of the early interest, with the balance if any to be adjusted towards part payment of the principal, does not constitute a usufructuary mortgage, if there is no stipulation in terms that the mortgagee is to remain in possession until payment of the mortgage money.[1] Thus, the mortgagor must part with one of the incidents of ownership, namely, the right to possession.[2]

The kind of usufructuary mortgage in which the profits are enjoyed by the creditor wholly in lieu of interest is the most common one. The borrower practically says to the creditor, "you lent the money and I the land; if either of us wants that which he has lent, he shall restore that which was lent to him."[3]

This closely resembles what is known as a Welsh mortgage in its incidents.[4]

54.53. *Personal liability*—In an usufructuary mortgage where the mortgagee takes possession of the property on the undertaking that he shall repay himself out of the rents and profits, the mortgagor undertakes no personal liability. This was laid down long before the Act, in 1850.[5] Of course, there is nothing to prevent the insertion of a covenant for personal liability. Such covenants, however, do create complications when the question of proper remedy arises. We shall advert to this aspect later.

54.54. *Zuri peshgee leases*—Commentaries on the Act, while discussing usufructuary mortgages, often deal with "Zuri peshgee" mortgages. Peshgee of course, means advance of money or payment before hand or on account, and the word "zar" or "zur" originally meant gold money. The compound word now means "payment in advance, a deposit or engagement to advance money, a bonus or premium of a lease, and an advance of money upon the farm of the revenue; money lent on a usufructuary mortgage."[6]

It would appear that the practice of entering into peshgee leases is attributable to the desire to evade the laws against usury, or the religious mandates against the charging of interest. In England also, such transactions were resorted to, for avoiding usury.[7] Although the law against usury has now been revised and does not survive in the rigid form in which it was previously in existence, yet a problem of the nature mentioned above does arise.

However, it is not always easy to distinguish between a pure lease and a mortgage masquerading as a lease. Here again, as in the case of a mortgage by conditional sale, the intention of the parties must be looked into. Once there is a debt with the security of land for its repayment, then the arrangement is a mortgage, by whatever name the transaction is called. It would not be practicable to enumerate the various tests applied in practice, since these tests would neither be exhaustive nor could they be conclusive.

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1 *Hikmatulla* v. *Imam Ali,* (1890) I.L.R. 12 All. 203.

2 Ghose, Law of Mortgage in India (1902), page 127.

3 *Vanneri* v. *Patanattia,* (1865) 2 Mad. H.C.R. 382.

4 Ghose, Law of Mortgage in India (1902), page 127.

5 *Jhanne Bibi,* Sadar Diwani of 1850 (Cal.) 44, cited in Ghose, Law of Mortgage in India (1902), page 127.

6 Wilson, Glossary, page 565, col. 1.

7 Ghose, Law of Mortgage in India (1902), page 131.

Every case of lease with advance of money is not necessarily a mortgage. It must arise out of the relationship of debtor and creditor and the transaction must be intended to constitute a security. This problem is not peculiar to transactions in India, because it would appear from a very early article in the Harvard Law Review[1] that the problem arose in the last century in the United States also, the general view being that the key to the situation may be found in the *economic relations* of the parties. If the owner of the land is in the weaker situation as between the two, the transaction will be a mortgage; but if the cultivation of land promises to be a better investment, the capitalist will naturally prefer this form of investment.

54.55. *Implied object*—The words "or expressly or by implication binds himself to deliver possession" which occur in section 58(d), were inserted by the amending Act of 1929 to negative the view that the absence of actual delivery of possession, the mortgage was not a usufructuary one. If the mortgagee, as so defined, does not get possession from the mortgagor he may sue for possession,[2] or for damages for breach of contract to give possession,[3] or for recovery of the mortgage-money.[4]

Of course, the mortgagee is not obliged to take possession. If he chooses to forego the benefit, it would have no effect on the recovery of the debt as between the mortgagee and the mortgagor. But when he permits the mortgagor to receive the rents and profits, he exposes himself to the risk of claims of the subsequent incumbrances.

54.56. *Effect of covenant to pay*—Section 58(d) is silent on the question whether a covenant to pay prevents a mortgage from being a usufructuary mortgage. Because of this want of clear provision in the section, there has arisen a controversy on the question whether the existence of a covenant to pay with or without an express power to sell, changes the character of a usufructuary mortgage so as to enable the mortgagee to sue for sale. It seems to be the view of the Allahabad,[5] Bombay[6] and Lahore[7] high Courts that the existence of such a covenant does not change the character of a mortgage. On the other hand, the view taken in Assam,[8] Calcutta[9] and Madras[10-11] is that such a covenant renders the mortgage an anomalous one. The controversy is of practical importance, because when the transaction is a usufructuary mortgage, then section 67 does not confer a right on the mortgagee to bring the property to sale. Mulla[12] has taken the view that if the covenant does not import a right of sale, even

1 (1896) Vol. 2, Harvard Law Rev. 36.
2 A.I.R. 1942 Oudh 172, 174.
3 A.I.R. 1964 Mad. 201, 202.
4 Section 68(d); A.I.R. 1919 Mad. 1164, 1165.
5 *Kanhaiya Prasad* v. *Hemidan*, A.I.R. 1938 All. 418, 420, 421 (F.B.).
6 *Krishna* v. *Hari*, (1908) 10 Mom. L.R. 615, 17.
7 *Sheikh Mohammad Abdullah* v. *Mohammad Yasin*, A.I.R. 1933 Lah. 151.
8 *Rahimuddin* v. *Nayan Chand*, A.I.R. 1950 Assam 18.
9 *Akbar Ali* v. *Mafijuddin*, A.I.R. 1942 Cal. 55, 58.
10 *Ramrakhamal* v. *Subaratnam*, A.I.R. 1953 Mad. 13, 14.
11 *Kangaya Gurukal* v. *Kalimuthu Annavi*, (1904) I.L.R. 27 Mad. 526 (F.B.).
12 Mulla (1973), page 387.

then a personal covenant makes it an anomalous mortgage, and that if it imports a right of sale, it would be an anomalous mortgage as per amending Act of 1929.

54.57. *Recommendation as to section* 58(*d*).—It appears to us that whatever be the theoretical position, it is, in the scheme of the classification of mortgages as given in section 58, desirable that this controversy should be resolved.

54.58. *Conflict as to sale*—A perusal of the judicial decisions would seem to show that there is a straight and direct conflict between the two views, which would now require legislative action. On the Allahabad, Bombay and Lahore view, the mere fact that there is a personal covenant does not create a right of sale on mere failure to pay the mortgage money. On the Assam, Calcutta and Madras view, where a mortgage is a usufructuary mortgage and has a covenant to pay the mortgage debt, then the mortgagee has a right to sue for sale. The Calcutta view is based on the reasoning that the mortgage would no longer be a usufructuary mortgage if there is a personal covenant to pay. The Calcutta case itself was under the Bengal Tenancy Act, 1885, section 26, G(5), but it involved the construction of section 58(d) of the Transfer of Property Act. The Madras view has been consistently to the effect that if there is a personal covenant, the mortgagee has a right to sue for sale, in the case of a usufructuary mortgage. But none of the Madras rulings, with respect, assigns any reasons for the conclusion at which the High Court arrived.

In the Madras Full Bench case,[1] it was held that where there was a promise by the mortgagor to pay on the date named, the mortgagee was entitled to a decree of mortgage-money under section 68(a), and to a decree for sale under section 67. This was a usufructuary mortgage, and the suit was for recovery of the amount due both personally from the mortgagor and *by sale of the mortgaged property*. Noting that the mortgage was a combination of a simple and usufructuary mortgage, the court held that the right to cause the mortgaged property to be sold in default of payment was implied within the meaning of section 58(b).

As late as 1962,[2] this view has been followed in Madras.

54.59. *Need for amendment*—Since the Act does not contemplate the existence of a mortgage which falls within more than one category, it is, so far as possible, desirable that the remedies of possession and sale should be clearly dealt with. Practical considerations seem to justify an amendment to the Act—say, by adding an Explanation—that *where the mortgagor binds himself personally to pay the mortgage money*,[3] and also delivers possession or expressly or by implication binds himself to deliver possession of the mortgage property to the mortgagee and authorities the mortgagee to retain such possession as provided in section 58(d), the mortgage should be deemed to be an *anomalous mortgage*. It will then follow that if a right of sale is expressly given, that remedy will be available to the usufructuary mortgagee, but not otherwise.[4]

1 *Kangaiya Gurukal* v. *Kalimuthu Annavi*. (1904) I.L.R. 27 Mad. 526 (F.B.) (Benson, Bhashyam Iyengar, Russel, JJ.).

2 A.I.R. 1962 Mad. 308.

3 Compare the language of section 58(a)—Simple Mortgage.

4 Section 67.

We recommend that the section should be so amended.

54.60. *Section* 53(*e*) *English mortgage*—The fourth class of mortgages is defined *in the Act* in section 58(e), which deals with an English mortgage, where the mortgagor binds himself to repay the mortgage money on 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.

It has been pointed out that the type of mortgage usually prevalent in England does not, speaking ordinarily, contain a personal covenant and in that sense the expression "English" in this definition is not quite appropriate. The legislature seems to have employed this expression on the basis that transfer of the property to the mortgagee with the specified proviso is of the essence of a mortgage as understood in England, at least before the Law of Property Act, 1925. Grant of an estate in fee with the condition that if the mortgagor shall repay the mortgagee the specified amount on a certain date, then the mortgagee shall reconvey the estate to the mortgagor, was the usual form of a mortgage deed in England. It is this position that is reflected, to some extent, in the definition of "English mortgage".

54.61. However, as already stated,[1] a personal covenant is not usually found in mortgages in England. Thus the definition, in that respect, departs from the English practice. The truth is that mortgages by conditional sale and English mortgages, taken together, exhaust those species of mortgages, in which a security is created by the transfer of ownership as distinct from a transfer of possession or a covenant giving the remedy of sale. A mortgage by conditional sale as defined in the Act excludes a personal covenant, while an English mortgage includes such a covenant. How far the retention of this complex scheme based on a refined distinction is desirable is a point which could be raised. But, then, the abolition of the distinction between English mortgage and mortgage by conditional sale may bring in the question of remedies. It is to be noted in this connection that an English mortgagee cannot now sue for foreclosure, these being an amendment made in 1929[2] to that effect. Before 1929, the Act in section 67, did not put any such limitation on the right of an English mortgagee.[3]

54.61A. *Genesis*—Until 1925 (when the English law of Property Act was passed), the usual form of a mortgage in England was the transfer of the mortgagor's interest in the property, with a proviso for reassignment upon payment of the mortgage money by a particular date. After the date had passed for payment, the mortgagor's right at law determined and the mortgagee was in law the absolute owner of the property. In equity, the mortgagor still retained a right to redeem and, upon payment of the debt and interest, to have the property recovered to him. It was, however, only an equitable right and did not prevent the *legal interest* of the mortgagor from passing despite his retention of the equity of redemption. The equity of redemption was an estate in land which could be devised, granted etc., and whereof they may be seisin. In fact, the mortgagor in England had only an equitable interest in the property both before and after the date for payment had elapsed—before the date, because he had a contractual

1 Para 54.60 *supra.*

2 Section 67, third paragraph, clause (a).

3 *Vasudeva* v. *Srinivasa,* (1907) I.L.R. 30 Mad. 426.

right to have the property reconveyed, and this contract created an equitable interest in the property; after the date, because, in equity, time was not the essence of the transaction, the contract of mortgage being, in equity, considered merely a loan of money secured by a pledge of the estate.[1]

Before the passing of the Law of Property Act of 1925, a mortgage in the English form of properties situated in the mofussil between parties of whom one was a Hindu, was always treated as only a mortgage by conditional sale.[2] Where both the parties were Englishmen, all the incidents of an English mortgage were held applicable.[3] After the passing of the Act, a mortgage in the English form could be created in the mofussil as well as in the Presidency Towns, no matter to what community the parties belonged.

This is the genesis of the clause. The three essentials of an "English mortgage" were stated in *Narayana* v. *Venkataramana*[4] to be as follows :

(1) The mortgagor should bind himself to repay the mortgage money on a certain day.

(2) The property mortgaged should be transferred "absolutely" to the mortgagee.

(3) The absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon repayment of the mortgage money, on the date on which the mortgagor bound himself to repay the same.

54.62. *Personal liability*—In an English mortgage, the debtor remains personally liable to pay the debt. A covenant to pay is an essential ingredient of such a mortgage. Where the intention is to create an English mortgage, this covenant will, in fact, be presumed. For every mortgage implies a loan, and every loan implies a debt for which the mortgagor's personal estate is liable. The absence of a covenant is, however, a strong indication of the intention of the parties. The fair criterion by which the court is to decide whether a deed of sale containing an agreement to recovery is a mortgage or not, is whether the remedies are mutual and reciprocal. If not, it is merely a conditional sale and not a mortgage.

54.62*A*. *Transfer whether absolute*—It would be noticed that section 58(e) speaks of an "absolute" transfer to the mortgagee, subject of course, to the specified proviso. While the definition of "mortgage" in the abstract in section 58(e) states that the mortgage is a transfer of an interest in specific immovable property, section 58(e) regards the transaction as a transfer of *the property*. There is an apparent inconsistency between the two, which gave rise to prolific case law. The position is now, however, fairly well-settled,[5-6] since it has been held by the Privy Council that clause (e), on its true construction, does not declare an English mortgage to be an absolute transfer of the property. It declares only that such a mortgage would be absolute, but for the proviso for re-transfer. In this sense, clause

1 *Seton* v. *Slade*, (1802) 32 E.R. 108, 111, 6 R.R. 124; 7 Ves. 265.
2 (1886) I.L.R. 12 Cal. 614, 616 (D.B.).
3 (1881) I.L.R. 7 Val. 394, 398.
4 *Narayana* v. *Venkataramana* (1902) I.L.R. 25 Mad. 235 (F.B.).
5 *Ramkinkar* v. *Satyacharan* A.I.R. 1930 319, 414.
6 See discussion in 43 C.W.N. Journal 47, Transfer of an interest.

(e) deals with form, and not with substance. Whatever form is used, nothing more than the mortgagor's interest is transferred, and that transfer is subject to the right of redemption.

54.63. *English mortgage by lessee*—Question also arose in the past whether, after a lessee has mortgaged his interest in form of an English mortgage, privity of estate is established between the lessor and the mortgagee from the lessee, so as to entitle the lessor to claim rent from the mortgagee of the lease on the basis that there has been an absolute assignment of the lease. After considerable fluctuation of views in the Calcutta High Court,[1] the position is now settled by virtue of the judgment of the Privy Council already referred to,[2] that the mortgagee is not liable by privity of estate for the burdens of the lease. This, in substance, means that the original relationship continues between the lessor and the lessee, notwithstanding the mortgage.

54.64. *Power of sale without intervention of court*—While an English mortgage, like a simple mortgage, can be enforced by sale,[3] it bears an additional feature worth mentioning. An important consequence resulting from the creation of an English mortgage is the validity of a power of *extra judicial* sale in certain circumstances.[4] In default of payment of the mortgage-money, a mortgagee in English mortgage has, without the intervention of the Court, the power to sell, or to concur in selling, the mortgaged property or any part thereof in the cases enumerated in section 69, subject to following the procedure prescribed by that section. Of the cases so enumerated, one is stated thus —

> "(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this "behalf by the State government in the official gazette."

This provision, incidentally, discloses two features of social and juristic interest —

(1) The legislature desired to create a dividing line between mortgages by conditional sale and English mortgages. The former was meant primarily for those *traditional Indian* mortgages which were framed as ostensible transfers of ownership. The latter was primarily meant for *non-traditional* mortgages framed as absolute transfers of ownership.

(2) While a mortgage by conditional sale primarily results in foreclosure, for an English mortgage, there exists a number of remedies —

(a) remedy on the personal covenant;[5]

(b) sale through court;[6]

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1 *Palakrishna Pal* v. *Jagannath*, A.I.R. 1932 Cal. 775, doubting *Bengal National Bank* v. *Janki Nath Roy*, A.I.R. 1927 Cal. 725.

2 *Ramkinkar* v. *Satyacharan*, *A.I.R.* 1939 P.C. 14.

3 a. Section 67 first para.

4 Section 69(1) (a).

5 Section 68.

6 Section 67, first para.

(c) sale without intervention of court where the parties do not belong to the excluded communities.[1]

54.65. *Position regarding English mortgagee's right to possession*—While, as the above analysis will show, the position as to the English mortgagee's right to cause the property to be sold is fairly clear, the question of his remedy to sue for possession raises several interesting points. The question turns upon the words in section 58(e), speaking of "absolute transfer". Do these words mean that the English mortgagee, when his mortgage debt is not paid in time, can seek possession of the property ? Section 58(e) does not, of course, expressly confer any right to *possession*. But, at least before 1959 (before the Privy Council case), the view taken by some High Courts was that he had such a right. This view primarily bases itself on the postulate that an English mortgage is essentially an "absolute transfer" of the property and that so long as payment by the mortgagor in time does not bring the condition into operation, the transfer retains its character of "absolute transfer".

54.66. *Bombay case*—In this connection, the following observations of Chagla, C.J. may be referred to—[2]

> "Now, well known text books on mortgages and eminent English Judges have admitted frankly the difficulty in defining the relationship between a mortgagor and a mortgagee when the mortgagor remains in possession of the mortgaged property. We are here dealing with an English mortgage and an "English mortgage" is defined under section 58(e) of the Transfer of Property Act as :
>
> "Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagees, 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."
>
> "Therefore, in an English mortgage there is the transfer of the *absolute interest*[3] of the mortgagor to the mortgagee, but the transfer is not complete and some interest is left in the mortgagor because he has a right to the reconveyance of the property and also to the right of redemption. To that extent it may be said that the whole of the interest of the mortgagor is not transferred to the mortgagee, but subject to this right which I have just indicated, *there is a complete and absolute transfer of the* interest of the mortgagor to the mortgagee. Therefore, under an English mortgage a mortgagee is entitled to the same rights as the mortgagor himself had in the property and one of the most important rights is the right of possession.
>
> "There can be no doubt that on an English mortgage being executed the mortgagee, becomes entitled to possession of the property. He may not take actual possession by sufference of the mortgagee or by permission express or implied given by the mortgagee. The mortgage may provide that on the mortgagor committing a certain default the mortgagee would be entitl-

1 Section 69(a).

2 *Sequerira* v. *Boolbar*, A.I.R. 1954 Bom. 81.

3 Emphasis added.

ed to enter into actual possession. In such a case the stipulation amounts to the permission being withdrawn or the license being terminated on the default taking place. Therefore, in this case when the English mortgage was executed, the possession of the mortgagor was a permissive possession. The mortgagee had bound himself not to withdraw that permission unless there was a default, and when the default did take place, the mortgagee withdrew the permission and the licence came to an end.

"It seems to me that under these circumstances the mortgagee was entitled under section 41 (of the Presidency Small Cause Courts Act) to institute proceedings for ejectment, because section 41 provides that when any person has had possession of any immovable property as the tenant or *by permission of another person* and the tenancy or permission has been determined or has been withdrawn, the person to whom the property belongs can apply for a summons against the occupant calling upon him to show cause why he should not be compelled to deliver up the property. In this particular case the person had possession of the property not as tenant but by permission of another person, and as that permission has determined, that other person is entitled to a summons against the occupant.

"With regard to the nature of the mortgagor's possession under an English mortgage, there are interesting observations of Lord Selborne in *Heath* v. *Pugh* :[1]

> ".....The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity), to be "at the will" or by the "sufference", or "permission", of the mortgagee, under a "tacit agreement" which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not wrong. He was entitled to the rents and profits as long as he remained in possession; mense profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee".

"Mr. Sukhtankar has relied on a decision of the Privy Council in *Ram Kinkar* v. *Satya Charan*[2] and his contention is that whatever view might have been taken of an English mortgage prior to this decision, after this decision it could not be said that a mortgagor under an English mortgage had no interest in the mortgaged property at all. Now, all that the Privy Council has done in this case, with respect, is to emphasise the fact that under an English mortgage a mortgagor has some interest left in the mortgaged property. That is undoubtedly so, because, as the definition of an English mortgage under the Transfer of Property Act itself indicates, a mortgagor has the right to have the property reconveyed to him and also the right of redemption. This important right that the mortgagor has, does create an interest in the mortgaged property which the mortgagor enjoys. But the Privy Council has not discussed in this judgment what are the rights of a mortgagor to the mortgaged property or what is the nature of the possession that a mortgagor has of the mortgaged property under an English mortgage."

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1 *Heath* v. *Pugh*, (1881) 6 Q.B.D. 345, 359.

2 *Ram Kinkar* v. *Satya Charan*, A.I.R. 1939 P.C. 14(B).

54.67. We have cited these observations *in extenso,* since they set out in full the reasons in support f the view taken. There are other decisions to that effect. Although the factual situations vary, these decisions—namely, in Patna[1] and Calcutta,[2]—take the view, expressly or by implication, that an English mortgagee can claim possession.

54.68. *Need for change and recommendation*—Having devoted serious attention to the matter, we have come to the conclusion that whatever be the position in England, it is not the intention of the legislature in India that an "English" mortgagee as defined in section 58(e) should, by *the very fact of execution of the mortgage,* have a right to possession. If the English mortgagee is to be taken as acquiring the right to take possession as soon as the mortgage is executed whether a right of entry is expressly covenanted for or not, then a jarring element is introduced into the section. The section, as we conceive the true position to be, is based on a scheme of keeping distinct the remedies of :—

(a) sale,

(b) possession,

(c) foreclosure, resulting from a conditional transfer of ownership,

and of classifying the various mortgages into species in which one of the remedies enumerated above would be available.

In other words, the remedy available constitutes a basic element of the scheme, even though on the surface it may appear that only *the* form of *the transfer* is the criterion. No doubt, the parties can create a mortgage combining more than one of the remedies enumerated above or even adding thereto. But, in the scheme of the Act, such a mortgage is to be regarded as an anomalous mortgage. The view taken in England[3] is that if the mortgagee allows the mortgagor to remain in possession, the mortgagor is, at law, merely a tenant at sufferance, but in equity, being the owner, the mortgagor can take the rents and profits for his own use and is not liable to account to the mortgagee. This may be a logical course to adopt in England, but it does not appear to be in harmony with the scheme of the section 58. The mortgagor in India transfers only an interest. This aspect was sufficiently elaborated by the Privy Council.[4]

Assuming that our construction of section 58, as stated above, is not correct, we would still take the view that if the law is as it has been held to be by the Bombay, Calcutta and Patna High Courts, it ought to be changed not merely in order to introduce a symmetry into section 58, but for a more fundamental reason, namely, that unless the parties expressly agree to give possession, the remedy of sale which is available to the English mortgagee[5] should be regarded as enough for all practical purposes. An argument that

1 (a) A.I.R. 1936 Pat. 211, 220;
(b) A.I.R. 1932 Pat. 360, 362.
2 (a) A.I.R. 1919 Cal. 908, 912;
(b) A.I.R. 1925 Cal. 77, 79.
3 *Scobie* v. *Collins,* (1895) 64 L.J.Q.B. 10(2).
4 A.I.R. 1939 P.C. 14.
5 Section 67, first paragraph.

an "absolute" transfer carries with it the right to possession—assuming that it is theoretically valid—does not carry in its support practical reasons of a compelling nature.

As a matter of legislative policy, the remedy of sale should suffice for an English mortgage.

We, therefore, recommend that[1] it should be provided in section 58(e) that an English mortgage does not carry a right to possession in the absence of an express agreement giving such right.

54.69. *Section 58(f) Mortgage by deposit of title-deed*—The next category of mortgages to be considered is defined in section 58(f). It is popularly known as an equitable mortgage, but its legal appellation is "mortgage by deposit of title deeds". Where a person in any of the following towns, viz., the towns of Calcutta, Madras and Bombay and in any other town which the State government concerned may, by notification in the official gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds. Equitable mortgages (mortgages by deposit of title deeds) were accepted in India as equivalent to simple mortgage, as pointed out by Mulla,[2] after the decision of the Privy Council in *Varden Seth* v. *Lachpathy*.[3] By virtue of section 96, the provisions in the chapter, which applied to a simple mortgage, apply, so far as may be, to a mortgage by deposit of title deeds. This, in fact, was substantially the position before the amendment of 1929 also.[4]

It is to be noted that, although popularly known as an equitable mortgage, such a mortgage creates a mortgage in which an interest in the mortgaged property is transferred to the mortgagee.[5]

54.70. *Territorial restrictions*—As clause (f) of section 58 now stands, it is applicable —

(i) to the towns of Calcutta, Madras and Bombay; and

(ii) to any other town which the State Government concerned may notify.

Though a large number of towns and cities have been notified by the State Government, a list whereof is available in most of the commentaries,[6] the question to be considered is whether this clause should not now be extended to all territories to which the Act extends. In the alternative, the next question to be considered is whether the cities and towns already notified should not be included in the clause, instead of it being left to the citizen to ascertain the position from the various notifications which are not always easily accessible. As to the first alternative, it may be pointed out

1 This is not a draft.

2 Mulla (1973), page 394.

3 *Varden Seth* v. *Lachpathy*, (1864) 9 M.I.A. 307 see also *Manekji* v. *Rustamji*, (1890) I.L.R. 14 Bom. 369.

4 *Imperial Bank of India* v. *Uri Gyam Thu*, A.I.R. 1923 P.C. 211.

5 *K. J. Nathan* v. *S. B. Maruty Reddy*, A.I.R. 1965 S.C. 1964; 2 S.C.J. 671.

6 Mulla (1973) pages 394, 395, under "Territorial restrictions"

that even in the districts to which the Act does not extend, deposit of title deeds as creating a mortgage has been recognised.[1-2] A mortgage by deposit of title deed is, therefore, valid throughout the Punjab, even in areas where the Act does not extend.[3]

54.71. *Case law as to local extent*—The Privy Council case[4] was one which arose in Madras for land situated outside that city. The Privy Council poiated out that no local law existed forbidding the creation of a lien by the contract and deposit of deeds as it existed in that case. By the general law of the place where the contract was made, that is, the English law, the deposit of title deeds as a security would create a lien on lands.

In the case decided in the Punjab, two eminent judges of the Chief Court—Rattigan and Rossignol[5]—specifically held that in those parts of British India where the Act was not in force, a valid mortgage can be created by deposit of title deeds. The house of which the mortgage was made in that case was situated in Kasumpati, Simla by a deposit of title deeds. Kasumpati is a suburb of Simla with a population of less than 1000 even in 1977. The mortgage was held to be valid. The Court had no doubt that in those parts of British India where the Transfer of Property Act, 1882, was not in force, "a perfectly valid mortgage can be created by deposit of title deeds". In so deciding, the court not only relied on the Privy Council decision of 1864 to which we have already referred, but also to a judgment of the Allahabad High Court[6] and a Bombay case.[7] The chief Court of Punjab also referred to Ghose's Law of Mortgage in India, 4th Ed. page 151. On the question whether the mortgage was merely on equitable one in its effect, the Chief Court approved the following passage in Shepherd and Brown[8] :—

> "A mortgage by deposit of deeds is a complete act and not an executory agreement and therefore section 48 of the Registration Act which gives priority to registered instruments as against oral agreements not followed by delivery of possession of the property concerned, does not apply. The mortgage by deposit of title deeds prevails against the subsequent transferee who takes under a registered instrument."

54.72. *Delhi*—In regard to the locality of Delhi, it is now well-settled that an equitable mortgage can be created.[9]

54.73. The principle of English law that a deposit of title deeds as a security for a loan would create a lien on the lands has been applied in India[10] as in conformity was *justice, equity and good conscience.*

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1 *Moti Ram* v. *Bharat National Bank*, A.I.R. 1921 Lah. 253.
2 *Stewar* v. *Bank of Upper India*, (1916) Punjab Record Civil No. 31, page 83.
3 *Paras Ram* v. *Mohun Manucha*, A.I.R. 1944 P.C. 22.
4 *Varden Seth* v. *Lachpathy*, (1864) 9 M.I.A. 303, 321.
5 *Stewart* v. *Bank of Upper India*, (1916) Punjab Record Civil No. 31, pages 85, 88, 89.
6 *Himalaya Bank Co.* v. *Quarry*, (1895) I.L.R. 17 All. 252, 260.
7 *Maneckji* v. *Rustomji*, (1889) I.L.R. 14 Bom. 269.
8 Shephard and Brown, commentary on the Transfer of Property (7th Edition), page 255.
9 A.I.R. 1937 Lah. 819.
A.I.R. 1944 P.C. 22.
10 A.I.R. 1960 Mad. 529, 531.
A.I.R. 1939 Rang. 321, 322.

54.74. *Need for amendment*—It is thus clear that in the areas where the Act does not extend, a mortgage by deposit of title deeds is fully recognised irrespective of the locality. The place to which the Punjab case related Kusampati, Simla—does not appear to have been a highly commercialised or urban locality. In this position, we do not think that there is any justification for limiting the application of this clause to specified areas. It is true, speaking theoretically and in the abstract, that the Act recognises such mortgages as a matter of convenience, in order that the mercantile community may be enabled to borrow money without the delay caused by the formalities of registration and it is also true that since registration is dispensed with for the validity of a mortgage by deposit of title deeds, subsequent moregagees may not come to know of the earlier mortgage by deposit of title deeds. However, these considerations cannot be conclusive, and in any case, in the numerous places where the clause has been already applied, the extension of the clause has raised no serious practical difficulties.

54.75. *Anomaly*—From the fact that in areas to which the Act does not now extend, this procedure is even now regarded as applicable, it would appear that the present position creates an anomaly. Outside the territorial extent of the Act, this mode of creation of mortgage is permissible without notification by the State Government and, irrespective of the nature of the locality, while within the territorial extent of the Act, such a notification is required, barring the cities already mentioned in the section. This certainly is an anomaly. It may be that in the 19th century, it was assumed that equitable mortgages were not common elsewhere outside the Presidency towns; in the areas outside the operation of the Act. This position, to some extent, found reflection in the limited scope given to equitable mortgages before 1929. It may be noted that section 59, before 1929, contained a saving in the third paragraph as follows :

> "Nothing in this section shall be deemed to render invalid, mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of all documents of title to immovable property, with intent to create a security thereon."

54.76. *Recommendation as to section 58(f)*—This negative and very limited provision was given a positive shape and a wider ambit in the amendment of 1929, whereby section 58(f) was introduced. Conditions have progressed very fast since then, and the very large number of towns notified by State Governments[1] itself shows the increase in urbanisation and commercial activity. In this situation, it appears to us that it will not be long before the need for extending section 58(f) to numerous other towns will arise.

In order that this economic progress may be reflected in the law, the better course, in our opinion, would be to extend section 58(f) to all the territories to which the Act extends, with a power to the State Government to exclude certain areas from the scope of this clause, if it considers it fit to do so. We recommend that clause (f) should be revised on these lines.

54.77. *Section 58(f) Other points for discussion*—We have so far disposed of the major question concerning mortgage by deposit of title deeds. It is now time to refer to certain points of detail relevant to the subject.

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1 Para 54.70 *Supra.*

The main points of detail which arise in connection with a mortgage by deposit of title deeds, seem to be the following :—

(a) Whether there is an intention to create a security;
(b) What is the meaning of "documents of title";
(c) Whether there is an effective delivery for the purposes of the section;
(d) The territorial aspect;
(e) What is the scope of the property covered by the security;
(f) If there is a written memorandum accompanying the deposit, whether registration is necessary;
(g) The remedies available to the equitable mortgagee.

54.78. *Intention to create a security*—The most important elements of a mortgage by deposit of title deeds, as in the case of any other mortgage, is the intention to create a security. This has been described more than once as the essence of the transaction.[1-2] There must, further, be a link between the deposit and the loan, although it is not necessary that the loan must accompany the transaction. The intention to create a secuirty is a question of fact, and not of law,[3] and the intention can be established by written documents, or written and oral evidence, or oral evidence only; but the intention must exist. Ordinarily, the intention is to be gathered from the parties conduct and statements, from previous history or from the memorandum accompanying the deposit. It is to be noted that an equitable mortgage as known to English law, could be created either by actual deposit or by memorandum in writing intended to create a security for money advanced. Of course, that did not operate as an actual assignment, but was enforceable in equity. Under the Act, however, what is required is deposit of title deeds with the intention of creating a security. Once this is done, there is no question of legal and equitable transfer. The transaction creates a mortgage for the purpose of the law, like any other form of mortgage.

54.79. *Documents of title*—The documents deposited must be documents of title. What is, and what is not, a document of title, is a matter of construction. It is well established[4] that a deposit of *some of the title deeds* relating to a property may be enough to create a valid mortgage over the entire property, if that was the intention. The only essentials are that there must exist a debt and deposit and an intention that the deeds shall be security for the debt.[5]

The deposit with the mortgagee of copies of jamabandi and plans does not, however, constitute a valid equitable mortgage, because they are not "documents of title."[6]

The general rule is that the scope of an equitable mortgage does not extend beyond the scope of the title deeds.[7]

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1 A.I.R. 1970 Mad. 367.
2 A.I.R. 1963 Mad. 223.
3 A.I.R. 1974 Cal. 319.
4 A.I.R. 1938 Mad. 865.
5 A.I.R. 1936 Lah. 251.
6 A.I.R. 1938 Lah. 255.
7 A.I.R. 1943 Sind 36.

As between the mortgagor and the mortgagee, it is not necessary that the documents should disclose a good title in the person creating the disposition.[1]

There may even be a missing link.[2] Where A deposited all the title deeds of a property except that under which he had obtained the property, and subsequently deposited this last deed with another person, it was held that the prior depositary had a valid title against the latter.[3]

54.80. *Delivery of documents*—There must be a delivery to the creditor of the documents of title. Otherwise, there can be no equitable mortgage. As an exception is made in the case of mortgage by deposit of title deeds from the general rule which requires a registered instrument in dealing with immovable property, the law insists upon delivery of the title deeds. This is required not merely for providing tangible evidence of the transfer, but also for the purpose of putting any person intending to deal with the property on notice of the transfer. In an English case,[4] A and B were in possession of title deeds for a purpose unconnected with any loan, and A merely orally communicated to B a request to hold the title deeds as trustee for a creditor of A. It was held that the creditor did not thereby become an equitable mortgagee. The very principle of part performance on which equitable mortgage rests was held to have no application to the case.

In *Daw* v. *Terrel*,[5] the facts were peculiar. X was entitled to three properties. The title deeds of one property were deposited with A as security for a loan. Then X borrowed from B, and deposited the title deeds of the other two properties at the same time, giving a direction to A to deliver the title deeds of the first property to B when his mortgage was satisfied. It was held that an equitable mortgage was created in favour of B on all the three properties. Where the title deeds are already with the creditor for a purpose unconnected with any loan, and the debtor writes to the creditor that he may retain the deeds as security for the loan, a delivery must be deemed to have been made and an equitable mortgage is therefore created by such deposit.[6]

Delivery of possession of the title deeds need not be actual physical delivery. Constructive delivery of possession is sufficient to create a valid equitable mortgage.[7] If the creditor is already in possession of the title deed, it would be hypertechnical to insist upon the formality of delivery back to debtor and then again to creditor.

54.81. Again, what is delivered must be a document of title. If the documents deposited show no kind of title in the depositor, no mortgage is created[8]. Where A deposits with B title deeds of Blackacre, assuring

1 (a) A.I.R. 1939 Rang. 185;
(b) A.I.R. 1960 Mad. 529, 531.

2 A.I.R. 1932 Cal. 589.

3 *Roberts* v. *Croft*, (1857) 53 E.R. 343, 346; 24 Beav. 223.

4 *In re Beetham; Ex Parte Broderick*, (1886) 56 L.J. Q.B. 353; 18 Q.B.D. 380.

5 *Daw* v. *Terrel*, (1863) 55 E.R. 351, 352; 3 N.R. 285; 33 Beav. 218.

6 (1964) Ker. L.J. 748, 751. *Fenwick* v. *Potts*, (1856) 44 E.R. 385, 490; 8 De G. M. & G. 506, (1871) 16 Suth D.R. 203, 205.

7 A.I.R. 1965 S.C. 430, 435.

8 (1961) Ker. L.T. 434, 443.
A.I.R. 1932 Cal. 589, 593 (Deposit of probate and redemption certificate relating to the property standing in the name of grandfather of the mortgagor held sufficient).

B that they are the title deeds of Whiteacre, but in reality they do not relate to Whiteacre, this would not create an equitable mortgage on Whiteacre.[1]

54.82. *Territorial aspect*—Next is the territorial aspect. For the validity of an equitable mortgage, it is enough if the parties reside in a place where section 58(f) applies. This proposition has two aspects —

(a) The property need not be situated in the territories to which the Act extends.

(b) The property need not be situated in the places to which the clause applies.

We have already discussed the first aspect.[2] As to the second aspect, it is now well-settled that the property need not be situated in the places where the clause applies. Whether or not the place where the property is a place mentioned in or notified under the clause, it is enough if the transaction is entered into at a place so specified or notified.

54.83. *Place of deposit material*—It is necessary that the deposit must be in the towns mentioned in the section, no matter where the properties are situated.[3]

Hence, even if the property is situated in non-notified towns, mortgage by deposit of title-deeds by delivery in a notified town is valid.[4]

54.84. *Situation of property no material*—Conversely, deposit of title deeds in a *town not mentioned* in the section gives no right to the mortgagee. It does not even operate as further security.[5]

A promissory note and a memorandum of deposit of title deeds were handed over *outside the limits* of the *presidency town,* to the agent of a solicitor who was acting both for the debtor and the creditor, with instructions to the solicitor to deliver the title deeds to the creditor. No such delivery was, however, proved. It was held that the requirements of a valid equitable mortgage were not satisfied, as the delivery took place outside the *presidency town* and further delivery to the common solicitor was not sufficient, as delivery was not made to him as *agent of the creditor.*[6]

54.85. *Scope of security*—The scope of security is the scope of title deeds, unless the contrary is proved.[7]

Where title-deeds are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. Where, however, the title deeds are handed over, accompanied by a bargain, then that bargain must rule, and when the bargain is

1 *Jones* v. *Williams,* (1857) 53 E.R. 274, 277, 278; 5 W.R. (Eng.) 775.

2 See discussion as to section 58(a), *supra.*

3 I.L.R. 38 Bom. 372;
A.I.R. 1930 Lah. 920;
A.I.R. 1937 Bom. 39.

4 1960 Ker. L.J. 388; 1960 Ker. L.T. 442.

5 A.I.R. 1927 Pat. 41;
A.I.R. 1932 All. 451.

6 36 C.W.N. 1028; A.I.R. 1932 Cal. 823.

7 A.I.R. 1916 P.C. 115;
A.I.R. 1925 Rang. 250.

a written bargain, it, and it alone, must determine what is the scope and extent of security.[1]

54.86. *Written memorandum*—For the validity of a mortgage by deposit of title deeds under section 58(f), it is not necessary that there should be a writing.

The essentials of a mortgage by deposit of title deeds under the section are :

(1) There must be a delivery of documents of title of immovable property

(2) Such delivery must be made to a creditor or his agent

(3) Such delivery must be made with intent to create a security thereon

However, in practice, the parties often write out a "memorandum" giving the details—all or some—of the transaction. This is done presumably with the object of avoiding controversy as to the transaction or its details. But sometimes this object is not achieved, and in fact, the consequence that ensues is one which was not anticipated by the parties—a controversy as to whether the memorandum ought to have been registered. Since this controversy affects the very validity of the transaction, it deserves to be considered at some length.

54.87. *Principle*—The principle is not complex. A mortgage by deposit of title deeds is not compulsorily registerable.[2] A memorandum which *records* the transaction, but does not itself purport to *create it*, does not require registration. The answer therefore depends on the distinction between a document which purports to *create a right*—vestitive fact—and a document which constitutes a mere record—an *evidentiary* fact. It is not always an easy one to apply.

54.88. *Contents of the memorandum*—If there is a written memorandum along with the deposit, the terms of the memorandum are conclusive evidence of the terms of the mortgage.[3] Such memorandum must indicate whether an equitable mortgage was intended by such deposit, and the extent of the security. The memorandum *creating* it must be registered in order to be admissible in evidence.[4]

When the deposit of the title deeds is independent *of the memorandum*, the deposit creates the mortgage, and the memorandum need not be registered,[5] because the parties did not *intend thereby* to create the charge[6].

This principle is true whether the creation of the mortgage and the preparation of the memorandum reciting the factum of the completed

1 A.I.R. 1961 Pat. 158.
2 A.I.R. 1970 S.C. 659.
3 A.I.R. 1916 P.C. 116; 31 M.L.J. 155 (P.C.).
4 A.I.R. 1932 Bom 401
5 A.I.R. 1923 Mad. 262.
6 A.I.R. 1950 S.C. 272; (1950) S.C.R. 548;
A.I.R. 1958 Punj. 218.
A.I.R. 1961 Punj. 81.
A.I.R. 1925 Cal. 972.

equitable mortgage with the list of the properties mortgaged are or are not simultaneous.[1]

Where the deposit of title deeds with the Bank was to create an equitable mortgage for the loan applied for by the appellant, and the oral and documentary evidence unmistakably prove that the title deeds are security for the loan obtained by the appellant, and could be *treated as the contract for the mortgage,* it is inadmissible in evidence.[2]

54.89. *Case law*—Transactions of this type were common in areas now outside India, and some of the judicial decisions arising in those areas also are instructive. In a Sind case[3], a memorandum executed by a debtor to a Bank stated : *"We confirm* having already deposited with you the title deeds of our following property in Karachi as per particulars given hereunder as security by way of mortgage for Rs. ..... advanced to us by way of overdraft and for which we have already handed you a demand promissory note and all interest thereon, and all costs and charges and sums that may be incurred or spent by you. We undertake .... to keep the mortgaged property insured....".

It was held that the document did not contain the bargain between the parties, but merely evidenced it, and therefore, did not require registration under section 17(1)(b) of the Registration Act or under the Transfer of Property Act.

54.90. *Position in England*—In England, a memorandum usually accompanies the deposit of title deeds by way of security, and the mortgagee will ordinarily be entitled to claim to have such a memorandum executed. Under section 58, however, no memorandum need accompany a deposit in order to create a mortgage, though such a memorandum is not prohibited. The reason is that the mortgage is created not by the writing, but by the deposit. When the debtor deposits with the creditor title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage. If the question arises whether, if such a memorandum is executed, it should be registered in order to create a valid mortgage, the answer depends upon the question : Did the document constitute the bargain between the parties, or was it merely the record of an already completed transaction ? In the former case, the memorandum itself constitutes the mortgage and must be registered. In the latter case, it need not be registered. For the purpose of considering the question whether the memorandum is to be taken as embodying the bargain between the mortgagor and the mortgagee, or as evidencing a transaction which had already been completed before the memorandum was executed or delivered, not only the terms of the document, but also the surrounding circumstances, must be looked into.

54.91. *Remedies*—Finally, there is the question of remedies. In England, a mortgage by deposit of title deeds carries with it the remedies incident to an English mortgage, such as foreclosure.[4] The equitable mortgagee has, prima facie, no right to the rents of the mortgaged property

1 A.I.R. 1961 Punj. 81.

2 A.I.R. 1971 S.C. 1613.

3 A.I.R. 1943 Sind 36.

4 A.I.R. 1939 Rang. 321, 323.
A.I.R. 1960 Mad. 529, 532.
Backhouse v. *Charlton,* (1878) 26 W.R. (Eng.) 504; 8 Ch. D. 444.
York Union Banking C. v. *Artley,* (1879) 27 W.R. (Eng.) 704; 11 Ch. D. 205.

until he has obtained an order of the Court.[1] Before the amendment of the Act in 1929, there was a difference of opinion as to the nature of the remedy available under this Act to an equitable mortgagee.[2] Section 96 of the Act inserted by the amending Act of 1929, now makes it perfectly clear that an equitable mortgagee has remedies similar to those of a simple mortgagee.[3] An equitable mortgagee has no right to possession. His only right is to obtain a decree for sale.[4]

A mortgagee by deposit of title deeds is not deprived of his right to recover the debt by his inability to produce either the deeds deposited or any memorandum of deposit, when the Court believes that there was a deposit and the deeds have been really lost.[5]

54.92. Where the mortgagor, besides making a deposit, also purports to confer a right of a different nature e.g. possession—the mortgage would become an anomalous mortgage. It would then be governed by section 58(g) and the other provisions of the Act applicable to anomalous mortgages.

54.92A. *Recommendation as to section* 58(*f*)—We have already indicated[6] the amendment needed in section 58(f). We now proceed to the next clause.

54.93. *Anomalous mortgage-section* 58(*e*)—The last category of mortgages to be dealt with is that described by the rather curious name of "anomalous mortgage". As defined in the Act, it means a mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage an English mortgage or a mortgage by deposit of title deeds within the meaning of the section. This definition is verbally unexceptionable. But certain aspects which are of practical importance may be usefully pointed out. In the first place, it is to be emphasised that a mortgage which is a combination of more than one type of the enumrated species *ipso facto* becomes an anomalous mortgage. For example, a usufructuary mortgage with a personal covenant for paying the money becomes, on a proper construction, a mortgage of the anomalous type,[7] Similarly, a combination of usufructuary mortgage and mortgage by conditional sale becomes an anomalous mortgage.[8]

Secondly, even where the mortgage is not technically of two types, yet an aberration from the definition of a particular species would make it an anomalous mortgage.[9]

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1 A.I.R. 1962 Mad. 59, 70.
A.I.R. 1960 Mad. 529, 532.
A.I.R. 1936 Rang. 290, 291.
Finck v. *Tranter*, (1905 1 K.B. 427, 439).

2 Report of the Select Committee, clause 47 (now clause 49) printed on pages 132. 135.

3 A.I.R. 1960 Mad. 529, 532.
A.I.R. 1936 Rang. 400, 401.

4 A.I.R. 1933 Mad. 570, 575.

5 *Baskett* v. *Skeel*, (1863) 11 W.R. (Eng.) 1019, 1020; 2 N.R. 547.

6 Para 54.70, *supra*.

7 (1968) 1 Mad. L.J. 139.

8 (1941) 73 Cal. L.J. 246, 248, cited in the Yearly Digest.

9 A.I.R. 1936 Pat. 211, 220 (Dhavale, J.).

Thirdly, the rights and liabilities of a mortgagor and mortgagee under an anomalous mortgage are primarily governed by the contract or local usage. In this sense, this type of mortgage is the most elastic of all the types enumerated in the section.[1] For example, if the right of foreclosure is given to the anomalous mortgagee by the contract, then he has, at any time after the mortgage money has become due to him and before a decree has been made for the redemption of the mortgaged property or before the mortgage money has been paid or deposited under the Act,[2] a right to obtain from the court a decree of foreclosure. There are, in fact, instances where the mortgagee in an anomalous mortgage is given both the right of foreclosure and right to sale.[3] Of course, under the procedural law,[4] the court has a discretion in such a case to pass a decree for sale instead of a decree for foreclosure.[5]

54.94. *No limit*—Reverting to the type of transactions which could fall within the category of anomalous mortgages, one can state that theoretically there is no limit to their number and variety. Such mortgages may take as many forms as the parties may agree to enter into. A mortgage giving the right to possession may contain also a covenant to pay the principal and interest[6] or a stipulation that the mortgagee should appropriate the rents and profits but only for a specified term of years and then the land be returned[7] or a provision for adjustment of the rents and profits towards interest and the principal with a covenant to the effect that the deficiency shall be paid by the mortgagor.

Then, there may be cases the mortgage, though framed as a simple mortgage with the amount repayable in a specified time, gives the mortgagee a power to foreclose if any other creditor brought a suit against the mortgagor, or attempted to attach the property.

The most common instance of anomalous mortgages is furnished by a combination of a simple mortgage and usufructuary mortgage. This was (before the amendment of 1929) described as a "simple mortgage usufructuary", but it now clearly falls within the definition of anomalous mortgage. As we have pointed out in the introductory discussion,[8] many of the local mortgages fall within this definition, since they cannot be accommodated within the strict language of section 58, clauses (b) to (f). Many of them are combinations of usufructuary mortgages and leases,[9] or of a right to possession with a personal covenant.[10]

54.95. *Mortgages of movables*—Before we take leave of section 58, we would like to deal briefly with one matter which does not fall within the section, but which is analogous to it. A mortgage of movable property

1 Section 98.
2 Section 67, first paragraph.
3 A.I.R. 1940 Nag. 156, 157.
4 Order 34, Rule 4(3), C.P.C.
5 A.I.R. 1935 All. 778, 785.
6 A.I.R. 1947 Lah. 46, 47.
7 (1902) I.L.R. 26 Bom. 252, 258.
8 See general discussion as to Section 58.
9 A.I.R. 1926 Mad. 650, 651 (Nanos for 12 years).
10 A.I.R. 1955 Travancore 207, (Otti Mortgages in Travancore Cochin).

is outside the section, but it seems now to be fairly well settled that such a mortgage can be made. Three propositions seem to be worth discussion :

(i) A mortgage of movables can be lawfully made.

(ii) Possession need not be delivered. This distinguishes it from a pledge, in which possession must be delivered.

(iii) Some title passes though possession is not delivered. On the first two propositions, the law seems to be fairly clear. On the third, the position may require some discussion.

54.96. *Mortgage of movables—validity*—Though neither the Transfer of Property Act nor the Indian Contract Act[1] makes any provision for the mortgage of movables, as distinguished from *pledge* in which possession of subject of security is transferred as a part of the transaction, yet mortgages of movables have been recognised from very early times in India. Such transactions are still valid even though they may be unaccompanied by possession.[2]

A Punjab case[3] on the subject is instructive. The plaintiff Bank sued to enforce a claim on an unregistered deed of mortgage of the machines, types, plants, printing presses, printing materials, apparatus, and also the goodwill, furniture, fixtures, fittings and appurtenances, and, belonging to a press. The Defendant-Appellant relied on a previous oral charge or hypothecation of these properties, made in her favour to secure advances made by her. It was held that in the Punjab, a charge of this kind in respect of movable property could be made without any deed in writing and if made orally it was as effectual (except in cases provided for by section 48 of the Indian Registration Act) as if it were effected by an instrument in writing.

It was held consequently, that the defendant's oral charge being prior in time must prevail over the rights of the plaintiff Bank under its written deed and that the question of notice did not arise.

54.97. *Possession not necessary*—The delivery of possession is not necessary to constitute a mortgage of movable property. There is case law on the point that a hypothecation of movable property, though not accompanied with delivery of possession, is valid and recognised in one Madras case[4], the owner of a coffee estate, in consideration of an advance of Rs. 1,000/- on the crop of coffee then growing on the estate made upon trust to sell the same and apply the proceeds to the satisfaction of the sum advanced and interest created a mortgage. It was agreed that the crop should be allowed to remain in possession of the planter, who was to cultivate, gather and prepare the crop and deliver it to the Bank.

It was held by the court that the instrument created not a mere hypothecation or pledge of the property, but an assignment of the property by way of mortgage.

54.98. In another case[5] in consideration of an advance of Rs. 1,450/- on interest, repayable on demand, certain boat-owners assigned to Strong

1 Gour, Law of Transfer (8th Ed.), page 2344.

2 (a) *Damodar* v. *Atma Ram*, 8 Bom. L.R. 344;
(b) *Shrish Chandra* v. *Nimori*, 9 C.W.N. 14;
(c) *Mobini Mohan Saha* v. *Bengal Steam Laundry Co.* 50 C.W.N. 258.

3 *Mrs. Stewart* v. *Bank of Upper India Ltd.*, (1916) Punjab Record No. 32.

4 L.R. 8 Madras 104.

5 *Kashway* v. *Strong Steel & Co.*, (1895) I.L.R. 21 Cal. 241.

Steel & Co., their paddy boats, the boat owners retaining, working and being responsible for the safety of the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to Strong Steel and Co., and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S & Co. On failure to make repayment on demand S & Co., were empowered to take possession of and to sell the boats. It was held by the High Court that the document was a mortgage, and not a pledge.

In another Madras case,[1] the mortgage deed gave security to the mortgagee not only over the immovable property (lands comprisd therein, but also over the produce realised therefrom every year. It stated :—

> "The produce realised therefrom every year have been hypothecated to you."

The High Court held that the mortgage deed will operate in respect of the produce on the land as a mortgage of movable property. It will be a valid mortgage of movable property. The moment the crops come into existence, the mortgagee gets title to the crop.

54.99. *Defect in title*—Though the delivery of possession is not necessary to constitute a mortgage of movable property, the transfer is not complete without delivery of possession in certain circumstances. In one Calcutta case,[2] the mortgagors—Weston and Summers—executed the following deed :—

> "As collateral security for the advance of Rs. 30,000 (Rupees Thirty thousand only), which you have made on our demand, promissory note and for any future advances which you may make to us, we hereby give you a lien over our stock-in-trade, outstandings, fittings, etc., in connection with our business, which is carried on in Calcutta, Simla and Rangoon, and we further undertake, whenever called by you to do so, to execute any assignment of our business to you with such conditions as you may require. Our business is free from all liens and encumbrances, save and except this, that we are now making and we undertake to keep it so."

This deed was executed in favour of Delhi and London Bank Ltd., Calcutta.

The firm of Weston and Summers became insolvent. The Bank, at no time, got *possession of the business* or stock-in-trade of the insolvent. These were taken over by the official Assignee, when the insolvent filed his petition for relief in the Court, the High Court held that the agreement or undertaking with the Bank could not be enforced in equity, and for its breach there could be no remedy at law. The Bank was entitled to preferential payment of so much of the fund as can be shown to represent the assets of the insolvent's business, which were in *existence* at the date of the letter of hypothecation. As regards the *balance of the debt*, the Bank must rank only as a general creditor of the estate.

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1 *Venkatacharan Chatti* v. *Venkata Rani Reddi*, A.I.R. 1940 Mad. 929.

2 *In the matter of Ambrose Summers, an insolvent*, (1896) I.L.R. 23 Cal. 592.

CHAPTER 55

MODE OF CREATING MORTGAGES

SECTION 59

55.1. *Section* 59—The mode of creating a mortgage—the formal aspect—is dealt with by section 59. The first paragraph deals with cases where the principal money secured is one hundred rupees or upwards. In such a case, the mortgage, other than mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

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

55.2. *History*—Before 1929, section 59 ran as follows :—

> "Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.
>
> "Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a rgistred instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.
>
> "*Nothing in this section* shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein, Akyab and in any other town which the Governor-General in Council may by notification in the Gazette of India, specify in this behalf, by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon."

The last paragraph of the section has now been transferred to section 58(f), and the words "other than a mortgage by deposit of the title deeds" inserted in the first paragraph as a consequential amendment. But, as will be indicated later, no consequential amendment has been made in the second paragraph of section 59.

55.3. Before the passing of this Act, no written conveyance was necessary by the law of India for creating a mortgage.[1] An oral mortgage could be validly made without writing, by simple delivery of possession.[2] Where, however, a mortgage securing a sum of more than one hundred rupees was created by a written instrument, it was required to be registered under the provisions of the Registration Act.[3] Under section 59—

(1) A simple mortgage can be made only by a registered instrument.

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1 *Mahomed Musa* v. *Aghore Kumar*, A.I.R. 1914 P.C. 27, 28.

2 *Ahmad Raza* v. *Syed Abid Hussain*, A.I.R. 1916 P.C. 41, 43.

3 Section 17(1)(b), Registration Act.

(2) A mortgage, other than an equitable mortgage, can be made only by a registered instrument, if the principal money secured by it is one hundred rupees or upwards.

(3) A mortgage, other than a simple mortgage or an equitable mortgage, can be made either by a registered instrument or by delivery of possession if the principal money secured by it is less than one hundred rupees.

55.4. *Scope*—The section has a wide scope. It applies to all mortgages, including anomalous mortgages.

A combination of a simple mortgage and a usufructuary mortgage, often referred to as a "simple mortgage usufructuary" was not classed under the Act, as it stood before 1929, as an anomalous mortgage. The characteristic of this mortgage is that the property is collaterally pledged (as in the case of a simple mortgage), with a covenant to pay, and the mortgage is given the usufruct of it by allowing him to take the rents and profits.

Where, under an instrument purporting to be a mortgage, possession was transferred and there was a stipulation to pay the money at a particular time, failing which the property was to be regarded as sold to the mortgagee, it was held, before 1929, that it was a simple mortgage usufructuary, and not a mortgage by conditional sale.[1] It would now be an anomalous mortgage. Where a mortgage provided that if the mortgagee took possession, he would be entitled to receive the rents and profits in lieu of interest, but that, if during the period of possession the profits do not cover the amount of interest at a certain rate, the mortgagor will make good the deficiency, it was held by the Privy Council that this was a combination of a simple and usufructuary mortgage.[2] A stipulation in a document ran as follows :—

> "If according to the terms of the deed the interest of each year be not paid on the due date, these terms will not prevent you (mortgagee) from recovering the amount then and there if you should so desire without waiting for the due date."

The agreement provided that if interest is not paid on due date, mortgagee could enter upon the property and pay himself the interest and also portion of the principal if the income is available for that purpose also.

It was held that the mortgage was primarily a simple mortgage, though in certain events, it might be converted into a usufructuary mortgage.[3]

In all these cases, the formalities must be complied with.

55.5. *Section 59—Recommendation as to second paragraph.*—In regard to the first paragraph of section 59, it may be mentioned that an exception for mortgage by deposit of title deeds is necessary, because in such a case there is neither registration of the instrument,—usually, there is no instrument—nor delivery of the property. Insisting on an instrument being registered would defeat the very object of recognising this category of mortgages, hence the need for an express exception.

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1 *Venkiah* v. *Donga Pal'ayi*, A.I.R. 1921 Mad. 12, 16 (F.B.).
2 *Jawahir Singh* v. *Someshwar*, (1906) I.L.R. 28 All. 225, 231 (P.C.).
3 *Rama Chandra* v. *Maharaja of Jeypore*, *A.I.R.* 1917 Mad. 198, 199.

It is curious that in the second paragraph of the section, there is no exception for a mortgage by deposit of title deeds. The available material does not disclose any reason for not making an exception. There is already an exception even in the second paragraph for a simple mortgage, obviously because, in a simple mortgage as defined in section 58(b), there is no delivery of the property. If there is a delivery of the property, then it would no longer remain a simple mortgage, and would become an anomalous mortgage. We are of the view that in the second paragraph also, there ought to be an exception for a mortgage by deposit of title deeds, and we recommend that such an exception should be inserted.

56.6. *Section* 59—*Recommendation as to signature.*—As to the expression "signed" which is followed by the words "by the mortgagor" in the first paragraph, we should mention that it is not the intention of the legislature that the signature must be by the mortgagor himself. Signature by an agent properly authorised would suffice, according to judicial construction.[1-3] Whilst this is a fairly sensible construction of the section, we think that it is desirable that the point should be expressly provided for in the language of the section. In this connection, we may draw attention to the language of the corresponding section[4] regarding gift. In the first paragraph of section 123, it is provided that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument "signed by or on behalf of the donor". Of course, the absence of these words in section 59 fortunately does not make any difference according to the judicial construction. However, it is to be noted that this position was not arrived at without some controversy. For example, in the Allahabad High Court for some time, the contrary view prevailed.[5] To prevent the controversy from arising again, and in any case, to make the section more self-contained than at present, we recommend that in section 59, first paragraph, after the words "signed by", the words "or on behalf of" should be inserted.

Of course, it is not necessary in this context to elaborate the meaning of "signature". "Signature" includes a mark,[6] and signature is not confined to signature by pen and ink; it can be in any other convenient mode—for example, use of a facsimile.[7]

55.7. *Attestation.*—Under the section, in the case of a registered instrument,[8] attestation by at least two witnesses is compulsory. A document which is not duly attested as required by law is of no effect, and this is so even if the execution is admitted. Hence a mortgage deed which is not properly attested is invalid as a mortgage deed, though it may be admissible in evidence as a simple money bond.[9] It is to be noted, however, that its use as a simple bond is permissible only where there is a personal liability.[10] Although a loan *prima facie* involves a personal liability to pay, this is not so

1 *Deonarain* v. *Kukarbind,* I.L.R. 24 All. 319 (F.B.).
2 *Shashi Bhushan* v. *Chandra Pashkar,* I.L.R. 33 Cal. 861.
3 *Sristidhar* v. *Raksha Kely,* I.L.R. 49 Cal. 438.
4 Section 123.
5 *Motia Begum* v. *Vorawar,* (1889) Allahabad Weekly Notes 196.
6 Compare section 3(52), General Clauses Act, 1897.
7 *Chandra* v. *Saratmani,* (1899) I.L.R. 25 Cal. 911.
8 *Mt. Hira Bibi* v. *Ram Hari Lal,* A.I.R. 1925 P.C. 203. 204.
9 *Dhana Mohammad* v. *Nastulla,* A.I.R. 1926 Cal. 637.
10 *Ram Narayan* v. *Adhindra,* A.I.R. 1916 P.C. 169.

in the case of every secured loan—and certainly not in the case of every mortgage. This consequence, arising from the invalidity of the mortgage by reason of want of due attestation, or for the matter of that, by reason of non-compliance with other statute, is not merely one operating on the mortgagee. In certain circumstances, it may operate on the mortgagor also. For example, if the mortgage deed is not attested, a mortgagor cannot be granted a decree of redemption on the basis of that deed, and his only remedy to sue on his title, that is to say, disregarding the mortgage.

55.8. *Proof of execution.*—Execution of the document must be proved. Thus, it must be proved that the document was attested by two witnesses, and that the mortgagor signed the document. In *Namberumal Chettiar* v. *Raghavachariar*[1] Abdur Rahim, J., observed as follows :—

> "A mortgae bond, in order to be valid, must be executed in the presence of two attesting witnesses. Section 68 of the Evidence Act further requires that one at least of the attesting witnesses to a mortgage bond should be called, if there is any alive. But that does not in any way affect the requirements of section 59 of the Transfer of Property Act, Section 68 of the Evidence Act lays down that in order to prove a mortgage bond, one of the attestators must be called. It would be competent for that attestator or for any other witness to prove that the execution was in the presence of two attestators and it is not necessary to call two attestators. There may be cases where all the attesting witnesses are dead, when the requirements of the law would be satisfied by any evidence "which would shown that the document was executed in the presence of two attesting witnesses."

And Seshagiri Aiyar, J., in the same case, observed :

> "Under section 68, it is necessary that a particular class of witness should be called in order to prove a document which is required by law to be attested. Therefore this provision does not do away with the necessity of showing that the document is valid. A document may be proved as required by section 68 and put on record. Nonetheless, in order that a decree may be founded on it, it must be shown to be valid; and for this purpose we must go to section 59 of the Transfer of Property Act. That section lays down that unless a mortgage is attested by two witnesses, there cannot be a proper mortgage. Mere proof by a single witness that it has been executed, cannot enable a party to get a decree on the mortgage, unless it is also shown that at its execution, the document is attested by two witnesses."

55.9. *Invalidity.*—The section lays down the manner in which a mortgage can be validly made. And it is a general principle that where a statute requires a transfer to be made in a particular manner, it can be made only in the way so prescribed by the statute, or by a decree of a competent Court. The section requires that where the principal amount secured is one hundred rupees or upwards, a mortgage other than an equitable mortgage can be made only by a registered instrument. An unregistered document of mortgage, in such a case, does not affect the property dealt with by it. Where such bond is executed in consideration of previous bonds, the previous bonds do not get merged in the unregistered bond, and the promisee does not lose his

1 *Namberumal Chettiar* v. *Raghavachariar*, A.I.R. 1921 Mad. 701, 702, 703 (D.B.).

right to proceed to enforce such previous bonds. An oral mortgage, in a case where the sum secured is one hundred rupees or upwards, is also invalid and conveys no interest.

55.10. *Consequence.*—Where the mortgagor is not permitted to establish the relationship by reason of an invalid deed, one consequence may be that the mortgagee acquires the status of a mortgagee by the doctrine of prescription—if his possession has been *qua* mortgagee.

Incidentally, the above discussion shows the utility of a personal covenant, wherever such a covenant can be spelt out.

In *Shamu Patter's case*[1], the Privy Council held—

> "Section 59 of the Transfer of Property Act requiring that in a certain class of cases a mortgage 'can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses,' could only mean that the witnesses were to *attest the fact of execution.* Any other construction in their Lordships' opinion would remove *the safeguards* which the law clearly intended to impose against the perpetration of frauds."

55.11. *Party as attesting witness.*—It has been held[2] that a party cannot be an attesting witness with reference to section 5. The principle seems to be that the attestation of a person to a document is to ensure that there is no fraud or other vitiating circumstance in the execution of the document

55.12. *Amount.*—Attention must now be devoted to two questions of substance, namely, how far the requirement of attestation is now called for, and whether the amount of one hundred rupees should be changed. As to the first question, the principal object of attestation seems to be to ensure that a person does not hastily enter into a transaction whereby he incurs pecuniary liability with an incumbrance on his immovable property. It appears to us that in the case of mortgages of *small amounts,* this requirement can be safely dispensed with. A person incurring a debt for a small amount if he chooses to mortgage his immovable property for this purpose, does not require this extra protection. For this reason alone, we would recommend the substitution of one thousand rupees in place of one hundred rupees in section 59. in both the paragraphs.

55.13. *Other laws giving protection.*—In this connection, it is proper to point out that subsequent to the passing of the transfer of Property Act in 1882, numerous legislative measures have taken their place on the statute book which protect debtors against the consequences of their own imprudence or of the tendency of others to exploit them. For example, some protection against unconscionable bargains is provided in the Usurious Loans Act, 1918. Money-lenders are regulated by State legislation in most States. Then, there is comprehensive legislation for the relief of agricultural indebtedness. Having regard to all these post-1882 developments, a mild relaxation of the requirement of attestation appears to be desirable.

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1 *Shamu Patter* v. *Abdul Kadir,* (1912) I.L.R. 35 Mad. 607.

2 *Gomethi Amal* v. *Krishna Iver,* A.I.R. 1954 Mad. 126. 127, paragraph 6, relying on the Privy Council decision in *Shamu Patter* v. *Abdul Kadir,* (1912) I.L.R. 35 Mad. 607.

55.14. *Purchasing power.*—Apart from this consideration, there is a purely financial aspect, namely, the purchasing power of the rupee has declined in the last century or so during which the Transfer of Property Act has been in operation. Without going into the details of the matter by quoting the price index and the like, it would be reaonable to state that the purchasing power has certainly declined to the extent that what was hundred rupees in 1882 would correspond now roughly to eight hundred rupees, if not more. For this reason also, we would recommend substitution of one thousand rupees in place of one hundred rupees in both the paragraphs of section 59.

55.15. *Redraft.*—On the above reasoning, we recommend a redrafting of section 59 as follows :—

> "59. (1) Where the principal money secured is *one thousand rupees* or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument "signed by *or on behalf of the mortgagor* and attested by at least two witnesses.
>
> (2) Where the principal money secured is less than one thousand rupees, a mortagage *other than a mortgage by deposit of title deeds* may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

CHAPTER 56

PERSONS DERIVING TITLE FROM MORTGAGORS AND MORTGAGEES

SECTION 59A

56.1. *Section 59A—Definition of "mortgagor" and "mortgagee".*—The expressions "mortgagor" and "mortgagee", occurring so frequently in the provisions relating to mortgages, are not confined to the person who created the mortgage or the person in whose favour it was created. Since the mortgagor's interest as well as the mortgagee's interest is transferable,[1] the rights conferred and liabilities imposed by the Act on each would attach to the transferee also. Incorporating this principle, section 59A provides as follows :—

> "59A. Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively."

This section was inserted in 1929, but the position was substantially the same according to judicial decisions pronounced before that year.

56.2. *Right of second mortgagee.*—The only question of detail to be considered in connection with this section is whether a mortgagee from a mortgagee falls within the section. It has been held by the High Court of Allahabad[2] that the section draws a distinction between two categories of mortgagors and mortgagees, and that the intention of the section is that persons who derive title from them are to be persons who derive title *as* a *mortgagor or* as a mortgagee. In other words, the word "mortgagor" would not, according to this view, include a subsequent mortgagee from the mortgagor, but would include only persons *succeeding* (by inheritance or by will or by sale or by auction-sale).

A similar view has been taken also by the Calcutta and the Madras High Courts. The Calcutta case[3] holds that a puisne mortgagee is not included in the term "mortgagor" in section 72, proviso. The Madras case[4] holds that the term "mortgagor" in section 69 does not include a second mortgagee, so that the first mortgagee, when exercising a power of extra-judicial sale, need not notify the second mortgagee.

In a case arising before the section was added, it was held by the High Court of Madras,[5] that the word "mortgagee" in section 60 (right of redemption) would include his sub-mortgagee. In another case,[6] it was held that the word "mortgagee" in section 83 includes his sub-mortgagee.

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1 Section 6.

2 *Piarey Lal* v. *Dina Nath,* A.I.R. 1939 All. 190, 192.
3 *Midnapore Zamindari Co.* v. *Saradindu,* A.I.R. 1948 Cal. 250, 255.
4 *D. Guruswami,* A.I.R. 1965 Mad. 142, 143.

5 A.I.R. 1927 Mad. 703, 704.
6 A.I.R. 1924 Mad. 453, 454, 455.

In 1965 the Madras High Court held[1] that the term "mortgagor" in section 69 (Power of sale), does not cover a second mortgagee.

56.3. *Case law as to foreclosure against second mortgagee.*—In a Madras case,[2] it was held that the sub mortagee is entitled to a decree for the sale of the original mortgagor's interest, in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. The Court quoted "Seton on Decrees", "Deniels' Chancery Practice", an American writer, Washburn, on "Real property", also Salkowski's work on "Roman Private Law", and Mackeldey's "Roman Law". Difiering with this view the Rangoon High Court observed[3]—"I do not suppose that one of these learned authors had even read the Indian Transfer of Property Act, and I personally have not be least idea what the American law of mortgages may be."

The Rangoon view is that the word "mortgagee" would not include a mortgagee from the mortgagee (i.e., a sub-mortgagee), and that he cannot sue for foreclosure of the original mortgage.

This is contrary to the Madras view, taken not only in the earlier case referred to above, but also in a case reported in 1954. The Madras High Court has held[4] that a "mortgagee" for the purpose of redemption or foreclosure would include all persons who derive title from him, and it is immaterial whether that title is derived by a sale *in invitum* or by private treaty or whether it is by an act of parties or by operation of law. It held that *a sub-mortgagee* can file a suit for foreclosing the principal mortgage.

56.4. *No change.*—On the specific question whether a sub-mortgagee can foreclose the mortgagor, we are of the view that the wider view—i.e., the Madras view[5]—is correct. That seems to be the view intended by the Legislature, and is more likely than the narrower view to advance the general intendment of the scheme of the Act. However, since, in other sections a different view may be intended, it is not possible to recommend any categorical provision amplifying the definition in section 59A in relation to sub-mortgagees.

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1 A.I.R. 1965 Mad. 142. 143.
2 *Muthu Vijia* v. *Venkatachallam Chetti,* (1897) I.L.R. 20 Mad. 35.
3 A.I.R. 1937 Rang. 56, 58.
4 *Karuppan* v. *Devasigamania,* A.I.R. 1954 Mad. 650, 656 (Rajamannar, C.J. & Venkata Ram Ayyar, J.).
5. Para 56.3, *supra.*

CHAPTER 57

REDEMPTION

SECTION 60

57.1. *Introductory*—English law has certain analogies with classical Roman law in that they are both "action-oriented" systems, in the sense that lawyers in both systems think in terms of remedies rather than of rights. While this preoccupation with remedies seems to have led to a relative lack of interest in the theory of legal procedure,—which is otherwise in the civil law systems of the continent,—it has its compensations. Civil procedure, sometimes, is seen as offering a screen on which great legal themes are projected with dramatic sharpness and clarity. So it is in the case of a suit for redemption and the pleas and defences raised in such a suit.

The right which has been often described as the most important right in the light of mortgages is the right of the mortgagor to redeem. Although, sometimes it is described as the "equity of redemption", that expression is not strictly accurate, even when one is speaking of the pre-1925 position in England, for reasons which will be indicated later. However, the substance of the matter is that section 60 describes the right of redemption, delimits its operation, gives it a name, contains a saving regarding the requirement of reasonable notice, and finally deals with redemption of a portion of a mortgaged property, when the person seeking redemption is interested in a share in the property.

57.2. *Right to redeem.*—It is in the first paragraph of section 60 that the right to redeem is dealt with. Curiously, the name to be given to this right is postponed until the third paragraph, and the section begins with a description of the contents of the right. The time element is important—"at any time after the principal money has become due". The right, in its content, is divided into three branches, which are given in clause (a), (b), and (c) of the section in the first paragraph. But it is conditional on payment or tender at a proper time and place of the mortgage money. It may be recalled that "mortgage money" is defined in section 58.

The three branches of the right relate to—(i) delivery of the mortgage deed and documents of title, (ii) delivery back of possession and (iii) re-transfer of the mortgaged property to the mortgagor. The most important element is not enacted in positive terms, but negatively, namely, that *a contract made* at the time of the mortgage cannot effect or abrogate or substantially reduce this right. This position flows indirectly from the fact that there are no words such as "in the absence of a contract to the contrary". It is the absence of these words which facilitates the application of the legal doctrine that a clog cannot be imposed on redemption, or the legal maxim—"once a mortgage, always a mortgage".

57.3. *History–In Kreglier* v. *New Patagonis Meat & Cold Storage Co. Ltd.*,[1] Lord Haldane, L.C., stated the history of the subject as follows :—

1 *Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd.*, (1914) 83 L.J. Ch. 79, 84; 109 L.T. 802.

"The reason for which a Court of Equity will set aside the legal title of a mortgagee and compel him to re-convey the land on being paid principal, interest and costs, is a very old one. It appears to owe its origin to the influence of the Church in the Courts of the early Chancellors. As early as the Council of the Lateran in 1178, we find, according to Mathew Parie (Historia Major at pages 114-115), that famous assembly of ecclesiastics condemning usurers and laying down that when a creditor had been paid his debt, he should restore his pledge. It was, therefore, not surprising that the Court of Chancery should, at an early date, have begun to exercise jurisdiction 'in personam' over mortgages. This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the Common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money which he had advanced to the feoffor was repaid on a date and at a place named, the fee-simple should revest in the latter, but that if the condition was *not strictly and literally fulfilled,* he should lose the land for ever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor, notwithstanding that he had actually forfeited the land to his mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty, by compelling the creditor to use his legal title as a mere security."

The equity of redemption, given by Courts of Equity, was however, regarded as an estate in land which could be devised, granted, etc., and of which there may be seisin.

The English doctrine of the equity of redemption was unknown to the ancient law of India. As was observed by their Lordships of the Privy Council in *Pattabhiramier* v. *Vencatarow Naicken.*[1]

"What is known in the law of England as 'the equity of redemption' depends on the doctrine established by Courts of Equity that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India."

57.4. *Equity of redemption and equitable right to redeem*—There is, in England, as stated above, a distinction between the "equity of redemption" and the "equitable right to redeem". The equitable right to redeem is lesser than what is included in the equity of redemption. The equity of redemption includes *all the interest of the mortgagor* that survives in him, after the mortgage. The equitable right to redeem, on the other hand, is confined to the actual right to redeem. This distinction is not often observed in practice, but is supported by leading writers, such as Fisher.[2]

57.5. *Postponement*—The equity of redemption arises as soon as the mortgage is made, while the equitable right to redemption arises only after the contractual right of redemption has come to an end.

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1 *Pattabhiramier* v. *Vencatarow Naicken,* (1871) 13 M.I.A. 560, 571.

2 Fisher and Lightwood, Law of Mortgage (1969), page 78.

The right of redemption cannot be altogether done away with upon the *original contract.* It may still be lawfully postponed in circumstances to be presently mentioned. The mere length of time is, of course, not conclusive, although it may be an important consideration. So long as the essential requirement of a mortgage is observed and the terms imposed are not oppressive and unconscionable, the court will not interfere.[1]

If the interest of the mortgagor is for short term itself, postponement of redemption for a long period is objectionable. For example, in a case often cited, decided by the Privy Council,[2] a term of 17½ years was mortgaged, but the redemption was postponed until the last 6 weeks of the term. Such postponement was regarded as rendering the right of redemption illusory and therefore not binding. Of course, if the transaction is not one of mortgage but of a different nature—for example, partnership —these principles have no relevance. In this connection, it is worth noting that even a collateral agreement might be regarded as objectionable. Thus, the doctrine of restraint of trade applies to mortgases,[3] so that a term imposing on the mortgagee a restraint, unreasonable in the circumstances may not be recognised.

Postponement of redemption for an uncertain period would certainly be void.

In applying these principles, regard will, of course, have to be given to the relation of the parties. "The directors of a trading company in search "of financial assistance are certainly in a very different position from that of a land owner in the hands of a crafty money-lender" as Lord McNaughten observed.[4] So much, however, is the anxiety of the law to protect the right to redemption that in one English case,[5] a mortgagor was allowed to redeem even though he had solemnly sworn on the Bible never to exercise the right.

57.6. *Movables—Redemption*—So much is the importance attached to redemption that it has been held that even a mortgagor of movable property is entitled to sue for redemption.[6] Before the Privy Council,[7] the question was raised, but not decided, whether, in the case of mortgage of movables by Hindus and Muhammadans, the right of redemption was lost after default by the mortgagor.

57.7. The equitable right to redeem being a creature of equity, is protected by equity, for otherwise the mortgagee, who can often bring pressure to bear on a prospective mortgagor by threatening to hold to the strict terms of the loan, might be able to defeat the whole purpose of the mortgage. The purpose of mortgage is to provide security and nothing more;[8] this purpose will be defeated by excess if any other right in the mortgage is recognised that might substantially defeat redemption. It has been observed that redemption is of the very nature and essence of mortgage, as

1 *Knightsbright Estates Trust Ltd.* v. *Brvne,* (1938) 4 All. E.R. 618 (Court of Appeal).
2 *Fairclough* v. *Swan Brewery Co. Ltd.,* (1902) A.C. 562 (P.C.).
3 *Esso Petroleum Co. Ltd.,* (1967) 1 All. E.R. 699.
4 *Samuel* v. *Jarrhl Timber & Wood Paving Corp. Ltd.* (1904) A.C. 323, 327.
5 *Sitsted's case cited in East India Co.* v. *Atkyns,* 1 Comyns 348; Ghose, Law of Mortgage in India (1902), page 269, footnote 4.
6 *Jagannath* v. *Fatthchand,* A.I.R. 1949 Nag. 368, 369.
7 *Baijnath* v. *Vally Mahomed,* A.I.R. 1925 P.C. 75, 79.
8 Megarry and Wade, Real Property (1966), page 931.

mortgages are regarded in equity.[1] It is for this reason that provisions making the mortgage irredeemable, or unduly confining the right of redemption either in respect of the persons who can redeem or in respect of the period during which redemption may be permissible or as to the extent of the mortgaged property that may be redeemed, were not favoured in equity. This is pithily expressed by the proposition that there must be no clog or fetter on redemption. This means not only that the mortgagor cannot be prevented from eventually redeeming his property— this would be a self-evident proposition—but also that he cannot be prevented from redeeming it free from all the conditions of the mortgage.[2]

Lord Henley, Lord Chancellor, observed in *Vernon* v. *Betchell,*[3]—

> "For, necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty men impose upon them."

Broadly speaking, clogs or fetters on redemption fall into major classes, namely, either the mortgage is practically rendered irredeemable, or redemption is made subject to onerous conditions. Under the first class, the principal sub-classes are—

(a) total bar against redemption, or unduly confining the right to redemption in regard to persons or property;

(b) exclusion of redemption by giving an absolute right to the mortgagee—for example, an option to purchase a mortgaged property, incorporated in the original mortgage;

(c) postponement of redemption until some future period which is oppressive and unconscionable, or makes redemption illusory.

In the second class, the principal instances are those furnished by collethal advantages.

57.8. *Gujarat case*—How wide and beneficial is the jurisdiction of the court to determine whether a particular stipulation is or is not a clog on redemption, and how appropriate it is to Indian conditions as it is in England, is illustrated by a recent Gujarat case.[4]

In 1909, a childless widow mortgaged a building site measuring 24 square yards situate in a taluka town to the owner of an adjacent property for a period of *199 years* to secure a debt of Rs. 61. One of the terms of the mortgage was that the mortgagee could make any type of construction or raise any superstructure on the mortgaged property and that if he did so, the property was to be redeemed on payment of the price of such superstructure in addition to the mortgage money. In 1965, the mortgagor's successor-in-title filed a suit for redemption for alleging that the postponement of redemption for 199 years constituted a clog on the equity of redemption and that, therefore, he was entitled to redeem the mortgage forthwith on tender of the mortgage money. The trial court dismissed the suit, holding that it was premature. On appeal, the District Court reversed the decision on the ground that in the facts and circumstances of the case

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1 *Nokes and Company Ltd.* v. *Rise,* (1902) A.C. 24, 30 (Lord McNaughten).
2 Megarry and Wade, Real Property (1966), page 931, paragraph 2.
3 *Vernon* v. *Betchell,* (1762) 2 Ed. 110, 113 (Lord Henley, L.C.).
4 *Maganlal Chhotalal Chhatrapati* v. *Bhalchandra Chhaganlal Shah,* (1974) 15 G.L.R. 193, cited in the Yearly Digest.

the postponement of redemption for such a long period constituted a clog on the equity of redemption. On appeal to the High Court, it was held (affirming the decision of the District Court) that :

(1) The doctrine of clog on the equity of redemption means that no contract between a mortgagor and mortgagee made at the time of the mortgage and as a part of the mortgage transaction or, in other words, as a part of the loan, would be valid, if in substance and effect, it prevents the mortgagor from getting back his property on payment of what is due on his security. Any bargain which has that effect is invalid and inconsistent with the transaction being a mortgage, and has no binding force.

(2) The Court's jurisdiction to relieve a mortgagor from his bargain on the ground that any condition which is a part of the transaction of mortgage constitutes a clog on the equity of redemption depends on whether the condition was imposed by taking advantage of any difficulty or embarrassment that the mortgagor might have been in, when he or she borrowed the money on the mortgage. If the Court, on an examination of the circumstances of the case, comes to the conclusion that the disputed covenant is so unduly harsh and unconscionable that for all practical purposes it nullifies the right of redemption or restricts the exercise of the right in such an unreasonable manner as to practically deny it, the Court will relieve the mortgagor of his bargain.

(3) A long term for redemption is not necessarily, or in every case, a clog on the equity of redemption. But a long term for redemption may, on a consideration of all the circumstances attendant on the execution of the mortgage deed, amount to such a clog. It would be necessary in this context to consider, besides others, the circumstances as to what was the amount advanced under the mortgage, the nature of the security offered by the mortgagor, the circumstances in which the mortgagor was compelled to secure the amount, the terms and conditions on which the amount, was, in fact, advanced and the other alternatives to which the mortgagor could have taken recourse for obtaining the sum advanced.

(4) Having regard, *inter alia*, to the fact : (i) that the mortgagor in the instant case was childless widow who mortgaged the property in question for 199 years to secure a debt of Rs. 61, although it was not necessary or customary to submit to such a long term; (ii) that the mortgagee who was the owner of the adjacent property thereby obtained a collateral advantage of beneficial enjoyment of his own property for a considerable period of time to the detriment of the mortgagor and (iii) that the mortgagee was entitled to raise any construction or superstructure on the mortgaged property and the mortgagor was liable to pay the price of the said construction or superstructure at the time of redemption, the bargain between the mortgagor and the mortgagee was unconscionable and the long term of the mortgage constituted a clog on the right of redemption.

57.9. *Act of parties*—The right of redemption can be extinguished by the act of parties. The "act of parties" must mean acts to which both the mortgagor and the mortgagee are parties.[1] Assertion of adverse title by the mortgagee during continuance of mortgage does not extinguish the right to redeem. Deposit by the mortgagor of the mortgage-money under section 83 does not also extinguish the mortgage, where the *mortgagee does not* accept the deposit.[2] Agan, the act of parties extinguishing the right to redeem must be one which is *independent* of the mortgage transaction and not part and parcel of it.[3] Otherwise, it will be a clog on redemption and consequently void. Thus, a condition in the mortgage deed that, on default of payment on a certain date, the mortgagee shall become the absolute owner, cannot extinguish the right to redeem, even if the date has passed.

57.10. *Loss of right by act of parties—Supreme Court case*— A recent Supreme Court judgement[5] (on appeal from the Maharashtra State Co-operative Appellate Court) discusses the question whether a mortgagor loses his right to redeem merely by a contract to sell. In India, there is no distinction between legal and equitable property, in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian law, there can be but one owner, that is, the legal owner. A contract of sale does not, in view of section 54, itself create any interest in, or charge on, the property. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Registration Act is that a contract for sale in respect of immovable property creates no interest. It is only on execution of the conveyance and registration of transfer of the mortaggor's interest that the mortgagor's right of redemption will be extinguished. The conferment of a power on the mortgagee to sell the property without intervention of the Court in a mortgage deed will not, by itself, deprive the mortgagor of his right to redemption. The extinction of the right of redemption must be subsequent to the deed conferring such a power. The right of redemption is not extinguished at the expiry of the period, and is not extinguished by a mere contract for sale. Therefore, until the sale is complete by registration, the mortgagor does not lose the right of redemption. It is only on the execution of the conveyance that ownership passes from one party to another. It cannot be said that the mortgagor lost the right of redemption just because the property was put to auction. The mortgagor has a right to redeem, unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act.[6]

It may be noted that even after the period fixed for redemption has expired, it remains a mortgage.

57.11. *Subsequent agreements*—Since the right of redemption is inviolable, any provision which directly or indirectly prevents the recovery by the mortgagor of his property upon performance of the obligation for

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1 *Panna Lal* v. *Rameshar Sahai*, A.I.R. 1915 All. 203, 206.
2 *Ahmadullah* v. *Abdul Rahim*, A.I.R 1924 All. 26, 28, (D.B.).
3 *Ram Singh* v. *Baij Nath*, A.I.R. 1919 All. 126, 128 (D.B.).
4 (1943) 1 M.L.J. 155, 157.
5 *Narandas* v. *S. A. Kamtam*, A.I.R. 1977 S.C. 774 (A. N. Ray, C.J., M. H. Beg & Jaswant Singh, JJ.)
6 A.I.R. 1937 Mad. 293 and A.I.R. 1944 Bom. 156 approved.

which the security was created, is repugnant to the very nature of the transaction and, therefore, void. However, this rule is not applied with the same severity when one comes to covenants which are entered into, subsequent to the mortgage. The broad principle on which a distinction is made by law between a covenant accompanying the mortgage and a covenant subsequent thereto, seems to that the subsequently created conditions do not partake of the oppression or exploitation which might have been operative at the time of the loan. Ghose[1] states the principle that though a mortgage cannot stipulate an advance or a collateral advance, there is nothing to prevent the parties from dealing with the equity of redemption *after the making of the mortgage*—except in the case of fraud. Although the problem does not appear to recur in this form now in England, the position may not be substantially different in that country.

57.12. *Collateral advantage*—The insertion of stipulations conferring on the mortgagee collateral advantages raises numerous problems. By collateral advantage is meant here a stipulation made by the mortgagor to do something in addition to repaying the loan with interest. Until redemption, of course, such a stipulation may be valid, if it is otherwise valid under the general law. But the question often arises whether it could servive redemption. If the stipulation can be construed as a term of the mortgage, the rule is that such a stipulation will not be enforeable if it is—

(1) unfair and unconscionable, or

(2) in the nature of penalty clogging the equity of redemption, or

(3) is inconsistent with or repugnant to the contractual and equitable right to redeem.[2]

A rough and ready test summing up all these three criteria would be the test of reasonableness.[3]

57.13. *Tests*—Although these tests—whether expressed elaborately or summarised pithily—might appear to be simple, but their practical application is not easy. The matter cannot be approached in a purely legalistic manner a certain amount of discretion is implicit. The bargaining the hall-mark of all equitable jurisdiction of the court which constitutes is implicit. The bargaining power and character of the parties, the circumstances of the loan, the nature of the security, the nature and duration of the restriction on the mortgagor's freedom to deal with the property and the precise terms of the collateral advantage, are all material.[4]

Of course, collateral advantage is not confined to a condition which does not affect the property. It may affect the mortgaged property, or it may be personal to the mortgagor. In either case, if it is a stipulation

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1 Ghose, Law of Mortgage in India (1902), page 284.

2 *Kreglinger* v. *Patagonia Meat & Cold Storage Co. Ltd.*, (1914) A.C. 25, 61 (per Lord Parker).

3 (1967) 2 All. E.R. 659.

4 Fisher and Lightwood, Law of Mortgage (1969), page 461.

in addition to repayment of the loan proper with interest, it is to be regarded as collateral. Every stipulation which is collateral is not necessarily void, and it is not void even if it must necessarily travel beyond the time of the mortgage.

57.14. *Payment to one of the co-mortgagees*—This brings us to certain points of detail concerning payment. There is some obscurity on the question whether a payment to *one of several co-creditors* is a good discharge of the entire debt. In a discussion of this question, it must be noted that the principle applicable is the same whether the debt is a personal debt or is a secured debt.[1]

In *Barber Maran* v. *Ramana Goundan*,[2] it was held by the High Court of Madras that such a payment to one-co-mortgagee was a good discharge. It followed the English decision in *Wallact* v. *Kelsall*,[3] and relied on section 38 of the Indian Contract Act, 1872 which provides that a refusal of a valid 'tender' by a promisor under a contract will discharge him from liability for the non-performance of the contract and that a tender to one of several 'joint' promisees has the same effect as one made to all the joint promisees. The correctness of the Madras decision in *Barber Maran's case*,[4] was doubted in some later decisions of that High Court,[5] but was approved in 1909[6] and also by a Full Bench in *Annapurnamma* v. *Akkayya*[7] in 1913.

57.15. *Criticism*—The Madras view does not, with respect, appear to be correct. The question does not seem to be capable of determination merely on the interpretation of section 38 and 45 of the Contract Act. The question must be decided by reference to general principles of law. Now, it is well settled that the co-creditors of a debt (secured or unsecured) should be presumed to be in the position of tenants-in-common and not joint-tenants. In the case of co-mortgagees, the above view would seem to be supported by the provisions of section 45 of the Transfer of Property Act, which provides that transferees under a joint transfer for consideration are entitled to distinct interests in the subject-matter of transfer. Co-mortgagees would, therefore, be entitled to distinct interests in the mortgage, or, in other words, they may be in the position of tenants-in-common with regard to the debt and the security.

57.16. *Case law*—It would be tedious to discuss at this place the gist of all the judicial decisions that have been given on the subject. Broadly speaking, the Madras High Court, except for a temporary fluctuation of view seems to have taken the stand that one co-mortgagee can give a discharge for the *entire mortgage debt*. In other words, where there are

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1 (1902) I.L.R. 25 All. 155, 157, 158.
2 *Barber Maran* v. *Ramana Coundan*, (1897) I.L.R. 20 Mad. 41, 463 (D.B.).
3 Wallace v. Kelsall, (1840) 56 R.R. 707.
4 *Barber Maran* v. *Ramana Coundan*, (1897) I.L.R. 20 Mad. 461, 463 (D.B.).
5 (1902) I.L.R. 25 Mad. 26, 38, 39 (D.B.).
(1912) I.L.R. 35 Mad. 685, 687 (D.B.).
6 (1909) 1 Ind Cas 210 (D.B.) (Mad.).

7 *Annapurnamma* v. *Akkayya*, (1913) I.L.R. 36 Mad. 544, 551 (F.B.).

several mortgagees, according to the Madras High Court, payment to one is valid. This view was never followed in Bombay and Calcutta or in Allahabad, but has been adhered to in Madras as recently as 1957[1]. As to the other High Courts, it is sufficient to refer to the Bombay case of *Sitaram* v. *Sridhar*,[2] the Calcutta case of *Jagat Tarini* v. *Naba Gopal*,[3] and the Allahabad case of *Jalhari Singh*.[4]

57.17. The Madras view originated first in a case reported in 1897.[5] The judgement is, in part, based on an English case[6] whose authority, as has been pointed out by Mulla,[7] has been shaken by a later decision.[8]

The analogy of the Indian Contract Act may not be applicable, but, in any case, it is worth while pointing out that under that Act,[9] when a promise is made to more than one persons jointly, the right to claim performance rests *with all of them* jointly.

57.18. *Recommendation to amend section* 60 *in regard to situation of several mortgages*—In this position, the question for consideration is whether the law should be clarified and, if so, in what direction. On principle, it does not, with due respect to the Madras High Court, appear to be proper that one co-mortgagee may be able to realise the security. Their interests, whether they are joint or several in the language of the common law as between themselves, are to be regarded, so far as the mortgagor is concerned, as entire and not as divisible.

If the contract was made with them together, it follows that the discharge of the contract also must be a transaction to which all of them are parties. The case may be different where the mortgage expressly states that the money is advanced, or belongs to the mortgages, *in stated sums or shares. But in the absence of such an express statement, the payment to one mortgagee cannot have effect on the interests of other co-mortgagees.* We, therefore, recommend that this position should be suitably incorporated in section 60 by an amendment.

We recommend that an Explanation should be inserted as follows below section 60 :—

> *"Explanation—In the absence of an express agreement, payment to one mortgagee shall not affect the interests of other co-mortgagees."*

57.19. *Persons who can redeem*—As to the persons entitled to redeem, section 60 does not make any elaborate provisions, leaving the matter to be spelt out from an interpretation of the word "mortgagor". Of course, so far as subsequent transferees of the mortgagor's interests are

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1 *Sakkarmaco* v. *Nagaswamirao*, A.I.R. 1957 Mad. 191.
2 *Sitaram* v. *Sridhar*, (1903) I.L.R. 27 Bom. 292, 294.
3 *Jagat Tarini* v. *Naba Gopal*, (1907) I.L.R. 34 Cal. 305, 351.
4 *Jalhari Singh* v. *Ganga*, (1919) I.L.R. 41 All. 631.
5 *Barber Man* v. *Ramanna*, (1897) I.L.R. 41 All. 631.
6 *Wallace* v. *Kelsall*, (1840) 7 M & W 264.

7 Mulla (1973), page 425.
8 *Powell* v. *Broadhurst*, (1901) 2 Chancery 160.
9 Section 45, Indian Contract Act, 1872.

concerned, section 59A settles the position; and the expression "mortgagor" in section 60 would be so construed as to allow redemption by a person who has *purchased* the equity of redemption. As regards other persons who would acquire an interest in the mortgaged property or have already such an interest otherwise than by derivative title, section 60 itself is non-commital. Some indication, however, is given by section 91, which expressly provides that besides the mortgagor, any of the specified persons may redeem or institute a suit for the redemption of the mortgaged property. The persons specified in section 91—to give its gist very briefly—include any person who has any interest in or charge upon the mortgaged property or in or upon the right to redeem the same, any surety for the payment of the mortgage debt or any part thereof or any creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property. Broadly speaking, section 91 follows the English aw, namely, that not only the mortgagor but also all persons having any interest in the property subject to the mortgage are entitled to reedeem.[1]

57.20. *Co-mortgagor and assignees*—It follows, therefore, that a co-mortgagor can redeem, as also an assignee of the equity of redemption, which, in this context, would include a subsequent mortgagee who desires to redeem a particular mortgage. Since section 91 makes elaborate provisions in this regard, it would be a reasonable view to take that the expression "mortgagor" in section 60, first paragraph, would, wherever necessary, be construed so as to include the persons entitled to redeem under section 91. It is enough to mention that in England a person who has, by adverse possession, acquired the title of the mortgagor is regarded as competent to redeem.[2]

57.21. *Mortgagor who has assigned his interest*—Conversely, a mortgagor who has parted with his interest would not be competent to redeem, because in section 91, the expression "mortgagor" means a person who has got a *subsisting* title to the mortgaged property.[3] There is an exception recognised in England to this limitation, where, after assignment of his rights, the mortgagor is sued by the mortgagee on his covenant.[4] Of course, in such a case, the mortgagor so redeeming will have a right of action against the assignee for reimbursement in respect of the monetary obligation charged.

57.22. *Section* 60, *first paragraph, proviso*—The proviso to the first paragraph in section 60, in substance, provides that the right conferred by the section must not have been extinguished by act of the parties or by decree of a court. In so far as it contains a saving for act of the parties, it recognises the possibility, at least in some circumstances, of extinction of the right of redemption by agreement and without going to court. Of

1 Mulla (1973), page 576, Commentary on section 91, clause (a).

2 *Fletcher* v. *Bird*, (1896) (Hawkins K.) (unreported, cited by Fisher & Lightwood, Law of Mortgage (1969), page 468].

3 *Apa* v. *Selan*, (1889) Bombay Printed Judgments, page 246; Ghose Law of Mortgage in India (1902), page 904.

4 *Kinnard*, (1888) 39 Chancery Division 636.

course, the act of parties must be some transaction subsequent to the mortgage. In practice, most instances of such subsequent agreements are in the form of sale of the equity of redemption between the mortgagor and the mortgagee. In the absence of any factual element which would render such an agreement void or voidable under the general principles of the law of contract, such a sale would be valid, and there does not appear to be any special disability attaching to such a sale merely by virtue of the fact that the parties stand in the relationship of mortgagor and mortgagee.

57.23. *Extinction of redemption.*—The right of redemption thus subsists until it is extinguished by act of prties or decree of Court. The "act of parties" must, of course, be subsequent to the mortgage, as already stated.[1]

57.24. *Decree.*—The "decree" of Court referred to is the (final) decree in a foreclosure suit[2] under Order 34, rule 3, of the Code of Civil Procedure and the (final) decree in a redemption suit under Order 34,Rule 8 of the Code. A decree for "possession" in favour of a mortgagee who is entitled to such possession under the terms of his mortgage does not extinquish the mortgagor's right to redeem.

Where a (final) decree is granted under Order 34, Rule 3, sub-rule (2) or under Order 34, Rule 8, sub-rule (3), "declaring that the mortgagor is debarred from all" rights to redeem the mortgaged property, the right to redeem is clearly extinguished. Until that decree is passed, however, the right to redeem is not lost even if the time fixed for payment has expired. Nor will the right be extinguished, where the decree for redemption or foreclosure omits to make such a declaration. And so long as such right exists, a suit for redemption would not be barred by *res judicata.*

57.25 *Second suit for redemption after decree*—The sanctity of the statutory right of redemption is also seen in another proposition now well-established in procedural law, namely, that where the decree does not, in so many words bar redemption, a second suit for redemption may be filed even after the decree.[3]

In *Raghunath Singh's case*[4] a decree for redemption had been passed in the following terms :

> "It is ordered and decreed that the plaintiff is entitled to a decree for possession by redemption of mortgage in the following terms, namely, that he should pay Rs. 4,20,860 by the 15th November, 1897, that if he will pay the said sum he will get all costs ..... *and that in case of default, his case will stand dismissed.,,*

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1 Para 57.22, *supra.*

2 [Amendments made recently in the Code have slightly altered the scheme.

3 A.I.R. 1934 P.C. 205, 207, 208.

4 *Raghunath Singh's case,* A.I.R. 1934 P.C. 205, 207, 208.

No payment was made, but a fresh suit for redemption was instituted. It was held that the decree was not, in terms of the old sections 92 and 93 of the Act; that the right to redeem was a rght conferred on the mortgagor *by enactment*, of which he can be deprived only by means and in manner enacted for that purpose and strictly complied with; that the above decree did not extinguish such right; and that a second suit for redemption was maintainable.

57.26. *Second suit for redemption after withdrawal.*—The strength afforded to the right of rtdemption by section 60 is adequate for overriding procedural bars to the institution of a fresh suit on technical grounds.

Fresh suit under C.P.C.—Under Order 23, Rule 1, Code of Civil Procedure, 1908, where a suit is withdrawn without the permission of the court, a fresh suit on the same cause of action is barred. It was held by the Madras High Court[1] that where a suit for redemption is withdrawn without the leave of the court, a fresh suit for redemption with regard to the same mortgage cannot be brought and that Order 23, Rule 1, Civil Procedure Code must be taken to override the provisions of this section in this matter. But a Full Bench decision of the Bombay High Court, with reference to Order 22, Rule 9, Code of Civil Procedure, held that the general terms of the rule cannot override the spcific provisions of the section, and that so long as the relationship of mortgagor and mortgagee continues and so long as the mortgage has not been extinguished by the decree of the court or by the act of parties, the mortgagor is entitled to go to a court of law to enforce his right.[2] The conflict was resolved by the decision of the Federal Court,[3] which impliedly approved the Bombay High Court's view and reversed the Madras High Court's decision. The Federal Court held :

> "If the right of redemption is not extinguished, provisions like Order 9, or Order 23, Rule 1 will not debar the mortgagor from filing a second suit because, as in a partition suit, the cause of action in a redemption suit is a recurring one."

57.27. *Operation of law.*—Section 60 does not refer to extinguishment by operation of law. Nevertheless, the extinguishment of the equity of redemption may take place by operation of law, where the mortgagee acquires the equity of redemption by inheritance or by adverse possession, or the mortgagor acquires the mortgagee's right by inheritance. A revenue sale for the arrears of Government revenue may also extinguish the right of redemption.

A mortgagee may—

(a) obtain a decree on his mortgage and, at the sale in execution thereof, purchase the property with the leave of the court;

(b) obtain a decree on a money claim unconnected with the mortgage, and, at the sale in execution of such decree, purchase the mortgaged property with the leave of the Court;

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1 *Mattapalli Raju* v. *Raghavayya*, A.I.R. 1945 Mao. 225, 223.
2 *Rajaram* v. *Ramchandra*, A.I.R. 1948 Bom. 226, 227, 228 (F.B.).
3 *Subba Rao* v. *Raju*, A.I.R. 1950 F.C. 1, 7.

(c) purchase without the leave of the Court the mortgaged property where it has been brought to sale in execution of a decree for money obtained by a third party against the mortgagor.

In case (a),[1] the position of the mortgagee is the same as that of a stranger purchaser, so that he gets an irredeemable title and the equity of redemption is extinguishment by the purchase.[2]

In case (b) also, the mortgagee will get an irredeemable title to the property.[3-5]

In case (c), where the mortgagee purchases the mortgaged property at a court sale in execution of his own decree, but without the leave of the court, the sale is not "void", but is only "voidable", and may be "set aside" on an application under Order 21, Rule 72, sub-rule (3), of the Code of Civil Procedure. The mortgagee will be regarded only as a trustee for the mortgagor in such cases and the right of redemption will not be extinguished. A sale in contravention of Order 34, Rule 14 of the Civil Procedure Code is also not void, but is only a voidable one, and the position of the mortgagee purchaser at such a sale until confirmation of the sale is, similarly, that of a trustee for the mortgagor.

57.28. *Obligation to transfer.*—There is one minor point concerning section 60, which should be noted at this stage. Amongst the obligations imposed by the section on the mortgagee is the obligation to transfer the mortgaged proptrty. Since every mortgage does not, so far as the form thereof goes, transfer the mortgaged property to the mortgagee it is not clear why a re-conveyance should be deamnded of the mortgagee in the case of every mortgage. Ghose has observed[6] that the intention of the legislature in this regard might have been expressed with greater precision. We find force in this comment by Ghose and do not see any reason why in the case of a mortgage, which itself was not expressed as a conveyance, there should be any right to a formal re-conveyance of property. Accordingly, we recommend that in section 60, first paragraph, before the words "(c) at the cost of the mortgagor", the words *"Where the mortgagor has transferred the mortgaged property to the mortgagee"*, should be added.

57.29. *Accretions to mortgaged property.*—The mortgagor has the right to redeem, not only all accretions to the mortgaged property, but also many things which may have been substituted in its place. Thus, to take the stock illustration of a flock of sheep. If all the sheep die, and are replaced by their young, the mortgagor would be entitled to redeem the latter. Where a mortgage comprised two policies of insurance on the life of the mortgagor, which the mortagee was empowered but not bound to keep on foot, and the mortgagee at the instance of a purchaser of the equity of redemption accepted a new policy in place of the old policies which were dropped, and the

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1 *Mahabir Pershad* v. *Macnaghten*, (1889) I.L.R. 16 Cal. 682, 692; 16 Ind. App. 107 (P.C.).
2 A.I.R. 1961 S.C. 1353, 1356; A.I.R. 1965 Ker. 132, 134.
3 A.I.R. 1961 S.C. 1353, 1356; A.I.R. 1965 Ker. 132, 134.
4 (1955) 2 Mad. L.J. 132, 134.
5 (1904) I.L.R. 32 Cal. 296, 316 (P.C.).
6 *Ghose, Law of Mortgage in India* (1902), page 281.

sale of the equity of redemption was afterwards set aside, it was held that the mortgagor was entitled to redeem the substituted policy as it formed a part of the equity of redemption.[1] As the Lord Chancellor, Lord Westburn, points out, whatever was done by the purchaser must be taken as having been done for and on behalf of the real owner of the equity of redemption, and the new policy became, therefore, impressed with a trust for his benefit. To say that, because the mortgagee was not bound to keep up the original policy, the mortgagor was not entitled to redeem, is to take, in the words of Lord Westburn "too narrow a view of the rights of the mortgagor who is entitled to claim the benefit of whatever has been done with respect to the equity of redemption.

57.30. *Section* 60, *fourth paragraph, Reasonable notice.*—The fourth paragraph of section 60 provides that "nothing in this section shall be deemed to render invalid any provision to the effect that if the time fixed for the payment of the principal money has been allowed to pass or, if no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money." The general rule in England is that a mortgagor must, after default, give six months' notice to the mortgagee of his intention to redeem or pay six months' interest in lieu of notice—except where the mortgagee has taken possession of the mortgaged property, and except in the case of an equitable mortgage by deposit of title deeds.[2] This requirement of notice seems to have originated in the theory of equity that since the mortgagor has, after default, lost his estate, equity will give him relief, only if he himself acts equitably. Equity insists upon notice in order that the mortgagee may seek another place for investing the money.[3-4]

57.31. *Reasonable notice.*—The present section, while laying down a rigid rule, allows a provision for reasonable notice. It is not very clear whether the section contemplates that the clause in the mortgage deed itself should be framed so as to use the words "reasonable notice" or words substantially to that effect or, whether it is sufficient if a duration is fixed for the notice that would be valid if the duration is reasonable in the circumstances. The latter seems to be a sensible construction, since what the fourth paragraph seeks to furnish is a *test* for determining how far such provisions are valid. It is for the parties, then to choose the duration and for the court to determine whether it is reasonable. But it is not necessary that the parties must use in the provision the words "reasonable notice".

It is obvious that if the notice period is regarded as unreasonable, then, it is taken out of the savings incorporated in the fourth paragraph and would be hit, speaking generally, by the peremptory provision in the first paragraph of the section which does not make any exception for a contract to the contrary.

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1 *Nesbitt* v. *Berridge*, (1864) 2 Jur. N.S. 53.

2 Cheshire, Modern Law of Real Property (1970), page 647.

3 *Cornwell Property Investment Company*, v. *Western and Toovey*, (1934) 103 Law Journal Chancery, 168, 171, (1933) All. E.R. Reprint 440.

4 Fisher & Lightwood, Law og Mortgage (1969), page 474.

57.32. *Recommendation.*—Case law on the secton would show that a conflict of views has arisen on the question whether a provision for redemption *only in a particular month or season* of the year is valid. Within the same High Court, different views seem to have been taken.[1-2] While no hard and fast rule can be laid down, practical considerations render it desirable that a clarification should be inserted to the effect that the mere fact the provision prohibits redemption except on certain days or during a certain period, shall not render it invalid, if the provision is reasonable in the circumstances. No hardship would be caused by such a provision, since the non-compliance therewith would not be a bar to a suit for redemption. The mortgagee will be entitled to interest for the relevant period, i.e., the period by which the notice actually given to the mortgagee falls short of the reasonable notice.[3]

We recommend that the fourth paragraph may be amplified as above, and opportunity may also be taken of making it clear by a suitable amendment that what is intended is a notice period which is reasonable in the circumstances, and not ritualistic repetition of the words "reasonable notice".[4]

57.33. *Section* 60, *last paragraph.*—The last paragraph of section 60 provides that 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 *only* 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. In so far as the paragraph goes it is unexceptionable, but there seems to be some obscurity resulting from the incompleteness of the language of the section on a few points. We shall first deal with the principle of this paragraph and its general scope, after which the specific problems that have arisen so far will be discussed.

57.34. *Principle*—The principle of the paragraph is clear enough. The mortgage security is indivisible and partial redemption is not allowed. A part-owner of the interest of the mortgagor can certainly redeem the whole mortgage, but cannot redeem his share only. The reason for this rule is that disintegration of the mortgage security would result in great injustice to the mortgagee.[5] In the leading Privy Council case,[6] on the subject, the rationale was thus explained :

> "It would put him (the mortgagee) to a separate suit against each purchaser of fragment of the equity of redemption, though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits and the utmost confusion and embarrassment would be created."

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1 *Govinda Menon* v. *Chatu Menon*, A.I.R. 1914 Mad. 563 (Invalid)—contrasted with *Kadir Bibi* v. *Mallappa Pillai*, A.I.R. 1946 Mad. 542, 544 (Valid).

2 A.I.R. 1917 Oudh 123, 124 (Valid)—contrasted with A.I.R. 1919 Oudh 385, 386 (Invalid).

3 *Nadir Shaw* v. *Shrinivi*, A.I.R. 1924 Bom. 264.

4 This is not draft.

5 Mulla (1973), page 437.

6 *Nilkantha* v. *Suresh Chandra*, (1886) I.L.R. 12 Cal. 414 (P.C.).

57.35. *Previous provision*—Since the law attaches the greatest importance to this principle, there is a categorical provision prohibiting disintegration. As is obvious from the word "only" now appearing in the section the exception thereto is a very limited one. There is, of course, nothing to prevent one co-owner from *redeeming the entire property.* But he cannot, in general, claim to redeem his own share. This aspect does not appear to have caused much controversy in England in recent judicial decisions. The law in England is substantially the same as in India.

57.36. *Exception in the last paragraph*—The exception which forms the latter half of the last paragraph of section 60 has given rise to certain controversies. The exception relates to the case where a mortgagee has acquired the share of the mortgagor—for simplicity, we are leaving out certain refinements also dealt with in the paragraph. Where a mortgagee acquires the *whole of the* mortgaged property, there is of course, a merger of the two interests and the case falls within the proviso to the first paragraph of the section, namely, extention of the right of redemption by act of the parties. Even where the merger takes place by operation of law, the principle will be the same. But where the mortgage acquires a *part of the* mortgaged property, the mortgage is not extinguished in its entirety, but only *pro tanto* in respect of that part. This consequence is, of course, not confined to mortgages, but may apply to many other rights where the person owing the right and the person against whom the right is enforceable become the same.[1] In regard to mortgages, on such partial acquisition the first provision that comes into play is section 82, under which mortgaged properties are bound to *contribute* rateably to the debt.[2] As a consequence of this section providing for *contribution,* the other properties are liable only for the balance of the mortgage debt.[3] But the more relevant consequence of such partial acquisition is the breaking-up of the integrity of the mortgage. The general rule is that the security is indivisible.[4] To this there is an exception under the exception to the last paragraph.

Its effect, when read with the first part, is that "a person interested in a share only of the mortgaged property", would then become entitled "to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage". The negative or prohibitory provision becomes inapplicable where the exception applies and the positive or permissive aspect of it takes charge.

57.37. *Controversy.*—There is,, in fact, no controversy on the proposition put forth above, namely, that where the mortgagee acquires the share of one mortgagor, the remaining mortgagor is entitled to sue for partial redemption. Controversy, however, has arisen on the question whether, in the case falling within the exception, one mortgagor may redeem the whole of the residue of the mortgage without the consent of the mortgagee. Some

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1 *Kudhai* v. *Sheo Dayal,* (1888) I.L.R. 10 All. 570, 574, 576 (Mahmood J.).

2 *Bisheshur Dayal* v. *Ram Sarup,* (1900) I.L.R. 22 All. 284, 289-291 (reviews cases).

3 *L. Sankaran* v. *Adima Kunja,* A.I.R. 1965 Ker. 132, 134, para 11.

4 *Amba Prasad* v. *Hoonga Ram,* A.I.R. 1930 All. 523, 524.

High Courts have taken the view that he is not entitled to redeem more than his share. To this group belong the High Courts of Allahabad,[1] Calcutta[2] and Madras.[3]

Certain other High Courts took the contrary view, namely, that a sharer in the mortgaged property, in the circumstances where the exception applies, is under section 60 entitled to redeem all the shares other than that purchased by the mortgagee. To this group belong the High Courts of Bombay,[4] Orissa[5] and Punjab.[6]

57.38. *Statutory provisions.*—Let us examine the statutory provisions in this regard, before dealing with the very difficult question as to what view ought to be adopted. The first thing to be noted, as has been pointed out by Mulla,[7] is that the right of the mortgagor of a share to redeem the *whole* is recognised in sections 91 and 95 and it is difficult to see why the acquisition by the mortgagee of a part of the property should affect that right as to *the rest of the proportion.* The owner of a share (in the residue) is, to quote Piggot J.,[8] "entitled on the strength of his position as for owner of the mortgaged property to redeem just as much of it as does not belong to the mortgagees themselves and he is entitled to do so on payment of a proportionate share of the mortgage debt." This is all that the section in the last paragraph, Exception, was intended to lay down. That exception was not intended to affect the principle already recognised, giving a right to one co-sharer to redeem the whole of the subsisting mortgage. The ordinary right of any sharer in respect of the property is to redeem the whole of the balance of the debt.[9] This is the general rule laid down in section 91, which was previously recognised by the Privy Council.[10] Where the Exception applies, the additional effect is to confer a right of *partial redemption.* In this sense, a suit for partial redemption, where permissible, is a combination of a suit for redemption and a suit for contribution. Mulla[11] has been at pains to point out that after the acquisition of a share of the property by the mortgagee, the *normal* right of a sharer in the residue is to redeem the whole residue and his right under *the exception* in this section is to redeem *his own share only* in that residue.

57.39. *Origin of the controversy.*—How, then, has the controversy arisen on the subject? It would appear that primarily the controversy has arisen because of a difference of opinion as to the proper reading of certain decisions of the Privy Council. The case of *Nawab Azimat Ali*[12]—a case decided before the Act—recognised the right of partial redemption in case of acquisition by the mortgagee. Apparently, the Privy Council also held that the sharer cannot redeem the whole of the residue without the consent of the mortgagee.[13] Then, there is the later decision of the Privy Council

1 *Amba Parsad* v. *Hooiga Ram*, A.I.R. 1930 All. 523, 524.
2 *Rakhal Chandra* v. *Tara* (1965) 69 Cal. W.N. 688, 692.
3 *Narayan Swami* v. *Perumal*, A.I.R. 1953 Mad. 720, 721.
4 *Hirabai* v. *Dinshah*, A.I.R. 1926 Bom. 303.
5 *Chandu Agasti* v. *Chandra Bala*, A.I.R. 1965 Orissa 63, 65.
6 *Pala Singh* v. *Attar Singh*, A.I.R. 1954 Punj. 81, 83.
7 Mulla (1973), page 445.
8 *Shyam Saran* v. *Banarsi Das*, A.I.R. 1922 All. 192.
9 Mulla (1973), page 442, under "Suit for partial Redemption".
10 *Narinder Narain* v. *Dwarkalal Mudu*, (1877) I.L.R. 3 Cal. 397.
11 a. Mulla (1973), page 443.
12 *Nawab Azimat Ali* v. *Jowahir Singh*, (1870) 30 M.I.A. 404, 407, 415 (P.C.).
13 Mulla (1973), page 444.

In *Mirza Yadalli Beg* v. *Tukaram*.[1] The mortgagee had foreclosed nine villages in that case, without making the purchaser in the equity of redemption of one village, a party. This purchaser now sued to redeem the whole mortgage. The contention of the mortgagee was that the purchaser was entitled to redeem only his own village. The Privy Council held that, he was entitled to redeem the nine villages. The case was of imperfect foreclosure and, therefore, the mortgagee had not acquired a complete title to any part of the equity of redemption; and so, the whole mortgage was regarded as open to redemption.[2] Controversy has arisen whether the judgment in *Mirza Yadalli Beg's case* has over-ruled the earlier judgment in *Nawab Azimat Ali's case*. The existence of this controversy is obvious from the discussion contained in a few judgments[3-5] of the High Courts.

57.40. *Recommendation.*—Recent decisions would show that the controversy is still continuing.[6-7] To solve the controversy, we recommend addition of an Explanation as follows :—

EXPLANATION

(*to be added to section* 60 *at the end*)

Nothing in this section shall be deemed to affect the right of a person interested in a share only of the mortgaged property to redeem, by virtue of section 91, *the entire mortgaged property or so much thereof as still remains subject to mortgage.*

57.41. *Accession.*—We may conclude our discussion of section 60 with a brief mention of accessions to mortgaged property. The subject of accession to the mortgaged property has several aspects, of which we are concerned with one at the moment. When the mortgaged property has received an accession after the mortgage, then, assuming that the accession forms part of the mortgage security by virtue of the specific provisions contained in the Act in that regard, such as, sections 63, 64 and 72, is the mortgagee, within the meaning of section 60, first paragraph, bound to re-deliver and re-transfer the accession also? That is the question with which we are concerned. On principle, it will appear that the answer should be in the affirmative. Perhaps, an express amendment in this regard is not necessary, having regard to the fact that no controversy has so far arisen.

An accession is not defined in the Act but one species is illustrated in section 63, which provides that 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. This section is based on the principle that the increase follows the principal

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1 *Mirza Yadalli Beg* v. *Tukaram*, A.I.R. 1921 P.C. 125.
2 Mulla (1973), page 444.
3 *Promotho Nath* v. *Ram Kissun*, A.I.R. 1927 Pat. 25.
4 A.I.R. 1965 Orissa 64, 65.
5 A.I.R. 1968 Bom. 106, 110.
6 A.I.R. 1965 Ker. 132.
7 A.I.R. 1956 Madras 293.

—*a principle stated in the Latin maxim accessio credit principle.*[1] *The concept was familiar to the Roman law, which had elaborate rules on the subject. The rules evolved show a highly sophisticated body of juristic doctrines.*

Accession may be natural or artificial, and may be corporeal or incorporeal. It would appear that whatever be the nature of the accession, delivery thereof to the mortgagor by the mortgagee is mandatory, subject to specific provisions contained in the Act.[2]

1 *Sheo Pujan* v. *Bhagwait Dubey*, A.I.R. 1949 Pat. 99.
2 Sections 63, 64, 70.

CHAPTER 58

RE-TRANSFER ON REDEMPTION

SECTIONS 60A AND 60B

58.1 *Section 60A.*—Section 60, which we have already discussed, gives the mortgagor the right to require the mortgagee, in the stated circumstances, to re-transfer the mortgaged property to the mortgagor or to such person as he may direct. That section is, however, silent about the assignment of the *mortgage debt* to a third person, in the sense that the mortgagee cannot, on redemption, be *compelled* to assign the mortgage debt though, of course, he is free to do so if he so desires. To meet this situation the amendment Act of 1929 introduced section 60A, on the lines of section 95 of the Law of Property Act, 1925. Under sub-section (1), where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transfering the property to assign the mortgage debt and transfer the mortgage property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

Sub-section (2) of the section provides that the rights conferred by this section belong to, and may be enforced, by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

Under sub-section (3), this section does not apply in the case of a mortgagee who is or has been in possession.

58.2. *Assignment of registered instrument*—As to the formalities for assignment, since the interest of a mortgagee not in possession is intangible immovable property, the transfer thereof can be only by a registered instrument, in view of section 54.

58.3. *No change.*—The above discussion discloses no need to amend section 60A.

58.4. *Section 60B.*—While the mortgagor is, on redemption, entitled to get back the documents of title,[1] a provision was also needed to clarify his right to inspect the documents of title *during the subsistance of the mortgage.* There was, in England, at common law, a doubt on the subject and the Conveyancing and Law of Property Act, 1881, section 16, replaced later by section 96(1), Law of Property Act, 1925, removed the doubt by making a special provision conferring such a right. In India, the Act of 1929 dealt with the matter by inserting section 60B. Under that section, a mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable time, at his request and expense, in this behalf, to inspect and make copies of abstracts of, or extracts from documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

There is hardly any case law on the subject and section 60B needs no further comments.

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1 Section 60, first paragraph.

CHAPTER 59

REDEMPTION—TWO OF MORE MORTGAGES

SECTION 61

59.1. *Section* 61-*Abolition of consolidation.*—Under section 61, a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, is entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

59.2. *History.*—The section is, in general, regarded as abolishing what was known as the doctrine of consolidation. It is not possible to understand either the substance of the section in its broad features, or the use of certain expressions employed in its drafting without some familiarity with the history of the law. The right of redemption possessed by a mortgagor was, in England, an equitable right, which could be exercised only on equitable terms.[1] The doctrine of consolidation was an application of this approach of equity. The general rule in equity is that a person who is entitled to two mortgages made by the same mortgagor can consolidate the mortgages against the mortgagor and refuse to allow him to redeem one mortgage without redeeming the other.[2] Before the mortgagee can insist on consolidation under this doctrine, however, certain important conditions have to be satisfied. The redemption dates must have passed; both the mortgages must be made by the same mortgagor;[3] and there must have been a time when both the mortgages were vested in one person and simultaneously both the equities of redemption were visited in one person.[4]

59.3. *Principle in equity.*—If these conditions are satisfied, the mortgagee could insist on consolidation against the mortgagor on the principle that redemption being an equitable right, the person who seeks the aid of equity must redeem it entirely. The underlying rationale was that if A has mortgaged Blackacre and Whiteacre to X, each property being worth £ 1500 and each loan being £ 1000, then, if the value of Blackacre subsequently decreases and the value of Whiteacre increases, it would be unfair to allow A to redeem Whiteacre (with the value increased) and leave Blackacre unredeemed (with the value decreased).[5]

This principle, sound in theory, sometimes led to hardship and the Legislature in England had to intervene by enacting, first, a suitable provision in section 17 of the Conveyancing and Law of Property Act, 1881, replaced later by section 93 of the Law of Property Act, 1925.

In India, section 61, as originally enacted followed the English Act of 1881. As revised in 1929, it follows the English Act of 1925.

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1 Snell, Equity (1966), page 424.
2 Snell, Equity (1966), page 455.
3 Snell, Equity (1966), page 426.
4 *Plece* v. *White,* (1896) A.C. 187, 190.
5 Megarry & Wade, Real Property (1966), page 920, paragraph 4(a).

59.4. We have referred above to one aspect, namely, that in order to understand the drafting of the section, it is necessary to have some familiarity with the history of the law. This point may be illustrated by referring to the words "a mortgagor who has executed two or more mortgages in favour of the same mortgagee". The emphasis on the execution of two or more mortgages by *the same mortgagor* is to be explained by drawing attention to the fact that it was only where the mortgage was executed by the same person in favour of the same person that equity limited the right of redemption, by insisting on consolidation. Since it was the object of the law reform in this context to abrogate this principle of equity, therefore, really speaking, it was not necessary to cover the case where mortgages were made by different mortgagors. Where the mortgages are made by different mortgagors, they could not, even at equity, be required to be consolidated, even if both properties late came into the same hands.[1] Thus, if A mortgages one property to X and B also mortgages another property to X, and then B purchases the equity of redemption on both the properties, X cannot insist on consolidation, because the mortgages were originally made by different mortgagors. Since equity did not insist on consolidation in such a case, there was, strictly speaking, no need in a measure of law reform, to abrogate the doctrine in relation to a situation where it did not apply.

Of course, no harm is done if the word "mortgagor", by virtue of section 59A, is taken as including his successors. But the point to be made is that no benevolent provision by way of a statutory modification was needed for such a situation.

The right to redeem one or more mortgages, separately or simultaneously, which is the right conferred by section 61, is exercisable only when there is no contract to the contrary. Even where there is such a contract made in favour of the mortgagee, the mortgagee might waive it expressly or by impliedly, it would seem.

No change is needed in the section.

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1 Megarry & Wade, Real Property (1966), page 922, paragraph (3), and page 922, bottom, example (i).

CHAPTER 60

RIGHT TO RECOVER POSSESSION

SECTION 62

60.1. *Introductory.*—Dealing still, with the right of the mortgagor, the Act deals in section 62 specially with the right of a usufructuary mortgagor to recover possesson. The query that would naturally arise is—where was the need to have a special provision for the right of the usufructuary mortgagor, when section 60,—the general section relating to "redemption"—already provides for re-transfer of possession by the mortgagee to the mortgagor consequential on redemption ? For answering this query, it is necessary to draw attention to certain features of section 60.

60.2. *Redemption—limitations of*—The right of redemption connotes the "right to pay" the mortagage-money and get back the property. Where the mortgagee is entitled to remain in possession till the mortgage-debt *is wholly* discharged from the rents and profits of the property, the mortgagor will not have the right to "pay" and clear off the encumbrance. He will have to allow that debt to be wiped out from *the usufruct* of the property alone. The mortgagor's right to get back the property after the debt has been cleared in this manner is not a right of "redemption". It is simply a right of recovering possession. Such a right is provided for in clause (a) of section 64.

Section 60 deals with a right of redemption, i.e., a right to require the mortgagee, *on payment of the mortgage-money,* to do the various acts referred to in that section. It applies to all mortgages generally. Section 62 is a special provision which is supplementary to the general provisions of section 60, and deals with usufructuary mortgages only. It provides for a right to recover possession from the usufructuary mortgagee in the two cases specified.

Although a suit for redemption of a usufructuary mortgage necessarily involves a prayer for possession and is, in substance, a suit for possession, a suit under section 62 is not necessarily a suit for redemption. For, in a case falling within clause (a) of section 62, the mortgagor is not entitled to pay the mortgage-money and claim back the property. He has to allow the mortgagee to continue in possession till the mortgage debt is paid off from the usufruct of the property itself. His suit for possession is, therefore, not one for "redemption".[1]

60.3. *Section* 62.—This is what section 62 provides—

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1 A.I.R. 1957 Pat. 452, 455.
A.I.R. 1946 All. 400, 402.
A.I.R. 1930 Mad. 160, 166.

"62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,—

(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 or any part thereof a part only of the mortgage 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 mortgage money or the balance thereof or deposits it in Court as hereinafter provided."

Clause (a) is concerned with the case where *the entire* mortgage money is to be paid out of the receipts. Clause (b) is concerned with the case where *only a part* of the mortgage money is to be so paid.

60.4. *Position in England.*—In England, the position of a mortgagee who is to continue in possession till the satisfaction of the mortgage-money by reception of the rents and profits is that of a tenant by *elegit,* and as soon as the principal amount and interest are satisfied his estate ceases and the mortgagor may maintain an ejectment II. This corresponds[2] broadly to the provision in clause (a) of a section 62. Where the right of the usufructuary mortgagee to possession is automatically determined by the terms of the contract, the mortgagor can maintain an action for ejectment against the mortgagee.

60.5. *Termination of right to possession.*—The principle underlying section 63 is that on payment or realisation of the mortgage-money, the mortgage comes to an end and the right of the mortgagee to remain in possession also comes to an end.[3] If, after the receipt of the mortgage-money, the mortgagee refuses to deliver back the possession and perform the acts he is bound to do, the non-compliance with the demand does not make the mortgage continue. But the mortgagor can enforce his sight to get back the possession and the mortgage deed and other documents relating to the mortgaged property, through Court.[4]

60.6. *Section* 62, *clause* (*a*).—Clause (a) of section 63 applies to that form of usufructuary mortgage in which the creditor is let into possession on the understanding that he is to enjoy the usufruct *till the whole of the mortgage-debt* is liquidated. This form of mortgage resembles a *vivum vadium,* in which no provision for "redemption" is made and the mortgagee is entitled to remain in possession till the entire mortgage-debt is wiped off from the rents and profits of the property. The words "when the money is paid" in clause (a) mean "when the money is paid *from the rents and profits*". They do not include a *payment by the mortgagor.* A suit, therefore, to recover possession of the property by the mortgagor before the debt is satisfied out of the rents and profits is premature and must be dismissed.

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1 *Yates* v. *Hambly,* (1742) 26 E.R. 618, 620.
2 *Paramsukh* v. *Yadav,* AIR 1918 Ng. 28, 29.
3 *Pally* v. *Augusthy,* A.I.R. 1967 Ker. 247, 248.
4 A.I.R. 1963 S.C. 1041, 1044.

60.6A. *Contractual term.*—Clause (a) does not say that a different rule is to be applied when, by the contract, a term of years is fixed. Where it is the intention of the parties, as expressed in the mortgage-deed, that the mortgagee is to take the rents and profits for a certain period, on the expiry of which the mortgage-money is to be deemed to be satisfied, then the mortgagor cannot, before the expiry of the period, recover possession of the mortgaged property. But the mere creation of a term is, by no means, conclusive on the point. The term fixed must form the essence of the contract. Where it does not form the essence of the contract, the mortgagor is entitled to recover possession of the property as soon as the mortgage-debt is satisfied from the rents and profits, even before the expiry of the term.

60.7. *Application of receipts.*—It may be noted that under section 76, the mortgagee in possession is bound to apply the receipts from the property towards the satisfaction of the mortgage-debt. Any sum, therefore, which the mortgagee retains in violation of the terms of the contract must be applied in reduction of the mortgage-money.

60.8. *Section* 62, *clause* (*b*).—Where only a part of the mortgage-money is to be adjusted out of the receipts from the property, the position is slightly different. The remainder of the mortgage-money must obviously be paid in cash. If a (minimum) term is prescribed in the mortgage deed for the purpose, the mortgagor has the right, *on expiry of the term,* to pay the remainder, and claim back possession. If there is no minimum term fixed, the right can be exercised at any time during the subsistence of the mortgage. If a term is fixed but is invalid as being a clog on the right of the mortgagor,[1] then also the position is the same.

There is nothing to *prevent a term* from being fixed in a usufructuary mortgage for the mortgagee's enjoyment, during which term the mortgage cannot be redeemed.[2] That this is to, is clear from the words "when the term, if any, prescribed for the payment of the mortgage-money has expired" in clause (b) of section 62.

60.9. *No change.*—The above discussion does not disclose any need for amending section 62.

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1 Section 60.
2 *Abhoy Charan* v. *Harendra Chandra,* A.I.R. 1940 Cal. 437, 438.

CHAPTER 61

ACCESSIONS TO MORTGAGED PROPERTY

SECTION 63

61.1. *Introductory*—The obligation of the mortgagee in possession to deliver back possession of the mortgaged property raises certain questions of considerable theoretical and practical interest. What is to happen where a change in the character of the mortgaged property has taken place in the period during which it was in the mortgagee's possession? How far can this change in character affect or benefit the mortgagor? The primary right of the mortgagor—one may assume—should be to claim the mortgaged property back exactly in the condition in which he delivered it, except for reasonable wear and tear and except for the effects of such acts as may be reasonably attributable to the fact that the property is delivered as a security for the loan. But enunciation of this primary duty does not solve the problem that may arise in the numerous fact situations that one can conceive of by way of a physical change in the nature of the property. Where such a physical change has, in fact, taken place, the law must take a positive stand on the question—who will reap the benefit or suffer the loss consequent on the change in character? A change in character of the property may result—

(a) from action of natural forces (e.g., alluvion); or

(b) from an act of the mortgagee for which he ought to be held responsible; or

(c) from a human act for which the mortgagee ought not to be held responsible.

Again, the change may be beneficial to the property or it may cause injury to the property or deterioration in its value. These being the various permutations and combinations, the provisions intended to deal with them could, in theory, have been complex, elaborate and extensive. Actually, they are not so—presumably because every legislative measure is not necessarily framed on the lines of an academic treatise. The provisions on the point under consideration are, in the Act, scattered at several places.

61.2. Taking up the provisions such as they are, we come to section 63, which deals with "accessions" to mortgaged property—

> "69. 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.
>
> "Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to

take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum.

"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."

61.3. *Principle*—Section 63 and section 70 are both based on the principle enunciated by the maxims *accessio credit principal* (the increase follows the principal) and *accessorium non ducit sed sequitur suum principale* (that which is the accessory or incident does not lead but follows, its principal). This section provides that the mortgagor shall, upon redemption, be entitled to the accession received during the continuance of the mortgage, and section 70 provides that the mortgagee shall be entitled to such accession as part of his security. They merely enact the law as it was applied before the Act was passed.[1]

It is, however, necessary for the application of this section or of section 70, that the property or right claimed by the mortgagor under this section or by the mortgagee under section 70 should constitute an "accession". The word "accession" has not been defined in the Act. In the Roman law, "accessio" is the general name given to every accessory thing, whether corporeal or incorporeal, that has been added to principal thing from without, and has been connected with it, whether by the powers of nature or by the will of man, so that in virtue of this connection, it is regarded as part and parcel of the thing.[2]

61.4. *Nature*—Although the section does not make it a condition that the mortgage should have made the acquisition by availing himself of his position as such mortgagee, yet the judgment of the Privy Council in *Sorabjee* v. *Dwarkadas*[3] shows that the sections is only[4] an application of the equitable principle enacted in section 30 of the Indian Trusts Act. That section is as follows :—

"90. Where a tenant for life, co-owner, *mortgagee* or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all

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1 (1874) 77 Bom. H.C.R.A.C. 32, 33 (D.B.).
2 Mackeld, Roman Law, 155, 156, cited in Broom. (A Selection of Legal Maxims, 10 Edition (1939) page 317.
3 *Sorabjee* v. *Dwarkadas* AIR 1932 P.C. 199.
4 Mulla (1973), page 454.

persons interested in such property gains any advantages, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage."

What amounts to an accession within section 63 is a question of a fact.[1] Accession by alluvion is a natural accession by virtue of section 63, and can be redeemed by the mortgagor along with the other property without payment of any additional moneys. There may also be what are called incorporeal accessions, such as the acquisition of an interest in the property.[2]

Of course, every thing which is substituted in place of the old property would not be an accession. Re-building a fallen house is not, therefore, an accession;[3] nor is a substantial building reerected in place of a pre-existing kuccha building.[4] These propositions are of particular importance in India, since the technical English common law rules as to fixtures do not, in terms, apply in India.

Natural accessions do not present much difficulty in regard to the adjustment of the rival claims of the mortgagor, and the mortgagee, since no money would ordinarily have been spent thereupon and, in any case, they would not be capable of separate possession or enjoyment without detriment to the principal property. Where, however, money has been spent by the mortgagee, and the accession is capable of separate possession or enjoyment without such detriment as aforesaid, the question of adjustment of the rival claims naturally arises. It is for this situation that the second and third paragraphs of the section make certain provisions. The last paragraph of the section deals with the special situation where, in a usufructuary mortgage, the accession has been acquired at the expense of the mortgagee, by providing that the profits shall be set off against the interest payable on the money so spent by the mortgagee.

61. 5. *Contract Act*—It may be noted[5] that under the Contract Act, in the absence of any agreement to the contrary, the bailee of goods is bound to return to the bailor natural increases or profits accruing to the goods during the period of bailment. Section 163 of that Act reads—

"163. Bailor entitled to increase or profit from goods bailed—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A."

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1 *Sheo Pujan Prasad* v. *Bhagwati Dubey*, A.I.R. 1949 Pat. 99.
2 *Siddheshwar* v. *Ram Saroop*, A.I.R. 1963 Pat. 412 (F.B.).
3 *Kallu* v. *Ganesh*, A.I.R. 1929 All. 340.
4 *Cheddi Lal* v. *Babu Nandan* A.I.R. 1944 All. 204.
5 Section 163, Contract Act.

61.6. *Case law*—In *Motilal Hirabhai* v. *Bai Mani*[1] the Privy Council held that where after shares, in a company, were pledged, the company issued fresh shares and allotted them to the old share-holders taking the call money from the yearly dividend payable on the old shares, on which they had resolved to pay a fixed interest of 6 per centum per annum, the new shares were "increase or profit" and the pledgee must return them to the pledgor along with the old shares. These additional shares were, in the opinion of the Privy Council accessions to the shares expressly pledged or hypothecated, and the pledgor was entitled to recover them. The decision of this case is based upon section 163 of the Indian Contract Act; none-the-less, the principles underlying this decision apply to the present case also.

In the case of *Shripad Laxman* v. *Kashibai*,[2] it has been held that where a shop is mortgaged with the site on which it was standing and the shop is subsequently destroyed by fire and a new shop is constructed in its place, the new shop must be deemed to be an accession to the mortgaged property within the meaning of section 70. Again, if a person mortgages his occupancy right in a holding and subsequently acquires the full right in the land, that is to say, becomes the absolute owner as a landlord, the mortgagee will be entitled to enforce the mortgage security against the enhanced right which the mortgagor happens to acquire subsequent to the mortgage, under section 70. In such cases, increase in the right must be regarded as accession to the security to which the mortgagee will be entitled.

61.7. *Recommendation—Change in structure*—While section 63 does not need any change of substances, its structure leaves some scope for improvement. The arrangement would, in our opinion, be improved if the various situations and sub-situations are dealt with distinctly. The structure of the section, on a proper analysis, could be represented as follows :—

(1) The first paragraph lays down the general proposition that the mortgagor is entitled to the accession in the absence of a contract to the contrary. This could be put as sub-section (1).

(2) Where such an accession has been acquired at the expense of the mortgagee, the second and third paragraphs govern the situation. There are two sub-situations :

(a) Where the accession is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay the expenses.

[This could be put as a separate sub-section].

(b) Where the accession is not capable of separate possession or enjoyment without detriment to the property, the accession must be delivered to the mortgagor subject to what is provided in (c) below.

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1 *Motilal Hirabhai* v. *Bai Mani*, A.I.R. 1925 P.C. 86.

2 *Shripad Laxman*, v. *Kashibai*, A.I.R. 1945 Bom. 248.

(c) In the case put in (b) above, the mortgagor is liable, in the case of an accession which is necessary to preserve the property or which is made with the assent of the mortgagor, to pay the proper cost thereof as an addition to the principal money with interest, at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum.

(d) In the case (c) above, the profits from the accession shall be credited to the mortgagor.
(Propositions (b), (c) and (d) above could be put into one sub-section).

(3) The last paragraph of the section makes a special provision for usufructuary mortgages. This could be put as the last sub-section.

61.8. *Recommendation*—We recommend a restructuring of the section on the above lines.

CHAPTER 62
IMPROVEMENTS

SECTION 63A

62.1. *Introductory*—In general, accessions increase or add to the extent or quantity of the property. Those alternations which increase the value of the property form a special category of, or are at least analogous to, accessions, These are dealt with under the head of "improvements" in section 63A, which reads :

> "63A. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for insub-section (2), be liable to pay the cost thereof.
>
> (2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor."

62.2. *Scope*—Section 63A does not enable the mortgagor to claim the value of improvements in every case. Sub-section (1) specifically provides that all such improvements shall, in the absence of a contract to the contrary, on redemption belong to the mortgagor and that he shall not be liable to pay the cost thereof. It is only in the special circumstances laid down in sub-section (2) that the mortgagee is entitled by a statutory right to be paid the proper cost of improvements,[1] of course, subject to a contract to contrary.

62.3. *Scope of the section and its significance*—The section was inserted in 1929 in view of the fact that before that amendment, there was a difference of opinion on the question whether a mortgagee who had effected improvements on the mortgaged property was entitled to claim the cost thereof from the mortgagor. According to one set of cases, the mortgagee was not so entitled except where the improvements constituted necessary

1 *Moidu* v. *Mammunhi*, (1974) Ker. L.J. 95; (1974) Ker. L.T. 879.

repairs.[1] According to another set of cases which followed the English law, the mortgagee was entitled to a charge for improvements if they were reasonable.[2] Yet another view left the matter to custom.[3] The section settles the controversy by making a specific provision.

According to the English law as summarised in the contemporaneous edition of Fisher on Mortgages,[4] the test was of reasonableness. The improvements must always be reasonable, having regard to the nature and value of the estate. The Special Committee, whose Report led to the amendment of 1929, instead of leaving it to the court to determine whether improvements were reasonable, proposed to have a "uniform and definite rule". That explains the rather elaborate provision in the section. The limitations imposed by the section make it difficult for the mortgagee—rightly so —to "improve the mortgage out of his (mortgagor's) estate".[5]

62.4. *Contract and custom*—It is to be noted that while section 63A makes an exception for a contractual stipulation to the contrary, it does not make an exception for "customary" improvements. There appears to exist in certain areas in the South a custom of allowing claims of the mortgagee for value of improvements effected by him, apart from an agreement.

62.5. *No change*—The above discussion discloses no need for amending the section.

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1 (1896) I.L.R. 19 Mad. 327, 329.
2 (a) A.I.R. 1918 Bom. 84, 85.
(b) (1899) I.L.R. 26 Cal. 1, 8.
3 *Union* v. *Rama,* (1885) I.L.R. 8 Mad. 415, 418.
4 Fisher on Mortgages, as referred to by the Special Committee.
5 *Gyan Chand* v. *Ram Prasad,* A.I.R. 1960 Pat. 503.

CHAPTER 63

RENEWAL OF LEASE UNDER MORTGAGE

SECTION 64

63.1. *Introductory*—The adjustment of claims of the mortgagor and the mortgagee in regard to *property newly acquired* is dealt with by the next section—section 64—which deals with renewal of a lease under mortgage. Where the mortgaged property is a lease 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 mortgagee's title thereto. Before 1929, the section was confined to cases where the mortgaged property was a lease for a "term of years". This restriction has now been omitted so that, whether it is a term of years as such or a lease for an indefinite period,—for example, a lease until the happening of a certain contingency—the section is applicable.

63.2. *Contract*—The section is subject to a contract by the mortgagor to the contrary. What is the position where there is no *express contract*? Such a question may arise where, at the time of creating the mortgage, the parties did not advert to the possibility of renewal.

This question arose in Calcutta High Court in 1921.[1] An opinion was expressed in the judgment that there is only a presumption that the mortgagee acquires renewal of the lease for the mortgagor's benefit and that such a presumption might be rebutted, and that when a new lease was obtained *bona fide* by the mortgagee after giving all parties interested notice and an opportunity of renewal, the new lease is not for the benefit of the mortgagor. Although this conclusion may not be strictly according to the terms of the section, the view taken, with respect, seems to be a sensible one.

63.3. *Purchase of reversion—Recommendation*—In England, where the mortgaged property is lease-hold and the lease contains an option to renew or to *purhase the reversion,* and the mortgagee exercises the option, the mortgagor is entitled on redemption to have the renewed lease or the *reversion* transferred to him, subject to payment of the property expenses involved in exercising the option.[2] Section 64 does not make any express provision for the situation of *purchase of reversion* by the mortgagee. It would appear that it will be convenient if this situation is also dealt with by an express provision. We recommend that the section should be so simplified. It may be noted that the English law as stated above, is wide enough to cover such a case. In fact, the principle is much wider than the situation of a lease. Every student of equity is familiar with the

1 (1921) 62 Ind Cas 692, 694, 695 (D.B.) (Cal.).
2 *Nelson* v. *Hennam,* (1943) Ch. 59; (1942) 2 All. E.R. 680.

doctrine in *Keech* v. *Sandford*.[1] In this leading case on the subject of constructive trust, the lessor distinctly refused to renew the lease to the infant and it was not suggested that the trustee was guilty of any improper conduct; yet the trustee was not allowed to take a renewal to himself. In the application of this principle to the particular subject under discussion, the position is that the additional term of the lease comes from "the old root subject to the same equity of redemption", as was observed by the Master of the Rolls in the leading case of *Bakestraw* v. *Brewer*,[2]

1 *Keech* v. *Sandford* (1726) Select cases in Chancery, 761.
Ghose, Law of Mortgage in India (1902), page 327.
2 *Bakeshuram* v. *Brewer*, (1728) 2 P Wms. 510.

CHAPTER 64

CONTRACTS BY THE MORTGAGOR

SECTION 65

64.1. *Section* 65—The implied covenants of a mortgagor are dealt with in section 65. The section enumerates five such covenants. At first sight, they may appear to be heretogeneous and having no connections with each other, but a close analysis would reveal that there is a common thread binding them. A mortgage is essentially a security and the object of the implied convenants is to strengthen the security and to read into the transactions, such conditions as may enable the mortgagee to avail himself of it without substantial impairment. In this sense, they are not extraneous to the mortgage, but are integrally connected with the security.

This is how section 65 reads—

"65. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

' (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(d) and, where the mortgaged property is a lease, 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 condition contained therein and observe the contracts binding on the lesee, 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.

> 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".

64.2. *Remedies*—In respect of every one of the contracts referred to in the various clauses of the section, the mortgagee has, of course, the general remedy, by way of damages under section 73 of the Indian Contract Act, 1872. This right to claim damages is not in any way taken away by section 68 of the Transfer of Property Act. The mortgagee has also other remedies open to him which[1] may, however, vary according to the particular clause of the section under which the implied contract falls.

64.3. *Sanctions*—Most of the covenants enumarated in section 65 have for them appropriate sanctions in other sections of the Act.

Thus, section 65(a) is the covenant for title and its breach represents a "wrongful act or default" of the mortgagor in terms of section 68(1)(c), so that the mortgagee is deprived of a part of his security and has a right to sue for the mortgage money under section 68.

Section 65(b) imposes an obligation on the mortgagor to defend his title. Corresponding to this is the provision in section 72(c), enabling the mortgagee to spend such money as is necessary for supporting the mortgagor's title to the property.

Section 65(c) imposes on the mortgagor the duty to pay all public charges accruing in respect of the property so long as the mortgagee is not in possession. Corresponding to this is the power of the mortgagee under section 72(b) to spend such money as is necessary for the preservation of the mortgaged property from destruction forfeiture or sale, after giving the notice required by section 72, first paragraph, proviso. On a similar principle is based section 69 of the Indian Contract Act, providing for re-imbursement where a person interested in property spends money which another is bound to pay. The text of section 69 is as follows :—

> "A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays for it, is entitled to be re-imbursed by the other."

Under section 65(d), certain covenants are imposed in case of lease. Where the mortgaged property is a lease, the mortgagor undertakes two principal obligations, namely, that in the past the terms of the lease as to rents and conditions have been complied with down to the commencement of the mortgage, and secondly, as to the future, that they will be complied with so long as the security exists and the mortgagee is not in possession. Corresponding to this is section 72(b), under which the mortgagee may spend such money as is necessary for the preservation of the mortgaged property from destruction, *forfeiture* or sale.[2]

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1 See para 64.3.

2 Section 72(b).

Lastly, under section 65(e), where the mortgage is a second or subsequent encumbrance, the mortgagor covenants that he will pay the interest from time to time accruing due on each prior encumbrance and will at an appropriate time discharge the principal money due on such prior encumbrance. For a breach of this covenant the remedies are provided in—

(i) section 68(c), which relates to the case 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; and

(ii) section 72(b), under which the mortgagee may spend such money as is necessary for preservation of the mortgaged property from destruction, forfeiture or sale; and

(iii) section 69 of the Indian Contract Act, 1872.

6.4. *English law.*—The provisions in clauses (a) and (d) of section 65 correspond to the provisions of section 7 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. C. 41), now reproduced in section 76, sub-section (1), clauses (c) and (d) respectively of the Law of Property Act, 1925 (15 Veo. V. Ch. 20).

The last clause of section 65 corresponds to section 76(6) of the Law of Proper Act, 1925 which runs as follows :—

> "The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenants, and shall be capable of being enforced by every person in whom that estate or interests is, for the whole or any part thereof, from time to time vested."

64.5. *Clause (a)*—Clause (a) of section 64 provides for a statutory covenant for title, similar to the one contained in section 55, sub-section (2), with respect to sales. A breach of the covenant will occur where the mortgagor's title or his power to transfer the interest is found to be defective. The consequence of such a breach is not to render the mortgage itself void, but merely to give rise to a right in the mortgages to claim certain reliefs.

The right of the mortgagee on the implied contract under clause (a) must be distinguished from the doctrine of estoppel that may be applicable between the mortgagor and mortgagee. As a general rule, the mortgagor cannot derogate from his own grant and he and his representatives will not be allowed to deny his title as against the mortgagee except where the mortgage is forbidden by law, in which case there can be no estopped against statute, and and except where the truth is known to the mortgagee, in which case also there is no estoppel.

But independent of any question of estoppel, if, as a matter of fact, that title of the mortgagor is found to be defective the mortgagee will, by virtue of this clause, be entitled to claim compensation for breach of the implied contract.

The failure to disclose at the time of the mortgage the existence of a prior incumbrance is, according to the High Court of Calcutta,[1] a breach of an obligation imposed by clause (a). A contrary view, namely, that the mortgagor is not bound to disclose any prior incumbrances on the property has been expressed by the Judicial Commissioner's Court of Nagpur.[2] The former view appears to be correct.

64.6. *Clause (b)*—Clause (b) of section 64 is only a legislative recognition of the principle that had been recognised even before the passing of this Act, namely, that a mortgagor was bound under the ordinary law of mortgage to indemnify the estate against expenses incurred in protecting the title. A breach of the implied contract under this clause occurs when the mortgagor, being in possession does not defend his title, or when the mortgagee is in possession and the mortgagor fails to assist him in defending the title.

64.7. *Clause (c)*—The implied contract under clause (c) of section 64 is that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property. The clause does not apply where the mortgagee is in possession of the mortgaged property. Under section 76, clause (c), it is the duty of the mortgagee himself in such a case to pay such charges from out of the income of the property.

64.8. *Last paragraph*—There is a provision in the last paragraph of section 65, under which the benefit of the covenants mentioned in the main section can be claimed by a transferee from the mortgagee of the property. This provision is silent about the burden. It would appear that the burden of the covenants covered in section 65 cannot be enforced against a purchaser of the equity of redemption.[3] In England also, the covenant will not affect in assignee from the covenantor unless he is a party to the contract.[4] Whether section 59A, inserted in 1929, makes any difference in this position is not very clear. As regards the duty to pay the taxes, it may perhaps be properly regarded as covenant which does not attach or concerns the property.[5] While a statutory provision imposing a liability on a person binds his legal representatives and assignees[6] the covenant for title is not enforceable against the subsequent assignee of the equity of redemption, since the person liable is the individual who gives the covenant and the obligation is a purely personal one, which does not run with the land.[7]

64.9. *No change*—The above discussion discloses no need to amend section 65.

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1 (1910) 7 Ind Cas 251, 252 (D.B.).

2 *Ramakrishna Nandram* v. *Ganesh Narayan,* A.I.R. 1934 Nag. 149, 151.

3 *Srinivasa Chari* v. *Gnanaprakash,* (1907) I.L.R. 30 Mad. 67, 71.

4 English cases are reviewed in *Subbiah* v. *Rama Reddy,* A.I.R. 1917 Mad. 228, 232.

5 *Subbiah* v. *Rami Reddy,* A.I.R. 1917 Mad. 228, 231.

6 *Ramakrishnama Chetty* v. *Vuvvati Chenga Aiyar,* (1916) 33 I.C. 321 (Mad.). referred to in *Subbiah* v. *Rami Reddy;* A.I.R. 1917 Mad. 228, 230.

7 Section 40.

CHAPTER 65

MORTGAGOR'S ENJOYMENT OF PROPERTY

SECTIONS 65A AND 66

65.1. *Introductory*—The creation of a mortgage does not necessarily transfer the possession and enjoyment of the property to the mortgagee. The mortgagee's interest in the property—a limited one in every case—does not extend to interference with the normal enjoyment by the mortgagor. This proposition has two aspects—positive and negative—given expression in sections 65A and 66, respectively.

65.2. *Section 65A—Mortgagor's power to lease*—The mortgagor's power to lease is governed by section 65A, quoted below :

"65A. (1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make lease thereof which shall be binding on the mortgagee.

(2)(a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

"(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall as far as may be operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were "contained in that sub-section."

The section needs no change.

65.3. *Section 66—Waste by the mortgagor*—While the mortgagor remains in possession, he must not overlook the fact that his rights are limited by the *security given to the mortgagee.* His enjoyment of the property is, accordingly, subject to the following rule enacted in section 66 :—

"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.

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."

65.4. *No change*—No change appears to be needed in the section.

CHAPTER 66

RIGHT TO FORECLOSURE ON SALE

SECTION 67

66.1. *Introductory*—Discussion of the rights and liabilities of the mortgagor commenced, it may be recalled, with the right of redemption (section 60). In symmetry with this, a discussion of the rights and liabilities of the mortgagee commences with the most important right—the right of foreclosure or sale. Redemption puts an end to the mortgage. Foreclosure or sale also puts an end to it, though in a different manner. This right is dealt with in section 67, which reads—

> "67. In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due 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 a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.
>
> A suit to obtain a decree 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 any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclosure, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditonal 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."

66.2. *Recommendation Foreclosure to be abolished*—With reference to this section, the most important question to be considered is whether the right of foreclosure should be retained at the present day. Although this

right has been recognised for along time in India, we have to consider the question whether it is just and fair to allow it to continue. The recognition of a right of foreclosure appears to us to be hardly in conformity with the approach of the law in other respects towards a mortgage. The doctrine evolved in the Court of Chancery—doctrines which have found expression in all the important sections of the Act dealing wth mortgages—have all through placed empasis on the fact that a mortgage remains, from the beginning to end, a security. And this is so—

(a) irrespective of the formula adopted in the particular mortgage, and

(b) regardless of whether the mortgage is between persons unequally situated, or is between parties who are both experienced in business affairs.

Without showing any unduly soft corner for the mortgagor, it is possible to do justice to both the parties by substituting sale for foreclosure. This, no doubt, is a modification of the rights flowing from a transaction into which both parties have entered of their own volition, but that may not be a conclusive argument in this particular field of law. If the mortgagee is given a right of sale through Court, the mortgagee will be able to realise his debt and at the same time the mortgagor will have satisfaction of realising the best possible price.

66.3. If this reasoning is accepted, section 67 could be suitably amended. A simple provision to the effect that in the case of a mortgage by conditional sale or an anomalous mortgage providing for foreclosure, the mortgagee may bring a suit for sale, could be substituted. After this substitution it will be possible to shorten the section considerably. And, of course,[1] consequential changes will be required in the Code of Civil Procedure in the Order relating to mortgages.

66.4. *Recommendation for change in structure*—Apart from this change of substance, we would also recommend a re-structuring of the section on the following lines in order to facilitate a better understanding :—

(a) The first sub-section should indicate separately that morgagees have the right of sale. This will incorporate the present first paragraph and part of clause (a) of the last paragraph.

(b) The second paragraph should be omitted, since foreclosure is to be omitted.

(c) The third paragraph, clause (a) in part, clause (b) and clause (c) may be put in the next sub-section, with consequential changes, since foreclosure is to omitted.

(d) The third paragraph, clause (d) should appear as a separate sub-section, since it is an exception of a general character.

66.5. *Redraft*—In order to implement the changes which we have recommended—in substance and in the structure—we recommend the following redraft of the section :

"67. (1) In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to

1 Order 34, C.P.C. to be amended.

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 a decree that the property be sold.

(2) Nothing in this section shall be deemed—

(a) to authorise a usufructuary mortgagee as such to institute a suit for sale; or

(b) to authorise the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for sale.

(3) *Nothing in this section shall be deemed* to authorise 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."

CHAPTER 67

MORTGAGEE'S DUTY TO BRING ONE SUIT

SECTION 67A

67.1. *Section* 67A—While a mortgagee has no right to insist on a consolidation of more than one mortgage executed by the same mortgagor,[1] he himself is under a duty to bring one suit on all such mortgages where he can obtain the same kind of decree.

Under Section 67A, a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

67.2. *Parties not the same*—Where the parties to the mortgage are not the same, there is no occasion for the application of section 67A. This principle was illustrated in an interesting situation[2] where the first mortgage was by the husband and the second mortgage was by the husband and wife *with respect to another property* in favour of the same mortgagee. First, there was a suit on the second mortgage and the decree was satisfied. Afterwards, the mortgagee filed a suit on the first mortgage, and an objection was raised that the second suit was not maintainable, being barred by section 67A. The objection was overruled.

67.3. No objection taken—Yet another exception to the operation of section 67A has been recognised by judicial decisions [3] [4] although not mentioned in the section. The section, it has been held, contins no prohibition against the institution of a suit on one of the mortgages in cases where no objection to the form of the suit was taken on the earlier occasion.

67.4. *Different properties*—With reference to section 67A, it is pertinent to point out that the section does not, in express terms, deal with the case where the properties are different. As the section stands at present, however, it is wide enough to permit the construction that if the mortgagee holds different mortgages *of different properties* obtained from the same mortgagor, he must enforce all or none, unless there is a contract to the contrary.[5]

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1 Section 61.
2 *Raja Gopalaswami Naidu* v. *Bank of Karaikudi*, A.I.R. 1971 S.C. 884.
3 *Pullamma Dammav Pullappa*, A.I.R. 1969 Mys. 20.
4 *K. C. Reddy* v. *R. Venkata Rao*, A.I.R. 1961 A.P. 175.
5 Mulla (1973), page 480.

Whether, however, this was the intention of the legislature when it inserted section 67A in 1929, is not very clear. The amendment was made in order to set at rest the conflicting decisions prior to 1929, and it would appear that almost all the previous decisions related to the situation where there were successive mortgages of the *same property*. This is apparent from the previous case law, conveniently reviewed in the decisions mentioned in the footnotes.[1-2]

67.3A. *Recommendation to confine section 67A to some properties*—It is a matter for consideration whether the section should not be limited to cases where the mortgages relate to the same property. In principle, there is no reason why the mortgages should be required to bring one suit for different mortgages of *different* properties. There is no question of harassment to the mortgagor in such a case. In fact, in practice, the separate trial of such suits is more convenient from the practical point of view, speaking in general. It may be noted that it has been pointed out by the Madras High Court[3] that the principle of consolidation by the mortgagee becomes necessary only when the mortgage relate to the same property and that its extension to mortgages over different properties is not necessary or even justifiable. The Madras High Court suggested an amendment of section 67A to narrow down its scope.

67.4. *Section* 67A—*genesis*—The Special Committee which reviewed the Act in 1927 observed with reference to section 67A as follows in its Report :

> "While dealing with S.61, we pointed out that it is inequitable to enforce the principle of the consolidation of securities to the prejudice of a mortgagor. When, however, a mortgagee holds several mortgages in respect of the same *or different properties*[4] it will be prejudicial to the mortgagor if the mortgagee is allowed to enforce one mortgage and keep the other mortgages alive. In the case of a number of mortgages in which the only remedy open is foreclosure, the advantage of the mortgagor will be very marked as he may lose the whole property in satisfaction of one debt, which may be less than the real value of the property and will be liable to have a personal decree passed against him in satisfaction of the debts under the other mortgages. In the case of mortgages too where the only remedy is sale, the property will never realise its fair and proper value if it be sold subject to another mortgage."

We are not, with respect, satisfied that this reasoning can apply at all to mortgages of different properties.

67.5. *Madras case*—The following extracts from the judgment in the Madras case are instructive.[5]

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1 *Nilu* v. *Asirbad*, (1920) 25 C.W.N. 129, followed in *Muhamat Babarak* v. *Dalip Singh*, A.I.R. 1927 Pat. 117.

2 *Sunder Singh* v. *Balu*, (1898) I.L.R. 20 All. 322 followed in *Dwarka Prasad* v. *Ulfat Rai*, A.I.R. 1931 All. 549.

3 *M. M. Sowear* v. *M. M. Goundan*, A.I.R. 1956 Mad. 567.

4 Emphasis added.

5 *M. M. Sowear* v. *Goundan*, A.I.R. 1956 Mad. 567, 469, para 6-7.

"In *Subramania* v. *Balasubramania,* 1916 Mad. 934, it was held by a Full Bench of this Court that it was open to mortgagee to bring a suit for the recovery of his debt by sale of the properties mortgaged to him subject to his interest "in a prior mortgage and the principle in section 61, which was applied to a suit for sale on the mortgage by a mortgagee holding more than one mortgage on the same property, was held not to be a sufficient ground for refusing to allow a mortgagee suing on a puishe mortgagee to sell subject to a prior mortgage in his favour.

"Sadasiva Aiyar J., suggested to the Legislature that section 61 of Act 4 of 1882 might be replaced by a section enacting that all consolidation, even in the case where the mortgagee and mortgagor are the same persons and the property is the same, is abolished. The view of the learned Judge was that the principle of consolidation which was abolished in the case of suits for redemption by a mortgagor who has mortgaged the same property in favour of the same mortgagee more than once be applied to a suit for sale compelling the mortgagee who had several mortgages over the same property from the same mortgagor not to institute more than one suit.

"The reason for requiring the mortgagee to enforce all the mortgages which he holds in favour of the *same property*[1] from the same mortgagor is 'that a sale of property subject to other mortgages is not likely to realise a fair price and would cause hardship to a mortgagor. In order to prevent such hardship, it was found necessary to extend the principle of S. 61 to suits for sale by mortgagees who held several mortgages over the same property from the same mortgagor.....

"In *Cadiram* v. *Punamchand,* 1933 Nag. 171, the principle of S. 67A was considered to be equitable in the case of a mortgagee who held two mortgages of different dates over *the same property.* The reasoning is that in case of mortgage by conditional sale, the mortgagor is likely to lose the whole property in satisfaction of one debt notwithstanding that the value of the property may be more than the debt and in cases of simple mortgage, the property will never fetch its real value if it is sold subject to another mortgage.

"The iniquity was found to be greater in that case where a purchaser of a part of the mortgaged property was sought to be made liable for the whole of the second debt, when he had paid the full price under the impression that it was freed from all encumbrances. But the provision was not held applicable to the facts of that case The principle of consolidation of mortgages by the mortgagee when he 'seeks to enforce the mortgages becomes necessary when the mortgages relate to the same property by the mortgagor, and no prejudice or injustice is likely to be caused to a mortgagor if the mortgagee institutes different suits on mortgages over different properties.

"The observations in 1933 Nag. 171 further demonstrate the purpose for which S. 67-A was intended, but apparently it was extended to mortgages over different properties also in order to

1 Emphasis added.

bring it in line with the amended S. 61 *without realising the necessity or the justification for a wholesale extension of the principle of S. 61 to S. 67A. It appears to me therefore that S. 67A requires to be suitably amended by compelling only a mortgagee who holds two or more mortgages over the same property executed by the same mortgagor* to sue on all the mortgages, and not a mortgagee who holds two or more mortgages over *different properties* from the same mortgagor."

We think that the above observations correctly state the law and there is no justification for including mortgages of different properties within section 67-A.

67.6. *Recommendation*—In the light of what is stated above, we are of the opinion that section 67-A should be confined to mortgages of the same properties.[1]

67.7. *Properties outside the jurisdiction—Recommendation*—What happens when the first mortgage related to property which is outside the jurisdiction of the court before which the suit is now instituted ? This question has also arisen before the courts. The view generally taken[2] is that the words "all the mortgages in respect of which the mortgage money has become due" must be limited to those mortgages which the court in which the mortgagee sues has jurisdiction to enforce. In this sense, the provisions of section 67A do not amend section 16 of the Code of Civil Procedure, 1908. Section 16 — so far as material and to state only the gist thereof, —provides that a suit relating to a mortgage of immovable property must be instituted in the court within whose jurisdiction the immovable property is situated.

67.8. *Recommendation as to the section*—Our recommendation to replace foreclosure is subject to Shri Sen-Varma's reservation.[3] Shri Sen-Varma's view was that this amendment necessitates also the abolition of mortgage by conditional sale. It may be stated, however, that mostly foreclosure is agreed by the parties because of *circumstances amounting to duress.*

Whether the substitution of sale for foreclosure should also lead to another amendment, namely, addition of personal liability, was a point which came up for discussion. It was pointed out that even now, the mortgagee who has remedy of foreclosure does not necessarily have a personal remedy. Parties may agree for a personal remedy but the substitution of sale does not necessitate such an amendment. Today, the

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1 For the suggested revised section, see para 67.8, *infra.*
2 A.I.R. 1939 Rangoon 247.
3 Shri Sen-Varma's reservation as to section 67 (substitution of sale for foreclosure).

mortgagee gets the property in kind. After the proposed amendment, the mortgagee will get a right to the *sale price,* within the limits of the debt. We think, therefore, that no such further amendment is required.

67.9. *Recommended redraft.*—In the light of the above discussion, we recommend that section 67A should be revised as follows :—

> "A mortgagee who holds two or more mortgages executed by the same mortgagor *in respect of the same property* in respect of each of which *mortgages* he has a right to obtain the same kind of decree under section 67 and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due".

CHAPTER 68

PERSONAL LIABILITY

SECTION 68

68.1. *Introductory.*—The remedies of the mortgagee are not exhausted by foreclosure and sale, which are dealt with in section 67. There is the important personal remedy against the mortgagor, and then there is the extra-ordinary remedy of extra-judicial sale. The personal remedy is not available in every case. There must be some basis, either in contract or equity or in some conduct of the mortgagor.

68.2. *Section* 68.—Section 68 deals with the personal liability of the mortgagor for the mortgage-money. The mortgagor may, in the mortgage contract, bind himself to pay the amount, in which case, the personal liability will arise under clause (a) of section 68 by the terms of the contract of mortgage. However, independently of such a contractual obligation, such a liability may arise under clause (b), (c) or (d), As was pointed out by the High Court of Calcutta in *Sukhadakanta* v. *Jogineekanta,*[1] clause (a) of section 68 gives the mortgagee a right *-ex contractu; now* (b) gives a right on equitable grounds and, clauses (c) and (d) give a right *ex delicto.* It may be stated that the rules laid down in the section were well recognised[2] even before 1882.

68.2A. *Cases within the section.*—The mortgagee has a right to sue for the mortgage-money according to section 68 "in the following cases and no others, namely". The precise and exclusionary language of the section is due to the fact that for a long time there existed a controversy in what cases the personal remedy is available. The legislature has now made it clear that it is only in the specified cases that the remedy is available, and having regard to the legislative scheme it is fair to take the view that in case of controversy the section should be construed strictly rather than liberally.

The first case in which the right arises is "where the mortgagor binds himself to repay the same" — clause (a). The proviso at the end of sub-section (1) however, provides that in this case a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money. This is implicit in the personal nature of the obligation.

Clause (b), (c) and (d) of section 68(1) read as follows :—

> "(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66 and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

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1 *Sukhadakanta* v. *Jogineeka,* A.I.R. 1934 Cal. 73, 76.

2 *Shabbu Ram* v. *Girdhar Singh,* (1884) I.L.R. 6 All. 298, 301, (Discussion as to deprivation of possession).

(c) where the mortgagee is deprived of the whole or part of the security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without distrubance by the mortgagor or any person claiming under a title superior to that of the mortgagor."

68.3. *Personal liability.*—Where the mortgagor binds himself to repay the mortgage money, the mortgagee is obviously entitled to sue on the covenant for recovery of the money personally from the mortgagor. Clause (a) so provides. The covenant may be express or implied. A personal covenant to pay the mortgage-money (i.e., a covenant to pay apart from the mortgaged property) must be presumed to exist in all mortgages, unless there is something in the *nature of a usufructuary mortgage or a mortgage by conditional sale,* indicating that there is no personal liability to pay implied in it. The remedy of the mortgagee is, as a general rule in such cases, intended to be only against the mortgaged property. The test to be applied, to find out whether the mortgagor has "bound himself" to pay the amount within the meaning of this section, is to see what remedy the mortgagee is intended to have for the recovery of the amount; the general rule is that a remedy limited to a particular mode of recovery, or a promise to pay out of a particular fund or in a particular manner, will exclude the general personal liability for such payment. Where the remedy of the mortgagee is intended to be only against the mortgaged property, there is no personal liability, even if the mortgagor has stated in the mortgage document that he will pay the money, for some such clause is found almost in all mortgages.

68.4. *Section* 68(*a*).—With reference to clause (a) of section 68, it may be noted that a personal covenant to pay the amount of the mortgage money exists in a simple mortgage or in an English mortgage.[1] The obligation may be expressed or implied. Ordinarily, a loan involves a liability to pay and the mere circumstances that it is secured by mortgage upon immovable property does not affect the right of a covenantee to sue the borrower personally.[2] But such liability may be expressly excluded or by implication, as we have already stated.[3]

An important consequence of personal liability is that the liability undertaken by the original mortgagor survives even if he assigns the mortgage. Conversely, the third person, who is an assignee, does not, by merely taking the assignment of an equity of redemption, make himself personally liable.[3]

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1 See discussion as to section 58, *supra.*

2 Ghose, Law of Mortgage in India (1902), page 104.

3 Para 68.3, *supra.*

4 Ghose, Law of Mortgage in India (1902), pages 847-848.

68.5. *Section* 68 (1) (b).—In contrast with clause (a) which is based on contract, clause (b) of section 68 is based on considerations of equity. No party is here at fault, nor is there any agreement, but the circumstances justify a personal decree even though the parties did not contract for it. Such a principle seems to have been recognised in decision before the Act, and, in fact, it was known to Hindu law.[1]

68.6. *Section* 68(1)(b) — *Compulsory acquisition*.—With reference to this clause, —section 68(1)(b) — there appears to be considerable obscurity on the question whether there is a "destruction" of the property within the meaning of clause (b) when the property is compulsorily acquired under law.

Some High Courts have taken the view that in such a case, the property is "destroyed".[2] If the matter were to be decided theoretically, we would prefer the opposite view, since acquisition does not affect existence of the property.

However, the practical importance of this question has been considerably reduced by the fact that after the amendment made in 1929, section 73(2) now provides that where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force, providing for mortgagor a reasonable opportunity of providing further security enough the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money in whole or in part out of the amount due to the mortgagor as compensation. That provision is based on the principle of "substitution" of one security for another. There is no new cause of action, but the security is shifted from one item to the other. In this position, we do not consider it necessary to recommend any amendment of section 68 on the point under consideration.

68.7. *Section* 68 (1) (c).—Clause (c) of section 68(1) deals with the case where the mortgagee is deprived of the whole or part of his "securty" by or in consequence of the wrongful act or default of the mortgagor. The liability here is delictual. It is not reasonable that after the security is impaired by the mortgagor's own act or default, the mortgagee should be obliged to realise the security only. By hypothesis, the security is itself impaired. The expression "Wrongful act or default" can be illustrated by a number of instances, — e.g., non-payment of the amount due on prior encumbrances, non-disclosure of the prior mortgage; or defect in the title where the mortgaged property is not transferable.

68.8. *Property not belonging to mortgagor*.—There appears to be some obscurity on the question whether, if a mortgagor includes in the mortgage property not his own, the remedy under this section exists— some cases taking the view that the remedy is on the basis of receipt, and not in the transaction.[3]

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1 Vayavahara Mayukha, Chapter 5, Section 11, referred to in *Vithobalava* v. *Chhotalal*, (1967) 7 Bom. H.C.R. App. Cases 116.

2 (a) *Sajjode Begam* v. *Janki Bibi*, A.I.R. 1917 Oudh 233;
(b) *Prokash Chandra* v. *Hassan Banu*, A.I.R. 1915 Cal. 699, 700 (Assumption to above effect).

3 *Shahzad Singh* v. *Narain Kurmi*, A.I.R. 1927 All. 190 (Wash & Pullan, JJ.).

In the two Oudh cases referred to by Mulla, the mortgagee was given the remedy of a personal decree.[1-2] We are of the opinion that section 68(1)(c) is wide enough to cover a case where the mortgagor transfers property which is not his own. It must be read with section 65(a), under which there is an implied contract by the mortgagor with the mortgagee—"that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same." We do not think that it is necessary to recommend an amendment, since the language of section 65 is clear enough.

68.9. *Section* 68(1)(d).—Under section 68(1)(d), the mortgagee has a right to sue for the mortgage money where the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor.

We have no comments on this clause.

68.10. *Section* 68(2).—Section 68(2) empowers the court, in the case of a suit under clause (a) or (b) to stay the suit until the mortgagee has exhausted all available remedies against the property, unless the mortgagee abandons the property and if necessary retransfers it.

The wording of this sub-section should be made less complex and more easy of reading. As the sub-section now stands, too many negatives detract from the simplicity, and create a jarring effect. Apart from that, the structure of the sub-section does not bring out the fact that the stay of the suit is until the mortgagee has exhausted the remedies. We recommend that sub-section (2) should be redrafted on the following lines :—

> "(2) : Where a suit is brought under clause (a) or clause (b) of sub-section (1), *then, notwithstanding any contract to the contrary,* the court may, at its discretion, stay the suit and all proceedings therein until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it;
>
> *Provided that such stay shall not be granted or, if granted shall, cease to* operate if the mortgagee abandons his security, and, if necessary, re-transfers the mortgaged property."

68.12. *Secton* 68 — *Anomalous mortgages —Recommendation.* — There appears to be a conflict of decisions on the question whether section 68 applies to anomalous mortgages. The answer given by certain High Courts[3-4] is in the affirmative.

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1 *Budra Prasad* v. *Nasiruddin Khan,* A.I.R. 1927 Oudh 315.
2 *Devi Prasad* v. *Shiv Narain,* (1914) 21 I.C. 518.
3 *Qadir Parasan Khan* v. *Kehr Mir,* A.I.R. 1935 Lah. 103, 104.
4 *Hundaldas* v. *Balukhan,* A.I.R. 1943 Sing 59, 61.

On the other hand, certain other High Courts have answered the question in the negative.[1-3] Having carefully considered the matter, we are of the view that the former view is correct. In view of this conflict of decisions, it is advisable to make it clear—and we recommend accordingly—that the provisions of the section apply to an anomalous mortgage as they apply to any other mortgage. An Explanation could be added to that effect.

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1 *Ramachandra Rao* c. *S. V. Co. Ltd.*, A.I.R. 1952 Mys. 125, 126 (Reviews cases).
2 *Ram Padarath* v. *Nimar Singh*, A.I.R. 1942 Oudh 172.
3 *Gajadhar* v. *Sivanandan*, A.I.R. 1924 Cal. 594.

CHAPTER 69

POWER OF SALE WITHOUT INTERVENTION OF COURT

SECTION 69

69.1. *Introductory*—The remedies of the mortgagee with which we have so far been concerned contemplate the institution of judicial proceedings. But the Act also recognises, in certain special situations, a remedy without the intrevention of the Court—power of sale. This is contained in section 69. The section reads—

"69.(1) A mortgagee, or any person acting on his behalf shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely,—

(a) Where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or a Budhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay,.....or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until—

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of the several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

"(3) 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 irregu-

larly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

"(4) The money which is received by the mortgagee arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior encumbrance, 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 authorised to give receipts for the proceeds of the sale thereof.

"(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.".

69.2. *Genesis.*—The power of sale of the mortgagee without the interference of the court was long recognised in the English law.[1-2] In India, such a power was recognised in large towns,—for example, in the island of Bombay[3-4], and in the town of Karachi.[5]

In the mofussil, the parties were governed by the local Regulations.[6] These Regulations did not recognise such a power but they did not prohibit sale either. In the Presidency of Bombay, the courts were inclined to recognise the power provided the parties intended to be governed by the English law.[7] To some extent, the power of extra-judicial sale given in section 69 owes its origin to this position which prevailed before the passing of the Act.

69.2A. *General power of sale.*—It is to be noted that though a simple mortgagee has always a power of sale,[8] that power does not extend to bringing the property to sale *without intervention* of courts.[9] It is section 69 which confers such a power.

The words "no others" in Section 69 show that the section is exhaustive. The limited scope of the section are rise to an attack on its constitutional validity with reference to article 14 and article 19(1) (f) of the Constitution before the Madras High Court, but the challenge did not succeed.[10]

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1 *Kershaw* v. *Kolton,* (1885) 4 Weekly Reports (Eng.) Col. Digest 74.
2 *Cockell* v. *Bacon,* (1852) 51 Eng. Reports 737, 738.
3 I.L.R. 2 Bom. 1.
4. I.L.R. 2 Bom. 252.
5 (1908) 2 Sind Law Reporter 90, 92.
6 Bombay Regulation 5 of 1872;
Bengal Regulation 17 of 1806.
7 *Pitambar* v. *Vanmali,* (1875) I.L.R. 2 Bom. 1, 8.
(Mortgage in the ordinary English form).
8 Section 58(b).
9 *Kishan Lal* v. *Ganga Ram,* (1890) I.L.R. 13 All. 28, 48 (Mahmood, J.).
10 *Narasimhachar* v. *E. B. S. 3rd Branch,* A.I.R. 1955 Mad 138—140.

69.3. *Section Analysis of the clauses.*—We may point out that the power under the section is based partly on contract and partly on other considerations. Clause (a) of sub-section (1)—though limited in its scape—operates irrespective of contract. Clauses (b) and (c) require a consensual element, though that by itself is not sufficient. The rationale underlying clause (a) is that either the parties were, historically speaking, governed by the English common law which recognised such a power, or that in their case it would not be against justice, equity and good conscience to recognise such a power. The rationale underlying clause (c) is that the persons residing in the notified cities have voluntarily chosen a remedy allowed in English common law. Having regard to the fact that in the Presidency towns and other noticed places competent legal advice from persons familiar with English conveyancing practice would be available, and also having regard to the fact that the parties, would, in general, be able to afford such advice, it would not be against justice, equity and good conscience to recognise such a power. Of course, these assumptions may or may not necessarily be true at the present day in all their amplitude, but they seem to underlie the special provision in clauses (a) and (c). Incidentally, in part, these clauses have their genesis in the Trustees' and Mortgagees' Power Act, 1866 (now repealed), but we need not go into details of that Act.

Clause (b) of sub-section (1) represents a special case. The power is expressly conferred by the mortgage and the mortgagee is the Government. Public interest in the speedy realisation of public dues is one important consideration that justifies this provision—of course, where the contract confers the necessary power. It may also be added that when the power is vested in the Government, the Government would act in a just and fair manner. Not only may it be expected to comply with the letter of the law,—i.e., the strict formalities prescribed by the rest of the section—but also it can be trusted to resort to this power only when absolutely necessary.

69.4. *Section* 69. (2).—So much as regards sub-section (1). Sub-section (2) places two restrictions on the exercise of the power. The prescribed notice must be under clause (a). Under clause (b), some interest under the mortgage amounting at least to *five hundred rupees* must be in arrears and unpaid for three months after becoming due. Whether these restrictions are cumulative or alternative, will be considered later. As to the requirement of notice, the important points that arise in practice relate to the effect of absence of, or defeat in, notice, This can be more conveniently dealt with under sub-section (3). As to the amount mentioned in sub-section (2), clause (b), we are of the view and we recommend, that "five hundred rupees" should now be raised to "*five thousand rupees*", having regard to the present purchasing power of the rupee as contrasted with what it was in 1882. We hope that this amendment will receive acceptance without much difficulty, for the reason given above.

69.5. *History of differences.*—In one of the well-known works on these mortgages in India,[1] it has been pointed out that the section was drafted after considerable debate and differences of opinion. The following history is given :

1 Macpherson on Mortgage (7th Ed.), page 672, cited by Gour.

"In the Bill, as introduced, powers of sale were (subject to certain provisions for the protection of the mortgagor), declared valid in all cases. The Select Committee, to whom the Bill was first referred, disapproved of this provision and hence the Bill declared[1] that such powers were invalid, except where the mortgagee was the Government or the property was situate in the Presidency towns or Rangoon. The Law Commissioners of 1879 modified this section by allowing[2] powers of sale in all cases where the principal money originally secured was Rs. 500 upwards. Lastly, the Select Committee at first adopted the section as modified by the Law Commissioners, but finally changed their minds,[3] and having formed the opinion that there were certain parts of the country in which the power was liable to be abused, re-drafted the section in its present shape."

It is to be noted that the power of sale is of an exceptional character.[4] Gour[5] has pointed out that the Code Napoleon absolutely prohibits the power of sale without recourse to court, and declares it to be null and void. This rule has been adopted by most of the continental systems.[6]

69.6. *Section* 69 (1) (a)—With reference to section 69(1)(a), it is to be pointed out that the exclusion of Hindus and other communities. has no relevance where the parties are limited companies. Not only has the Privy Council held, as a matter of principle, that limited companies do not need the special protection that is needed by others who do not execute mortgages in English form[7] but also it has been specifically held that clause (a) does not apply to limited companies mortgaging their assets to trustees of debenture-holders.[8]

69.7. *Section* 69(2)-*Defect in.*—It would appear that there is some defect in the drafting of sub-section (2), inasmuch as the sub-section which contains two clauses or conditions, does not state clearly that the two conditions must be both satisfied. In fact, the use of the conjunction "or" at the end of clause (a) naturally gives support to the view that it is enough if either of the two conditions is satisfied. Such a view, in fact, has been taken by the Madras High Court,[9] which has held that if interest amounting to Rs. 500 is in arrears and unpaid for three months, then the mortgagee can exercise the power of sale without notice to the mortgagor. Another consequence of the present wording of the section is that it has been held[10] that the power of sale under clause (b) can be exercised even if there is no default in paying off the principal money. This view, in the view of one commentator, is not correct, since the power of sale arises only in the default of payment of mortgage money under section 69. But the matter is not so simple, since "mortgage money" is a wide expression.

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1 See Bill No. II, section 39.
2 See Bill No. IV, section 69.
3 See their final Report, dated 24th January, 1882, para 4.
4 Gour, Transfer of Property Act, Commentary on section 69.
5 Articles 2078, 2090, Code Napoleon.
6 Story, Bailments, section 309.
7 *Kanhaya Lal* v. *National Bank of India Ltd.*, A.I.R. 1923 P.C. 114.
8 *L. B. Apte* v. *R. G. N. Trusts Official Liquidator*, A.I.R. 1962 A.P. 274, 297, 298.
9 *P. H. J. S. Nidhi* v. *Kuddus Sahib*, A.I.R. 1926 Mad. 841.
10 *Firm of A. C. Kundu* v. *Rookanand*, 11 Burma Law Times 147; 43 I.C. 921: cited by Mitra, Transfer of Property Act (1971), page 696, paragraph 429.

69.8. On the first point, there is certainly scope for a re-consideration of the *substance of the section.* One consequence of the section as it now stands, is that because of the word 'or', where the arrears of the interest mount to a specified sum, the power of sale can be exercised without the necessity of giving any notice. In the Madras case,[1] Kumaraswamy J. observed that it was unnecessary to decide the question, but Krishnan J. observed that in cases falling under secton 69, if interest amounting to Rs. 500/- is in arrears for three months, the power of sale can be exercised without notice. It is also the view taken in Mysore[2] that the two clauses are alternative. In England also, the statutory provision[3] is couched in the alternative.

The Madras construction may be correct on the present wording. But if the matter were to be examined on principle, we do not think that such a position is really a just one. The power of sale without intervention of the court is, at least in Indian conditions, somewhat extraordinary and it will be conducive to justice if the scheme is altered in this regard. Opportunity should also be taken of providing that the mortgage money or some part thereof (this is meant for instalments) should have become due and should have been in arrears. Although this point can be said to be fairly implicit in the present scheme, it is better to make it clear. A better course would be to impose a restriction as to the minimum amount to become due before sale can be held.

69.9. *Recommendation.*—We have devoted some thought to the substance of the matter. Leaving aside the thorny question of the proper construction of the section, we are of the view that on principle it is desirable that before the power can be exercised, there must be satisfied two conditions, namely,— (i) a safeguard in the form of notice and, secondly, (ii) that the minimum amount due (to be laid down in the section) is in arrears. If these two conditions are satisfied, then it should not matter whether the amount in arrears is under the head of principal or under the head of interest.[4] We are aware that such an amendment will change the scheme of the section as it now stands, but that cannot be a factor detracting from the soundness of the amendment if it is otherwise justifiable. If the proposed amendments is regarded as imposing a stringent restriction on the right of sale, then we would, in reply, quote the view expressed in one of the English cases,[5] to the effect that a power of sale in mortgage deed is nothing but an authority to *defeat the equity of redemption.* Much has been and can be said on both sides in regard to the recognition of such a power. But the fact that caution is required cannot be denied. The observations in an elaborate judgment of the Madras High Court are worth quoting.[6]

> "(8) We have no hesitation in observing that s.69, T.P. Act is a drastic provision and places 'bona fide' mortgagors who have a real defence to any action on the mortgage, in a very disadvantageous and

1 *P. H. J. S. Nidhi* v. *Khuddus Sahib,* A.I.R. 1926 Mad. 841, 844, 847.
2 (1968) 1 Mys. L.J. 69, 80.
3 Section 103, Law of Property Act, 1925.
4 Use of the mortgage-money in the opening may require re-consideration.
5 *In re Harwood,* (1887) 35 Ch. D. 470.
6 *A. Batcha Sahib* v. *Nariman K. Irani,* A.I.R. 1955 Mad. 491, 493, paragraphs 8 to 12 (Mack & Krishnaswamy Naidu JJ.).

helpness position. Section 69 empowers the mortgagees, in whom the power of sale without the intervention of the court is expressly conferred by the terms of the mortgage deed and where the properties are situated in certain important towns including the City of Madras, to sell after giving three months' time in writing and calling upon the mortgagors to pay the principal sum; and when once the sale has been effected in exercise of such a power, s.69 (3) provides that the title of "the purchaser shall not be impeached 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, and the only remedy of a person who is damnified by an unauthorised or improper or irregular exercise of the power is to sue the mortgagee for damages.

"While therefore in a suit for sale or foreclosure instituted on a mortgage, the defences open to the mortgagor can be raised and considered, no such opportunity is however available to the mortgagor, where the mortgagee purports to exercise the power of sale under s. 69 without intervention of court. Even bonafide and substantial defences open to the mortgagor as to any pre-maturity of the sale and as to the correctness of the amount claimed by the mortgagee in pursuance of which he purports to sell and such other defences, as would disentitle the mortgagee from recovering the mortgage amount, cannot prevent the sale being proceeded with, unless by an order of court in a suit instituted by the mortgagors. The present suits have therefore become necessary in order to prevent the mortgagees from seeking to sell the properties for the recovery of the amount which, according to the plaintiffs, "will not be the amount to which they will be legally liable.

"(9) Further, if one examines the legal effect of such a sale, by reason of s.69(3), the title of the purchaser cannot be impeached. The grounds which are ordinarily available to a judgment debtor in a sale of mortgaged property in execution of a mortgage decree to have the sale set aside under the provisions of 0.21, C.P.C., will not be available, however much the sale is vitiated by any material irregularity in the conduct of the sale and even if the sale is for an amount which is not actually due. The mortgagor is really helpless and the properties, however valuable they may be, will be lost to him, his right against the mortgagee being only for recovery of damages.

"While s. 69 T.P. Act as is seen from its application being restricted to important towns, was enacted for the purpose of facilitating recovery of money advanced on immovable properties situated in towns of commercial importance and to encourage the growth of trade and commerce—the idea being to enable the lender to recover the amount speedily rather than by pursuing the ordinary remedy of instituting a mortgage suit and going through the formalities of a suit and execution proceedings—in actual practice, the benefit conferred by the section on the mortgagee to sell mortgaged properties without intervention of court has been more often misused to the detriment of the mortgagors, taking advantage of the immunity of the purchaser from his title being questioned, provided by the statute.

"There is great scope afforded by the language of s.69(3) for mortgagees to circumvent the law and notwithstanding that they may not have a real right to recover the amount and may not succeed in getting a decree for the amount claimed by them in a suit on a mortgage, the properties might be sold, causing irreparable injury to the mortgagor, who is disentitled from recovering his properties, which sometimes are very valuable. Once the sale is held, ordinarily it is not liable to be set aside except on the ground of fraud or that the sale was a benami transaction, the mortgagee himself being the purchaser. In view of the language of s.69(3), it is generally a herculean task for one to have a sale held under s.69 set aside and it is seldom that one succeeds in such a suit to set aside sale.

"(10) Section 69, T. P. Act of 1882, was modelled on the English Conveyancing Act of 1881 (41 and 42 Vict. Ch. 41) and the English Property Act of 1925. Prior to the enactment of the Transfer of Property Act, 1882, the powers of a mortgagee to sell the properties mortgaged were dealt with under ss. 6 to 9 Trustees' and Mortgagees' Powers Act (Act 28 of 1866), which was modelled on Lord Cranworth's Act (23 and 24 Vict. C. 145). It was found, as pointed out by Fisher on Mortgage, Para. 975, 6th Edn. that the purchaser's title was protected where no case had arisen to authorise the exercise of the power, and where no notice had been given and that Lord Cranworth's Act was silent as to improper exercise of the power after it had arisen, and which was irregular otherwise than by the absence of notice; nor did it protect the purchaser where he was aware of the absence of notice, or of other irregularities; and it gave the person damnified an express remedy in damages only where the exercise of the power was unauthorised, but none where, being authorised, it was improperly exercised either for want of notice or otherwise.

"Section 8, Trustees' and Mortgagees' Powers Act, 28 of 1866, was in similar terms and the only "grounds on which the title of the purchaser could be impeached were that no case had arisen to authorise the exercise of such a power and that no notice had been given. The additional protection given to the purchaser in respect of the non-impeachability of the sale was that even if the power was otherwise irregularly and improperly exercised, the right of the mortgagor, who had suffered by such unauthorised or improper or irregular exercise of the power, was only in damages and not to have the sale set aside. The defect pointed out by Fisher as existing in Lord Cranworth's Act was subsequently removed by Conveyancing Act of 1881 reproduced in the English Property Act of 1925.

"(11) The anxiety of the Indian draftsmen in incorporating into s.69(3) the language of the provisions of the Conveyancing Act of 1881 and the English Property Act of 1925 was therefore to bring it in line with the law in England to protect the purchaser's right in respect of properties sold in pursuance of the power of sale conferred on the mortgagee. By virtue of s.69(1) the provisions of the Trustees' and Mortgagees' Powers Act of 1866, were no longer applied to mortgages and it is s.69 T.P. Act, as amended by Act 20 of 1929, that now governs the mortgages, where a power of sale without the intervention of court is conferred on the mortgagee. In the statement

of Objects and Reasons of the Amending Act of 1929 with particular reference to s.69, it is stated that it was the intention of the provisions of s. 69 to bring it in accordance with the English Statute, viz., the English Conveyancing Act and the English Property Act of 1925, as the procedure of the Indian Act 28 of 1886 based on the earlier Lord Cranworth's Act, which has been repealed could no longer exist and required to be revised.

"The incorporation into the Indian statute of the provisions of the English enactment places the mortgagor in a mortgage, where a power of sale is conferred without the intervention of court, at a great disadvantage.

"In view of the language of s. 69(3), as it stands, no sale held in pursuance of the power of sale can be successfully challenged in a court of law, however much the mortgagor may have a just and real grievance as to the circumstances under which and the manner in which the sale is held, apart from the question as to whether any case had arisen for the sale at all. Except that it was thought necessary to bring s.69(3), T.P. Act in line with the English statutory provisions, there was no other ground shown for such wholesale incorporation of the provisions of the English statute in the Indian enactment. But experience has shown that far from advancing the object with which s.69 was included in the Indian Act, which was mainly on grounds of commercial policy to facilitate lending and borrowing on security of immovable properties in towns of commercial importance and to make recovery of amounts advanced on security of immovable properties easier and quicker, the protection of s.69(3) has been working havoc to the great detriment of honest mortgagors.

"(12) While the power of sale without the intervention of court may be supported and justified in the conditions prevailing in a commercially advanced country like England, where the machinery employed for selling the properties can be said to be perfect and reliable, its introduction in India, though it is confined to towns of commercial importance, with all the implications of the English statute, does not seem to be necessary or justified since, from the results of its working, it has been found that there is scope for its abuse resulting in great injustice to 'bona fide' mortgagors, who are likely to be deprived of their properties by an improper and irregular exercise of the power of sale. Section 69(3) affords greater sanctity to a private sale than to a sale held by court in pursuance of the provisions of the Civil Procedure Code, where, after notice and settlement of sale proclamation, a sale is ordinarily held and such sale may be set aside for any material irregularity in the conduct of the sale.

"However such a provision in a mortgage for a power of sale may be supported, it does not appear that such a power of sale requires to be conferred on the mortgagee enabling him to sell the property without the intervention of court, especially in the conditions prevailing in our country and taking into account the manner in which this power is liable to be misused. A power of sale may no doubt be conferred not without the intervention of court, but without the necessity of

instituting a mortgage suit and selling the property only after the final decree through the elaborate process provided in the Civil Procedure Code for sale of immovable property. A power of sale may be conferred in the mortgage-deed, but such a power of sale may be exercised without the necessity of the mortgagee instituting a suit for sale and obtaining a decree, and he *may be direct to apply to the court to exercise the power of sale, asking the court to appoint a Commissioner to sell the property.*

"Such a provision might greatly help the furtherance of the object with which the provision came to be included in England and incorporated in Indian statute and at the same time protect the interests of the mortgagor, since the court, before appointing a commissioner, will have an opportunity to go into the question as to whether a case had arisen for the sale and since the sale would then be in the hands of the commissioner, an officer of Government, the property may be expeditiously sold without the elaborate procedure of setting a sale proclamation and other formalities required for sale under the Civil Procedure Code. I consider that no power of sale without the intervention of court should be conferred on mortgagee and any sale of mortgaged property in order to ensure the interest of the parties must be through a civil court.

"In enacting the provision one of the objects must have been to enable the mortgagees to realise their monies without instituting a suit on the mortgage paying the necessary court-fee. But in actual practice, this object of dispensing with the court-fee is rarely achieved, since a purchaser at a private sale has necessarily to seek the assistance of court to recover possession of the properties purchased and a suit for possession would be necessary for the purpose, with the consequential heavy court-fee to be paid, calculated on the market value of the property. Payment of court-fee therefore at some stage or other could not be avoided. Further, the purchaser at such a sale is not likely to pay the full value of the property as he has to make provision for expenses of the litigation for recovery of possession, which invariably is inevitable, as no mortgagor in possession would ordinarily deliver possession to a purchaser at a sale held in pursuance of the power of sale under s. 69.

"(13) Section 69(3), which protects the purchaser at a private sale against all possible and reasonable objections as to the sale on grounds, which would otherwise entitle the mortgagor. if he were a judgment-debtor, to question the sale successfully if one is held in pursuance of a mortgage decree for sale, is a provision resulting in considerable injustice, which requires to be suitably amended so as to protect the interests of the power of the property as well. Section 69 therefore requires in the light of the experience of its working consideration by the legislature. In any event, suitable and substantial amendments appear to be necessary by bringing the conduct of sale under supervision of courts, removing the restrictions imposed on the mortgagor from questioning the sale, and making provisions for the sale being *questioned in appropriate cases on grounds similar to that provided in the Civil Procedure Code for setting aside a sale held through*

court, and such other amendments as may be necessary to avoid the abuse to which the provisions might furnish an easy handle.

"(14) I have considered it necessary to deal with this aspect of the case at some length with a view to impress upon the courts the disastrous effects of allowing such a sale to be proceeded with, and the principles that should therefore guide a court in considering a relief for injunction, restraining the mortgagees from selling the properties without intervention of court."

We have given this lengthy extract to show that the section needs to be amended.

69.10. *Redraft of section* 69(2)—A tentative re-draft of section 69, sub-section (2), is recommended below :—

"(2) No such power shall be exercised unless and until both the following conditions are satisfied, namely,—

(a) an amount due under the mortgage, *whether by way of principal or interest, amounting at least to five thousand rupees,* is in arrear and unpaid after becoming due; and

(b) notice in writing requiring payment of the principal money *or interest* in arrear has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money *or of interest* or part thereof, for three months after such service".

69.11. *Section* 69(3)—This brings us to sub-section (3). From the practical point of view, sub-section (3) is the most important part of the section. The sub-section saves non-compliance with sub-section (2) in certain cases, so as to save the validity of the sale, but rights as between the mortgagor and the mortgagee are not affected. When a mortgagee desires to exercise his power of sale for recovery of the principal money, he cannot do so unless and until he complies with the provisions as to notice contained[1] in the section. If, however, a sale is held without a notice, it will only afford a ground for damages, if any, to the mortgagor damnified by the sale.[2] If there has been no fraud or collusion in the matter, the mortgagor has no cause for complaint.[3]

69.12. *Effect of notice.*—What is the position if *the purchaser* had notice of improperiety or irregularity at the time of the sale ? In *Chabildas Laloobhai* v. *Dayal Mowaji,*[4] it has been observed by Jenkins C.J. that the section permits a distinction between a purchaser with notice and a purchaser without notice of an irregularity and that though a sale may not be impeachable on the mere ground that the power was improperly exercised,

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1 *Kamalambal* v. *Purushottam*, A.I.A. 1934 Mad. 644, 645 (D.B.).
2 *Madras Deposit etc. Society* v. *Passanhaes*, (1888) I.L.R. 11 Mad. 201, 203
3 *Nadar* v. *Indian Bank, A.I.R.* 1967 S.C. 1296, 1297: (1967) 2 S.C.R. 613.
4 *Chhabildas Laloobhai* v. *Dayal Mowaji*, (1904) 6 Bom. L.R. 557 (Affirmed in ILR 31 Bom. 566; 34 Ind App. 179 (P.C.).

this protection does not extend to a case when there is the additional ground that the purchaser *had notice of the improper exercise of the power.*

69.13. *Section* 69, *Effect of sale.*—Finally, we may deal with the effect of a sale. In England,[1] the effect of a sale under the provision corresponding to this section is to destroy the equity of redemption and convey the property to the purchaser free from all subsequent encumbrances. In India, the same principle was held applicable in cases before the Act. In *Kishendatt Ram* v. *Mumtaz Ali Khan*,[2] the Privy Council observed as follows :—

> "The effect of sale under a power of a sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately "for the mortgagor. The estate if purchased by a stranger, passes into his hands free from all incumbrances."

Even under the present section, the effect of a sale would be the same. The right to redeem does not come to an end when the mortgagee, having a power of sale under the mortgage-deed, enters into a contract of sale, in the purported exercise of that power. The right to redeem is not extinguished by such a contract; the right comes to an end only when the conveyance in pursuance of the contract is executed.[3] The mortgagor can, therefore, redeem the mortgage at any time before the completion of the sale.

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1 The Law of Property Act, 1925 (15 Geo V. Ch. 20), Section 104(1).
Waring (*Lord*) v. *London & Manchester Assurance Co. Ltd.*, (1935) 152 L.T. 390, 391, 1935 Ch. 310; 104 L.J. Ch. 201.
Belton v. *Bass Ratchiffe and Greeton Ltd.* (1922) 2 Ch. 449, 463; 91 L.J. Ch. 216; 127 L.T. 357.
Born v. *Turner*, (1900) 2 Ch. 211, 215, 216; 48 W.R. (Eng.) 697; 69 L.J. Ch. (Property passes to the purchaser with all its legal incidents).

2 *Kishandatt Ram* v. *Mumtaz Ali Khan*, (1880) I.L.R. 5 Cal. 198, 211.

3 *Abrahan Ezra* v. *Abdul Latif*, A.I.R. 1944 Bom. 156, 158, 159.

CHAPTER 70

ACCESSIONS

SECTION 70

70.1. *Introductory.*—The right of the mortgagee to accessions is dealt with in section 70. It may be recalled that the subject of accessions, in the context of the right of the mortgagor, has already been dealt with in section 63. In regard to leases, the matter is governed by section 108(h) and (i). There are, no doubt, certain differences between sections 63 and 70— perhaps unintentional—with which we shall be concerned later. At this stage, it would be sufficient to say that the law of accession in general is based on the principle that an accretion becomes blended with the property to which it becomes accessory. The subject was discussed at great length in Roman law, and the familiar maxim *accessio cedit principale* (the increase follows the principal), and its elaborations, have been the basis of civil law systems on the continent. The position in the common law jurisdictions, of course, is not different in substance. For some reasons not easily ascertainable, however, the matter has received more extensive attention in Roman law than in the common law.

70.2. *Roman law.*—In Roman law,[1] there is preserved an opinion of Paul which more nearly answers to the layman's conception of equity. A house given as security was burnt down, and L.T. bought the site and built thereon. A question arose concerning the pledge right. Paul gave as his opinion that the pledge could still be followed, and that therefore what was built upon the ground was considered to pass with it, that is, with the pledge right; that possessors in good faith can, however, be obliged to restore the building to creditors *only upon condition* that they recover outlay upon the structure, to the extent of the increase effected in the value.[2] But if a mortgaged house is pulled down and a new building erected in its place by an assignee of the equity of redemption the mortgagee can enforce his security on the new building.[3]

70.3. *Accession to mortgaged property.*—Section 70 reads—

> "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."

There are two illustrations—

> "(a) A mortgages to B a certain field bordering on a river. The field is increaed by alluvion. 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."

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1 Ghose, Law of Mortgage in India (1902), pages 350-351.

2 1—29, 2, D. de Pign. 20, 1.

3 *Morais* v. *Hafeezun*, S.D. (N.W.P.) 1860, 432.

70.4. *Substitution.*—A case of accertion to the mortgaged property must be distinguished from one in which something is substituted for the original subject of the mortgage. Thus, to take a familiar instance from the Roman law, if a farm, together with the slaves upon it, is pledged, and the slaves die and are replaced by others, the right of the pledgee shall not extend to the latter, unless they happen to be the offspring of those who have died.[1] But substituted property may be effectually included in a security by apt words which should never be wanting in mortgages of stock, machinery, plantations or the like, in which the subject-matter of the pledge may change from day to day. But where an article is substituted *for something which was an essential part of*[2] the pledge, then the substituted article will pass in the same way as the original article, even though there may be no words to that effect in the mortgage-deed.

70.5. *Need for provision.*—The need for a specific provision on the subject may be explained. So far as property existing at the time of the mortgage is concerned, section 8 would have been sufficient to transfer the legal incidents of the property mortgaged, to the mortagee. But obviously that section could not be relevant in the case of *subsequent* enlargement either of the interest or of the property. The rationale underlying sections 63 and 70 is that the *subsequent* accesion becomes a part and parcel of the property as soon as the accession takes place. Before the Act, the Privy Council, in one of the reported decisions on appeal from Oudh, observed.[3]

> "Most acquisitions by the mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and, on the other hand, many acquisitions by the mortgagee are in like manner treated as accertion to the mortgaged property or substitutions for it, and therefore subject to redemption."

70.6. *Puisne mortgages.*—It should be noted that the principle that the accession follows the principal finds illustrations in other contexts; after redemption of the first mortgage, the accessions to the property enure for the benefit of the *subsequent mortgage.* This proposition is not enacted in so many words in section 70. But since it uses the word "mortgagee", the proposition may be easily spelt out from the section.[4]

70.7. *Application.*—The section is limited to "purposes of security", but the principle that the accession follows the principal might become available—sometimes with unusual results—in a situation like following. In a Travancore-Cochin case,[5] the defendant had hypothecated the property in plaint in favour of the plaintiff. Of the two buildings found on the property, one was in existence at that time, and the second was subsequently put up by the defendant. The plaintiff sued on the mortgage bond and obtained a decree for foreclosure and in execution of the decree, obtained delivery through Court. The buildings were excluded in these proceedings. It was held that under the law, the defendant (mortgagor) had no right to compel the plaintiff, who had become absolute owner of

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1 Ghose, Law of Mortgage in India (1902), page 351.
2 Ghose Law of Mortgage in India (1902), page 351.
3 *Kishen Datt* v. *Mumtaz Ali,* (1878) I.L.R. 5 Cal. 198 (P.C.).
4 Compare Ghose, Law of Mortgage in India (1902), page 351.
5 *Anthony Ouseph* v. *M. George,* A.I.R. 1950 Travancore Cochin 78, 79.

the site in question to *purchase the building* standing thereon. It was the right of the defendant mortgagee to get possession of the site after removal of the buildings. His obligation to pay the value of the building arose only in case he wants that and the tenants are prepared to sell them at an agreed price.

70.8. *Accession by mortgagor's representatives*—Section 70 is silent as to the person by whom the accession is made. The accession may be made—(a) by natural causes, such as alluvion, or (b) by the mortgagor, or (c) by any other person. A building or other structure erected by the owner on his own land will be an accession as is shown by illustration (b) to the section. The words "mortgagor" and "mortgagee" in this section as well as in section 63 will include their representatives, and the principles applicable to buildings erected on mortgaged land by a mortgagor or a mortgagee will apply equally to their representatives.[1] The improvements effected, and new buildings constructed, on the properties which have fallen to the share of the mortgagor or his transferee must be treated as accessions to the mortgaged property and, as such, available for the satisfaction of the mortgage debt.[2] Thus, the auction-purchaser in execution of a prior mortgage decree will be a representative of the mortgagor and a building erected by him on the land will be an accession to the property to the security of which the mortgagee would be entitled.[3]

70.9. *Case law.*—At this stage, it may be helpful to refer to a few illustrative cases in India. In a Bombay case,[4] the High Court has held as follows :—

On the principle of the maxim *quibuid plantatur solo solo cedit* (whatever is attached to the earth becomes part of it), any building constructed on the mortgaged plot becomes a part of that, and an accession to it. If a mortgagor mortgages a house and thereafter makes an addition to the house,—e.g. by enlarging the bathroom, — all these additions would go as security to the mortgagee. Therefore, where a shop is mortgaged with the site on which it was standing and the shop is subsequently destroyed by fire and a new shop is constructed in its place, the new shop must be deemed to be an "accession" to the mortgaged property within the meaning of section 70.

In one Calcutta case[5] after execution of the simultaneous mortgages in respect of a house and certain lands appurtenant thereto, the mortgagor erected two other houses on the lands, and subsequently executed various mortgages in respect of the several houses. The decree in the suit by the fourth mortgagee directed that the whole of the property should be sold free of incumbrances in separate lots, and the sale proceeds should be distributed among the various mortgages in accordance with their priorities. The property more or less pledged by each mortgage and their sale-proceeds were insufficient to pay off the mortgages.

1 A.I.R. 1931 All. 277, 286.
2 A.I.R. 1933 Lah. 771, 773.
3 A.I.R. 1931 All. 277, 286.
4 *Shripad Laxman* v. *Kashibai*, A.I.R. 1945 Bom. 248 (D.B.).
5 *Krishna Gopal* v. *Miller*, (1902) 29 I.L.R. 803 (Cal).

It was held that for the purpose of the security of the two prior mortgages, the two new houses were "accessions" to the mortgaged property and became incorporated with the original subject of the security, as though they had been in existence at the time when the original security was given.

In one case,[1] the Allahabad High Court has held that a condition in a mortgage that if the mortgagee constructed a new building by demolition of the mortgaged property which was a katcha structure, the mortgagor would pay the cost of construction at the time of redemption was not, in the circumstances of the case, a clog on the equity of redemption.

70.10. *Substituted property*—On the question whether *the right of redemption of the mortgagor* goes to the extent of covering property which *has been substituted,* a Privy Council case[2] is of interest.

An Oudh talukdar granted an usufructuary mortgage of a portion of his taluk, in respect of which there existed certain subordinate *birt* tenures. The mortgagee having subsequently acquired these *birt* tenures by purchase did not, as he might have done, keep them alive as distinct sub-tenures, but treated them as merged in the taluk. The mortgagor, many years after, brought a suit for redemption, when the question arose, whether, upon repaying the sum expended by the mortgagee in the purchase of the *birts,* in addition to the amount due on the face of the mortgage-deed, the plaintiff was entitled to the possession of the estate as then enjoyed by the mortgagee, or whether the mortgagee was entitled to retain the *birt* rights and interests purchased by him as an absolute under-proprietary tenure in subordination to the talukdar, and to have a sub-settlement on that basis.

It was held by the Privy Council that the plaintiff on repayment of the original mortgage debt, and on reimbursing the defendant the sum expended in purchasing the *birt,* was entitled to re-enter on the estate with all the rights and privileges enjoyed by the latter.

70.11. In a Nagpur case,[3] a proprietary share in a village was mortgaged along with some sir fields "with reservation of occupancy rights of cultivating these air fields". Later on, the mortgagor sold his equity of redemption and then surrendered his tenancy rights in the sir fields to the transferee. In his suit on the mortgage, the mortgagee contended that with the possession of both proprietary and tenancy rights by the transferee the tenancy rights disappeared and that improved the security of the mortgagee and should be regarded as an accession within the meaning of this section. It was held that this was not a case of accession. It was a case of construction of the mortgage deed. The mortgagee was taking as his security the proprietary right in certain indicated fields, i.e., the right to receive rent in respect of the land, and not the land itself. That subsequently his mortgagor transferred the land to another, did not make any difference.

The question has arisen with reference to movables also.

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1 *Chhedi Lal* v. *Babu Nandan,* A.I.R. 1944 All. 205 (D.B.).
2 *Kishen Datt* v. *Mumtaz Ali,* (1878) I.L.R. 5 Cal. 198 (P.C.).
3 (1941) 1041 Nag. L.J. 35, 36 (D.B.)—(Yearly Digest).

70.12. *Comparison with section* 63—Both sections 63 and 70 are based on the principle that the accessory follows the principal. But under section 70, the mortgagee is entitled to the security of the accession, whether acquired by himself or by the mortgagor. If it is acquired by the mortgagor, the mortgagee is not bound to bear any portion of the expenses incurred by the mortgagor in acquiring such accession. Under section 63, however, the mortgagor is not entitled to certain accessions acquired at the expense of the mortgagee, unless he pays the expenses.

70.13. *Duration*—Section 63 provides that the accession should be received *during the continuance of the mortgage.* Section 70, while stating the fact that the accession should have been received "after the date of a mortgage" does not expressly state whether it should have been received *during the continuance of the mortgage.* But this position is implicit in the words "for the purposes of security". It has been held by the High Court of Madras[1] that even for the purposes of section 70, the accession must have been received before the mortgage becomes extinguished. Accordingly, the acquisition by the mortgagor, after the mortgaged property has been sold in execution of the mortgaged property has been sold in execution of the mortgage decree, cannot be considered as an "accession" to the mortgaged property within section 70.

70.14. *No change*—The subject being of an abstruse character, we have discussed the section in its theoretical and practical aspects, but no change is required.

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1 A.I.R. 1921 Mad. 627, 628, 639.

CHAPTER 71

RENEWAL OF MORTGAGED LEASE

SECTION 71

71.1. *Introductory*—Analogous to accession is the renewal of a lease which is under mortgage. In this regard section 71 provides that when the mortgaged property is a lease 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.

71.2. *Principle*—The principle applicable to persons in fiduciary position is well-known. Where a lease is renewable by custom or contract, a renewal of the lease by a person who is a *trustee,* an *agent* or other person in a *fiduciary position,* enures to the benefit of the persons beneficially interested in the lease.[1] The principle has been extended to persons who, though not in fiduciary position, are in a special position with respect to other persons, by virtue of which they owe a duty to such persons. Thus, as section 90 of the Trusts Act provides, a tenant for life, co-owner, mortgagee or other qualified owner of any property, gaining, by availing himself of his position as such, an advantage in derogation of the rights of other persons interested in the property, will be in a quasi-fiduciary position, and must hold the advantage for the benefit of the persons interested in the property.[2]

71.3. *Special position*—The same principle has been recognised by sections 64 and 71 of the Transfer of Property Act with regard to the renewal of mortgaged leases. The mortgagor and the mortgagee both occupy a special position in respect of the original lease that is mortgaged, and, as such, owe a duty to each other, and, consequently, the new lease is subject to the same equities as the original one.[3]

A renewed lease is regarded as a graft upon the old stock. Sir William Grant, M. R. in *Moody* v. *Mathews,*[4] observed that in equity the renewed lease is considered the same lease.

As was stated in *Rakestraw* v. *Brewer,*[5] "this additional term comes from the old root, and is of the same nature, subject to the same equity of redemption."

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1 *In re Lord Ranelagh's Will* (Trustee), (1884) 26 Ch. D. 590, 599; 53 L.J. Ch. 689.
James v. *Dean,* (1804) 8 R. R. 178, 188; 15 Ves. 236.
Beyan v. *Webb,* (1905) 53 W.R. (Eng.) 651; 93 L.T. 298, 301.

2 Section 90, Trusts Act.

3 *Re Biss* v. *Biss,* (1903) 51 W.R. (Eng.) 504, 507; (1903) 2 Ch. 40, 62.

4 *Moody* v. *Mathews,* 7 Ves. 174, 184.

5 *Rachestran* v. *Brewer* (1729) 2 P. Wms. 513; 24 E.R. 829.
Bagho v. *Anaji,* 5 B.H.C.R. (A.C.) 116.

71.4. *Section* 71(a) *counterpart of section* 64—Section 71 is a counterpart of section 64. Gour comments that[1] if the renewal of a term is regarded as an accession—as it is in England[2]—this section might have been more advantageously added as an illustration to the last preceding section. A similar illustration is, indeed, appended to section 90 of the Indian Trusts Act, 1882, which runs thus :

> "(a) A, a tenant-for-life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease."

71.5. *Purchase of reversion—Recommendation*—Section 71 is satisfactory in so far as it goes. But it is proper that the same principle should be applied to the purchase of the reversion by the mortgagor. We have made a recommendation[3] to that effect in regard to section 64, and recommend that section 71 should also be similarly amplified.

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1 Gour, Commentary on section 71.
2 *Rakestraw* v. *Brewer,* 2 P.W. 511;
Fisher, section 684; Robb., pages 164, 175.
3 See recommendation as to section 64.

CHAPTER 72

RIGHT TO RE-INBURSEMENT FOR NECESSARY EXPENSES

SECTION 72

72.1. *Introductory.*—Dealing with the rights of the mortgagee to incur certain necessary expenditure, section 72 permits the mortgagee to spend money for necessary purposes and, in the absence of a contract to the contrary, to add such money to the principal money at the specified rate of interest. After the amendment of 1929, the section is not confined to a mortgagee in possession—though the marginal note still continues to refer to "Right of mortgagee *in possession*".[1]

The section reads as follows:

"72. A mortgagee may spend money as is necessary—

(b) for the preservation of the mortgaged property 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 renewable lease-hold, 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.

Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

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 added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum. 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 authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure."

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1 This may be attended to when reprinting the Act.

72.2. *Genesis.*—Clauses (b) to (e) of section 72 are founded on the pre-existing law. The Bill referred to the earlier cases as their justifying authorities.[1] The section therefore codifies the pre-existing rules.[2]

The penultimate paragraph[3] as to insurance was originally taken from Lord Craneworth's Act.[4]

72.3. *Not exhaustive.*—The provisions of section 72 are not exhaustive,[5] for it is conceivable that instances may occur which, though not falling within its scope, may still call for the intervention of the Courts on the ground of justice, equity and good conscience; but such cases must in any case be regarded as exceptional.

72.4. *Section* 69, *Contract Act.*—As will be seen later, there is a provision in section 69 of the Contract Act which would entitle the mortgagee to secure re-imbursement for some, if not all, of the expenses listed in section 72. In particular, the situation in section 72 (b) is largely covered by section 69.

In so far as the section secures the outlay *in the same way as the mortgage money,* section 72 goes a good deal further than section 69, Contract Act which confers *on him a bare right* to re-imbursement.

72.5. *Rationale.*—The rationale of section 72 is sometimes said to be based on the fiction of an implied request by the mortgagor. There might be another rationale also, viz. the payments are in the nature of a salvage payments, and are, therefore, recoverable as part of the mortgage—money.[6–8] (See the word "necessary").

72.6. *Section* 72 (*b*).—To come now to the text of the section, we find a provision in clause (b) authorising the mortgagee to spend such money as is necessary for the preservation of the mortgaged property from "destruction, forfeiture or sale." These words also occur in section 63, second paragraph under which, where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession at the expense of the mortgage, and separate possession or enjoyment of the accession is not possible, then the accession must be delivered with the property. But the mortgagor is liable, if the accession was

1 The reference as marginally noted in the Bill were—
Clause (*a*)—Macpherson's Mortgagees, 109, 113;
Ramji v. *Chinto*, 1 B.H.C.R. 199, 203;
Manchersha v. *Kamrunisa*, 5 B.H.C.R. (A.C.) 109;
Bagho v. *Anaji* 5. B.H.C.R. (A.C.) 116.
Clause (*b*)—*Ameeroolah* v. *Ram Das*, (1868) N.W.P. H.C.R. 187.
Clause (*c*)—*Brojonath* v. *Bhugobutty*, 1 W.R. 133;
Clause (*d*)—*Nugendra Chunder* v. *Kaminee*, 11 M.I.A. 241 (P.C.).
2 *Girdhari Lal* v. *Bholanath*, I.L.R. 10 All. 611, 614;
Bohra Thakur Das v. *Collector of Aligarh*, I.L.R. 26 All. 593, 597.
3 (1860) 23 & 24 Vict. c. 145, sec. 11 (Powers of mortgagee) since replaced by 44 & 45 Vict., c. 41, secs. 19(ii), 23(1), (2) (iii) re-enacted as sec. 107(2), 109(7), Law of Property Act, 1925).
4 Gour.
5 *Upendra Chandra* v. *Tara Prosanna*, (1903) I.L.R. 30 Cal. 794, 800;
Rakhohari v. *Biprodas*, (1904) I.L.R. 31 Cal. 975, 978.
6 *Lachman Singh* v. *Saligram*, I.L.R. 8 All. 384.
7 *Kamaya* v. *Devappa*, I.L.R. 22 Bom. 440.
8 *Upendra Chandra* v. *Tara Prosanna*, I.L.R. 30 Cal. 794.

necessary to guard the property from "destruction, forfeiture or sale," to pay the proper cost thereof. We are concerned this time with the meaning of the word "sale". It is stated[1] that the word "sale" is to be construed *ejusdem generis* with destruction or forfeiture" and must therefore be a sale which threatens to extinguish the security, an equity of redemption, would not be within the section and the mortgagee could not recover the amount paid to save a sale, subsequent to the mortgage, in execution of a money decree, or sale for recovery for cesses for which the mortgage right could not be sold. Ordinarily, a compulsory sale would be a sale of the equity of redemption. but circumstances may arise where the sale is of the entire ownership. This, would normally happen where the proceedings for sale are *prior to the mortgage*—as was the situation in a case which went up to the Privy Council.[2]

72.7. *Recommendation as to section 72(b)—word "sale".*—That the intervention by the mortgagee where only the equity of redemption is sold would be an officious intervention, seems to have been settled long before the Act.[3] This was also laid down in a Kerala case.[4] We think that it may be desirable to make it clear that the "sale" spoken of in the section must be a sale free from the particular mortgage on which the mortgagee bases his claim of reimbursement. We recommend accordingly.

72.8. Clauses (c), (d) and (e) require no comments.

72.9. *Insurance.*—As to the last two paragraphs relating to insurance, it is necessary to discuss one criticism made by Ghose. This what he said.[5]

"I presume that the proportion of two-thirds has been fixed upon, because mortgagees seldom lend more than two-thirds of the value of the property which is given as security. But clause (f) of section 76 of the Act requires the mortgagee to apply any money which he may receive on a policy of insurance in reinstating the property, and if he fails to do so, he may be debited with such loss as may be sustained by the mortgagor. But how the mortgagee can be expected to discharge his duty when he receives two-thirds only of the value of the property, is a puzzle for which I do not pretend to be able to give you any solution. The fact that a similar provision is found in the English Conveyancing Act from which this section has been borrowed, almost word for word, may explain the situation, but cannot help us in solving the difficulty."

This comment was repeated in later editions.[6]

72.10. *Recommendation.*—We have given careful thought to the question, since the matter has been raised by such an eminent jurist. It appears to us, however, that if the matter is viewed in the proper light,

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1 Mulla (1973), page 516.

2 *Mahomed Rahimtulla* v. *Esmail Allarakhia*, A.I.R. 1924 P.C. 133.

3 *Seetal* v. *Huzaree*, (1845) Sadar Diwani Adalat. North-Western Provinces, 196; Gour (1973), Vol. 3, page 2970, footnote 10.

4 *George* v. *South Indian Bank Ltd.*, A.I.R. 1959 Ker. 294.

5 Ghose, Law or Mortgage in India (1902), page 639.

6 Ghose, Law of Mortgage in India (5th ed.) pages 575-576, quoted in Mitra, (12th Ed.), page 732.

there is no such dffiiculty as has been put forth by Ghose. What the Act contemplates is that the money which is received *actually* by the mortgagee as insurance money shall be applied *towards re-instaling the property in so far as such money is sufficient for the purpose.* It is not the intention of the Legislature that the mortgagee should be out of pocket. If loss or damage by fire has occurred, then what he receives on account of insurance against such loss should not be spent for any other purpose. That is the principal object of the provision. Of course, opportunity could be taken of making this clear—and we do so recommend—by adding suitable words in section 76(f). But even without such an amendment, the true position is as we have stated above.

What section 76(f) requires the mortgagee to do is that, where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply *any money which he 'actually receives under the policy'*[1] or so much as may be necessary, in reinstating the property. It is seen that the mortgagee is not required to spend in any case more than what he has received under the policy and there is, therefore, no question of the mortgagor claiming any further loss, beyond the amount of two-thirds of the value of the property. If the money is insufficient and the property has been destroyed, remedy is under section 68.

72.11. *Personal liability.*—There is one question which touches the entire section. Under the section, it seems to be doubtful whether the mortgagee can, in the absence of a convenant to that effect, recover any money which he may spend under this section personally from the mortgagor.[2—3]

72.11A. *Claim if can be enforced apart from mortgage.*—The section allows a mortgagee to add to the principal of the mortgage-money the sum expended by him over the purposes mentioned therein. In other words, the mortgagee is entitled to a charge over the mortgage-security even for the amount spent. But can such charge be enforced independently of the mortgage? The High Court of Allahabad has held[4] that a claim for expenses cannot be enforced apart from the claim under the mortgage. In that case a mortgagee in possession paid certain arrears of land revenue payable by the mortgagor, to avert the sale of the property. The mortgagor deposited the principal and the interest thereon in Court which was accepted by the mortgagee and the deed and possession were delivered to the mortgagor. The mortgagee subsequently brought a suit to recover the amount of land revenue by sale of the mortgaged property. The High Court disallowed the suit and observed as follows :—

> "In our opinion, whatever may be the position or right of a person paying money under such circumstances, who is not a mortgagee, the position of a mortgagee making such payments is this : if he makes such payments and wishes to seek a direct remedy against the mortgaged property in respect of them by a suit for sale of that mortgaged pro-

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1 Emphasis added.

2 See Ghose, Law of Mortgage in India (1902), page 655.

3 *Bavanna* v. *Bala,* (1889) 9 M.L.J. 177;
Imdad v. *Bodri,* (1895) I.L.R. 20 All. 401.

4 I.L.R. 13, All. 195, 199 (D.B.).

perty, he must do so in his character and position as mortgagee, for it was in that character and position, and that only that he paid the money. He must, if he deires to bring the property to sale in respect of such payments, add on those payments to the principal money due under the mortgage. In other words, in our opinion, a mortgagee making such payments as mortgagee, does not, by reason of making those payments, obtain a lien independently of that under his mortgage. In this case..... having abandoned their lien and rights as mortgagees, it appears to us that the plaintiffs cannot revive them in order to sustain a suit for money which they could have added to the original mortgage-debt, and in respect of which they were entitled to continue in their character as mortgagees and to hold on the deed of mortgage."

72.12. Then, there is a Calcutta case.[1] After obtaining a preliminary decree on his mortgage, the mortgagee deposited a certain amount to set aside a sale of the mortgaged property in execution of a rent decree. The property was thereafter sold privately by the mortgagor, who satisfied the preliminary decree completely. The mortgagee brought a suit to establish his right to *the lien on the* mortgaged property in respect of *the deposit that had been made by him.* It was held that the suit was maintainable for the reason that the lien acquired for the mortgagee in respect of the deposit was not discharged by the payment and satisfaction of the preliminary decree. We are not sure, with respect, if this is a correct view. A lien for expenses under this section is enforceable only along with the claim under the mortgage, and only so long as the latter is subsisting; if the latter claim is no longer subsisting, the mortgagee cannot have any remedy *under this section.*

72.13. *Section* 69-*Contract Act*—But the mortgagee would be entitled, to recover the amount under section 69 of the Contract Act.[2–3] Under that section, the mortgagee is entitled to be re-imbursed by the mortgagor for the money spent by him on revenue and land taxes, paid in order to save the property from forfeiture and sale.

72.14. *Remedy under section* 69, *Contract Act*—Section 72 *entitles the mortgagee* to add to the mortgage money the amount spent by him, *inter alia,* for the preservation of the mortgaged property from destruction, forfeiture or sale, provided that prior to the payment, the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title. The provisions of the section are not obligatory. The opening words of this section, namely, "A mortgagee may spend such money as is necessary" are sufficiently indicative that this is a right which is optional for the mortgagee to exercise. In other words, section 72 gives the mortgagee an additional right, a right over and above what he got under the ordinary provisions of law.[4] Where a mortgagee is entitled under the ordinary law to recover the amount spent by him in order to protect the mortgaged property from destruction, forfeiture or sale, that right is not

1 *Ambika Charan* v. *Ramgati Guha,* A.I.R. 1915 Cal. 369, 370.
2 A.I.R. 1937 Nag. 225, 226.
3 A.I.R. 1940 Nag. 285, 286.
4 Gour.

taken away by secion 72. When a person who is interested in payment of money pays that amount which benefits the other, he is entitled to be reimbursed by him under section 69. Therefore, section 72 does not exclude the personal right[1] of suit which the mortgagee has under section 69.

72.15. *Madras case*—It would be useful to refer in this connection to a Division Bench decision of the Madras High Court.[2] In that case, an argument was advanced that the mortgagee was not entitled to bring a *separate suit* for recovery of the money, spent by him for preservation of the mortgaged property and all that he was entitled to was to add that money to the principal mortgage money and to insist upon repayment rather than upon payment by a separate suit. While repelling this contention, the High Court laid down as follows :

> "The language of section 72 is against this contention. The words are—the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money. It is a permissive provision and not an obligation imposed upon the mortgagee. As we read the section, it seems to us that the Legislature intended to give larger rights to the mortgagee than he would otherwise have. Every person who spends money for the benefit of another is entitled to sue for that money. The ordinary rules of contract would secure him that right. In the case of a mortgagee, the Legislature apparently intended to put him in a higher footing. He is given the liberty of adding the expended moneys to the amount of the mortgage, thereby securing to the moneys a charge upon the property. The use of the word "may" shows that it is an additional remedy conferred upon the mortgagee and that it is not the sale remedy."

72.16. A similar view has been expressed by the Calcutta High Court.[3] In similar circumstances, it was held in that case that under section 69 of the Contract Act the mortgagee was entitled to succeed. Therefore, the contention that section 72 of the Transfer of Property Act bars a separate suit to recover the amount spent for the preservation of the mortgaged property is not tenable.

72.17. A separate suit by the mortgagee for moneys recoverable under section 72(b) is, therefore, maintainable.[4] According to the Chief Court of Oudh,[5] a prior mortgagee, setting aside a sale by the puisne mortgagee by deposit of the sale amount can only add it to his mortgage amount and cannot get a money decree.

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1 *Bhubneswari Devi* v. *Pandit Sheogovind Lall Missir*,. A.I.R. 1963 Pat. 185.

2 *Tirumalai Muthureera Paramasiva Venkttasami Naicker* v. *Muthusami Pillai*, 45 I.C. 949 (Madras) (D.B.).

3 *Umesh Chandra Banerjee* v. *Khulna Loan Co.*, (1907) I.L.R. 34 Cal. 92.

4 *Venkat Saattayya* v. *Mulibai*, A.I.R. 1955 Andhra 274.

5 *Jagannath Singh* v. *Jagjiwan Das*, A.I.R. 1925 Oudh 429.

72.18. *Recommendation as to personal liability*—We do not, with respect, agree with the Oudh view. We recommend that the matter should be clarified by adopting the wider view. Instead of leaving the matter to be governed by section 69 of the Contract Act[1] it should be provided in section 72 that the mortgagee shall also be entitled to recover the amount due under section 72 from the mortgagor personally.

72.19. *Section* 72, *proviso—Recommendation.*—We would, for obvious reasons, exclude from the operation of the proviso, cases where destruction is imminent, and recommend accordingly that the proviso be modified on the above lines.

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1 Para 72.13, *supra.*

CHAPTER 73

RIGHT TO PROCEEDS OF REVENUE SALE OR ACQUISITION

SECTION 73 AND NEW SECTION 74

73.1. *Introductory*—An interesting provision conferring a right on the mortgagee, not in the property but in its proceeds, appears in section 73. Normally, the mortgagee's remedy is against the property. If, however, the property is sold, by a public authority, so that the original property is lost *and this loss affects the security,* justice requires that the mortgagee ought to have a claim in what is substituted therefore. This principle—known as "substituted security"—finds expression in section 73—though the section does not put the doctrine in the forefront. The section provides—

> "73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charge and deductions directed by law.
>
> (2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money in whole or in part, out of the amount due to the mortgagor as compensation.
>
> (3) Such claims prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due."

73.2. *Rules of justice*—Section 73 enacts a rule which is the counterpart of section 72. Taken as a whole, it formulates an equitable rule well recognised by the Courts.[1] Enacting, as it does, a rule consistent with "justice, equity and good conscience",[2] it is equally applicable to cases arising before its enactment[3] and in areas where the Act is not in force.[4]

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1 *Kundummal* v. *Kashi Bai*, I.L.R. 26 Bom. 363;
Jaijit Rai v. *Govind*, I.L.R. 6 All. 303, 309;
Cf. Kadir Moidin v. *Nepean*, I.L.R. 26 Cal. 1, 6 (P.C.).

2 Gour.

3 *Rameshwar Nath* v. *Naramdeshwar Prasad Narain Singh*, A.I.R. 1940 Pat. 627. 629;

4 *Kadir Moidin* v. *Nepean*, I.L.R. 26 Cal. 1.6 (P.C.).
Mohd. Sadid v. *Harakh Narain*, A.I.R. 1936 Pat. 583, 584.

The section creates a cumulative remedy, and is not intended to operate as a bar to any other remedy which the mortgagee may have under the law.[1]

73.2A. *Principle*—Although the rule embodied in the section has been long upheld upon the general grounds of reason and justice, it may be justified from another standpoint[2] As on the re-allotment of property on partition the mortgagee of a co-sharer's interest takes, not what was originally mortgaged, but what he has received as his share.[3] So, in the case of a sale of the property, the surplus money may be regarded as the subject of his mortgage *in the new form,* which it had assumed, and on which will be fastened the same right which he had aganist the original property.[4]

73.2B. *Scope*—Of course, it is assumed that the sale is free of encumbrances. This would appear to be necessarily implied. For, the object of the section is, in the words of Trevelyn and Veverly, JJ., "to relieve the mortgagee of the effects of the injury which he would suffer by the property which was a security for his money being sold, and to give him a right over the residue of the sale-proceeds. It is not intended in any way to enlarge the interests of persons purchasing at a sale for arrears of revenue or rent. If that had been the intention, any subsequent provision of law providing that a sale for arrears of revenue or rent could be got rid of as incumbrance would be unnecessary. It is, in our opinion, intended to refer to cases where the law has otherwise provided that the effect of a sale "for arrears of revenue or rent should nullify a mortgage."[5] And so it was held in an earlier case[6] that the section applied only to cases where the mortgagee was deprived of his substantive security by the fact of the sale being free from his incumbrance. Where, therefore, the sale is not held free from it, the mortgagee can, it has been held in some cases, lay no claim to the surplus proceeds, but may enforce his mortgage against the auction-purchaser. Where the mortgagee's rights are not diminished by the revenue sale at all, and he has his full right to put the mortgaged property to sale, he has no right to proceed against the surplus sale-proceeds. To accede to the proposition that he can also proceed against the sale-proceeds would mean that by reason of the revenue sale the security held by the mortgagee was increased. This was clearly not the intention of the Legislature. The only reason for section 73 was to protect a mortgagee whose security has, in fact, been diminished.

73.3. *Mortgagee's fault*—If the sale was brought about by the mortgagee's own conduct, he cannot then be allowed to take advantage of his own wrong. But otherwise the rule here enunciated is a part of the general

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1 *Shivachidambara* v. *Kamakshi*, A.I.R. 33 Mad. 71.

2 Ghose.

3 *Bvjnath* v. *Ramoodeen*, 21 W.R. 233, 236 (P.C.) followed in *Sharat Chunder* v. *Hurgobindo*, I.L.R. 4, Cal. 510; *Hem Chunder* v. *Thakomoni*, I.L.R. 20, Cal. 533; *Joy Shankari* v. *Bharat Chandra*, I.L.R. 26 Cal. 434, 440.

4 *Barhamdeo* v. *Tarachand*, I.L.R. 41 Cal. 654 (P.C.).

5 *Beni Prasad* v. *Rewat Lall*, I.L.R. 24 Cal. 746, 740;
Hemchandra v. *Tafazzel Hussain*, 8 C.W.N. 332.

6 *Prem Chand Pal* v. *Purnima Dasi*, I.L.R. 15 Cal. 546, 552, 553.

principle of substituted security. In a Calcutta case,[1] property was sold under a decree on the first mortgage, which had been passed in a suit in which the second mortgagee (whose mortgage had then matured) was impleaded. The first mortgagee afterwards brought suit on the third mortgage which he had on the property. He, however, did not implead the second mortgagee, and obtained a decree thereon, in execution of which he withdrew the surplus sale-proceeds. The second mortgagee then sued on his mortgage, claiming, *inter alia,* the surplus sale-proceeds so withdrawn by the first mortgagee. It was held that it should be regarded as a suit to enforce *a claim for money charged upon immovable property,* falling within Article 132 of the Limitation Act, 1908 and not (as contended for by the appellants), one for money and received under Article 120. The right of the puisne incumbrancers to follow the surplus sale-proceeds after the decreeholder's claim was satisfied, was recognised by the Court, as an equitable right, not extinguished or discharged by the sale but transferred thereby to the surplus sale-proceeds.

73.4. *Section not exhaustive case of partition*—Section 73 is by no means exhaustive.[2] The doctrine of substituted security is not confined to the case of acquisition and other situations which are specifically dealt with in section 73. It is well established by several judicial decisions of the Privy Council[3] and of the Allahabad,[4] Calcutta,[5] Madras[6] and other High Courts[7] that where the subject of a mortgage is an undivided share in property and the joint sharers effect a partition, the security of the mortgagee will attach to the share allotted in severalty to his mortgagor.

73.5. In *Mohammad Afzal Khan* v. *Abdul Rahman*[8] it was held that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the scurity subject to the right of the other co-sharers to enforce a partition, if the mortgage is followed by partition and the mortgaged properties are allotted to a co-sharer or co-sharers other than the mortgagor.

Therefore, if the mortgage is followed by a partition and the mortgaged properties are allotted to a co-sharer or co-sharers other than the mortgagor, then, in the absence of fraud, they take the mortgaged properties. The mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share.

73.6. In the leading case of *Byjnath Lall* v. *Ramoodeen Chowdhry,*[9] it was held by the Privy Council that the mortgagee would take the subject matter of the pledge in the new form which it had assumed. The doctrine of substituted security was applied.

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1 *Barhamdeo* v. *Tarachand,* I.L.R. 33 Cal. 92, affirmed I.L.R. 41 Cal. 654 (P.C.).

2 *Rana Sheo Ambar Singh* v. *Allahabad Bank, Allahabad,* A.I.R. 1959 All. 179.

3 *Md. Afzal Khan* v. *Abdul Rahman,* A.I.R. 1932 P.C. 235 (Dineshaw Mulla delivered the judgment of the Board).

4 A.I.R. 1938 All. 221.

5 *Rup Chand* v. *Madan Mohan, A.I.R.* 1960 Cal. 351, 355, para 21.

6 A.I.R. 1948 Mad. 1.

7 *Amar Singh* v. *Bhagwan Das,* A.I.R. 1933 Lah. 771, 772. (Tek Chand, J.) (reviews cases).

8 *Mohammed Afzal Khan* v. *Abdul Rahman,* A.I.R. 1932 P.C. 235.

9 *Byjnath Lall* v. *Ramoodeen Chowdhry,* L.R. 11 A, 106 (P.C.).

73.7. *Mortgage of specific item*—On the question whether a mortgage of a *specific item of property* creates, on partition, any right in favour of the mortgagee in the property allotted to the mortgaging co-sharer, the position seems to be this. If the item mortgaged is allotted to some other co-sharer and an item other than the mortgaged one is allotted to the mortgagor co-sharer, then the other co-sharer takes the item allotted to him (in the absence of fraud) free from the mortgage, and the mortgagee can recover only against the item allotted to mortgagor in substitution of the item mortgaged.[1]

The substituted security is that fraction of the share allotted to the mortgagor as bears the same proportion to the share as the mortgaged property bears to the entire joint property.[2]

73.8. *Case law*.—A Madras case[3] illustrates the position. The mortgage in that case was of some *specific item of family property*, executed by one of the co-shares. On a subsequent partition, these items fell to the share of another co-sharer. It was held that the mortgage was not binding on such items.

Though what was directly decided was that the mortgagee was not entitled to proceed against the properties allotted *to the other co-sharers*, yet the decision is really based on the rule that the mortgagee is entitled to proceed against, and only against, the substituted property which falls to the share of the mortgagor at the partition. The other part of the rule, namely, that he was not entitled to proceed against the property originally mortgaged, was only a corollary to this part of the rule.[4]

A similar view has been taken in Nagpur,[5] Lahore,[6] and Patna.[7]

It is well established that the mortgagee's right in such a case is not a mere personal right, but amount to a charge. It would be like a security, though it would not amount to a mortgage. The charge (in this case originating in the agreement) is conferred by the law.

73.9. *Recommendation as to partition*—Since the situation of partition is a frequently recurring situation in India, it seems to be desirable to insert in the Act a specific provision on the subject, so that the law might be self-contained as far as possible. Accordingly, we recommend that a provision analogous to Section 73(2) to deal with the above situation should be inserted as section 74 (old section 74 was repealed in 1929). The suggested new section can draw upon the material contained in present section 73(2)—of course, after making the necessary modification.

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1 *Issaku* v. *Seetharamraju*, A.I.R. 1948 Mad. 1, 3 (F.B.).
2 *Hakimlal* v. *Ramlal* (1907) 6 Calcutta Law Journal 46 (Ashu Mookerji J.) cited in A.I.R. 1948 Mad. 1, 3 footnote 3.
3 *Muthiah Raju* v. *Appalaraju*, (1911) I.L.R. 34 Mad. 175.
4 See discussion in *Issaku* v. *Seetharamraju*, A.I.R. 1948 Mad. 1, 4, para 10 (F.B.).
5 *Liladhar* v. *Shivaji*, A.I.R. 1936 Nag. 126.
6 *Moti Lal* v. *Vadhawa Singh*, A.I.R. 1934 Lah. 660.
7 *Ganga Prasad* v. *Dilsaran Singh*, A.I.R. 1937 Pat. 345.

One question of substance that would require consideration is whether the right to be created in the mortgagee should be fully equated *to a mortgage*, or whether it should be regarded as a *charge*, so that the *bona fide* transferee of the item for value without notice would be protected against such a charge. The latter seems to be an equitable course and is also in conformity with the judicial trend.[1-3]

73.10. *Recommendation*—Our recommendation is briefly as follows :—

(a) Where the mortgagor, being the owner of an undivided share in immovable property, mortgages an undivided share, then, after partition, the mortgagee shall have a share on all immovable property allotted at the partition to the mortgagor.

(b) Where the mortgagor, being the owner of an undivided share in immovable property, mortgages a specific item of immovable property, then, after partition, the mortgagee shall have a charge on that fraction of the share allotted to the mortgagor as bears to the share of the same proportion as the specific property mortgaged bears to the entire joint proporty.

73.11. *Section 73—charges*—By its terms, section 73 applies the doctrine to *mortgaged property*, which is sold to recover arrears of revenue or other charges of public nature and to compulsory acquisition of such property.[4] The doctrine has, however, a wider operation. In *Union of India* v. *Official Liquidator, EMT Ltd. Eluru,*[5] for example, this doctrine was applied *to a charge*, in winding up proceedings. In that case, by a decree a charge was created on thirteen buses belonging to a company. The company thereafter went into liquidation. The Official Liquidator sold four of the buses. It was held that after the sale of the buses, the charge was enforceable against the sale proceeds.

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1 A.I.R. 1938 All. 221, 225.

2 A.I.R. 1930 Nag. 139, 142.

3 A.I.R. 1953 Cal. 453, 456.

4 *Raja Sharada Narain Singh & Co.* v. *U.P. Oil Industries Ltd.*, A.I.R. 1964 All. 558.

5 *Union of India* v. *Official Liquidator,* E.M.T. Ltd. Eluru. A.I.R. 1960, A.P. 555.

CHAPTER 74

LIABILITIES OF MORTGAGES IN POSSESSION

SECTION 76

74.1. *Section* 76—*Introductory*—The liabilities of a mortgagee in possession are set out in section 76 in nine clauses, of which the first four constitute positive obligations, the fifth constitutes a negative obligation not to commit waste, and the next four primarily pertain to matters of account. These liabilities have counterparts in some of the analogous provisions in the statute law of India. Thus, clause (a) has a counterpart in section 15 of the Indian Trusts Act and section 158 of the Contract Act. Clause (g) has a counterpart in section 19 of the Trusts Act and in section 213 of the Contract Act. To some of the clauses (b), (d), (g) and (h), an exception is provided by section 77. We shall deal with the text of each clause separately.

74.2. *Section* 76(*a*)—The case-law on clause (a) of section 76 reveals a certain amount of fluctuation of views on the question whether a mortgagee can create a lease whose term may extend beyond the duration of the mortgage and, if so, whether this is also the position in regard to agricultural land. Clause (a) provides that the mortgagee must manage the property as a person of ordinary prudence would manage it if it were his own. How far does this empower the creation of a lease which may extend beyond the duration of the mortgage ? In our opinion, the true position in law is as follows :

(1) The general rule is that a person cannot confer a title better than he himself has. On this general rule, a limited owner would not be able to create an interest in the property which might enure beyond the termination of his own interest.

(2) In the case of a mortgage, however, section 76, clause (a), by expressly requiring a mortgagee to manage the property as a person of ordinary prudence would manage it if it were his own, impliedly creates an exception to the above rule. If the lease is of such a character and duration that a prudent owner of property would enter into it in the usual course of management of his own property, then the lease would be binding on the mortgagor, even though the mortgage has been redeemed.

(3) The fact that the land is non-agricultural does not necessarily make a difference. The key test is that of prudent owner of property. Where, in the circumstances, a lease of a house for a long period is prudent, it would be permissible.

74.3. *Case law*—It would be tedious to summarise here[1] the various decisions of the Supreme Court and High Courts in this context. The important decision have been collected by Mulla and other writers.

1 For selected cases, see Appendix to this chapter.

The gist of those decisions, as properly understood, is as stated above. To some extent, obscurity or controversy on the subject has arisen because dicta from time to time pronounced by the Supreme Court or the High Courts are read divorced from the context, or because that is believed to be the general rule is applied in disregard of exceptional circumstances. Widely framed propositions, such as, that a lease created by the mortgagee beyond the term of the mortgage will determine on redemption—sometimes relying on section 111(c), Transfer of Property Act—or that a mortgagor landlord is not bound to recognise a lease granted by the mortgagee beyond the limits of the obligation created by the mortgage, if read divorced from the context would give an incorrect idea of the total picture. The statement of the position made by Mulla[1] appears to be substantially in conformity with the judicial decisions, properly read. While it is unlikely that a prudent manager would create a lease for a period longer than the mortgage, yet if it can be shown in any given case that such a lease is prudent, it would bind the mortgagor even after redemption, and even though the lessee acquires thereunder rights of a permanent or quasi-permanent nature.

74.4. *Section 76(a)—Application to Agricultural land*—Some cases[2] hold that where the land is not agricultural, a tenancy created by the mortgagee does not survive the termination of the mortgagee's interest (unless agreed to by the mortgagor). On the other hand, the view has been taken[3] that clause (a) extends not only to agricultural lands, but also to urban property.

74.5. It was held in a Full Bench decision[4] of the Allahabad High Court that the general rule, that a lease executed by a mortgagee in possession would come to an end and the rights of the person holding under the same would get extinguished on the redemption of the mortgage, is subject to one conception contained in section 76(a), which applies not only to agricultural land but also to urban immovable property. Hence, if during the subsistence of the mortgage, the mortgagee, acting as a man of ordinary prudence lets out the mortgaged premises and enters into a *bona fide* transaction in connection therewith, the rights of such a person admitted to tenancy would not get automatically extinguished on redemption of the mortgage. The person so let in, would be entitled to continue in occupation of the premises as a tenant of the mortgagor after redemption. Section 76(a) appears to be based on the hypothesis that in case a mortgage had not been executed and the mortgagor as owner had remained in possession, he would have also similarly let out the premises and, therefore, if instead of the mortgagor, the mortgagee, who came in his place did the same, it would be considered as binding on the mortgagor as well.

We respectfully agree with the law as laid down by the Allahabad High Court. We do not think that the matter could be suitably dealt with by amendment.

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1 Mulla (1973), pages 558, 559.

2 *Kamlakar* v. *Gulam*, A.I.R. 1963 Bom. 42.

3 *Thakur Madhavji* v. *Meghaji*, A.I.R. Guj. 37.

4 *Tajammal Kesari* v. *Mir Khan*, A.I.R. 1974 All. 234 (F.B.).

74.6. *Section* 76(*b*)—Under section 76, clause (b), it is the mortgagee's duty when in possession to use his best endeavours to collect the rents and profits thereof. This becomes relevant where the mortgagee himself is in possession. In such a case, the matter would have been dealt with by a contract between the parties by adjustment of rent towards interest or in other agreed manner. An important consequence of clause (b) which affects third person is that the tenant is bound to pay rent only to the mortgagee in the case of a usufructuary mortgage. It has been specifically held by the Madras High Court that a letter of attornment is not necessary[1]. In the Madras case,[2] it was held that where the usufructuary mortgagee intimated the fact of mortgage to the tenant and demanded payment of the rent, but the tenant did not pay the rent, it would constitute wilful default, rendering the tenant liable to eviction within the meaning of the Madras Buildings (Lease and Rent Control) Act, 1960. It was specifically held that in view of section 76 (b) and section 109, attornment is not necessary to complete the title of the usufructuary mortgagee.

We have no further comments on this clause.

74.7. *Section* 76(*c*)—Under section 76(c), it is the liability of the mortgagor, in the absence of a contract to the contrary, to pay, out of the income of the property, the Government revenue or other charges of a public nature and all rent 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. Ghose[3] has criticised the drafting of a part of this clause, namely, the closing words of the clause "any arrears of rent in default of payment of which the property may be summarily sold". He says that they show inadvertence on the part of the draftsman, because the mortgagee would, on the present wording, be bound to pay arrears of rent *due at the time of taking possession.* Apparently, he regards this as anomalous.

74.8. *Conflict of view*—There seems to be a conflict of views on the point mentioned above. It has been assumed that the mortgagee should pay arrears of rent *due after the mortgage.* But a contrary view has been taken in many cases.[4] If this is the law, the question to be considered is whether it ought not to be changed. There are two alternatives open. Either it could be provided that the liability regarding arrears is only for rent accruing due during possession, or it could be provided that even past arrears must be paid. The first course would be meaningless. The amendment made in 1929 would seem to support the construction that even past arrears must be paid by the mortgagee. As to arrears becoming due during his tenure as mortgagee, the words "and all rent accruing due during such possession" already cover the case.[5]

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1 *Ezhumalai* v. *Padmawati,* (1971) 2 M.L.J. 121.
2 (1971) 2 M.L.J. 121, 122.
3 Ghose, Law of Mortgage in India (1902), page 868.
4 52 I.C. 902 cited in the commentary.
5 *Priyanath* v. *Mrutunjoy,* A.I.R. 1956 Orissa 61.

74.9. *Recommendation as to section* 76(*c*)—In our opinion, it may be just and fair[1] to provide that the arrears may be arrears even for the past. Here the clause is concerned only with the prevention of a summary sale. But the mortgagee must have a right to recover them from the mortgagor. In fact, section 72(b) already gives him such a right. But the matter may be made more clear by making clause (c) of section 76 *subject to section* 72(*b*). The amendment seems to be necessary to do justice to both the parties.

74.10. *Section* 76(*c*)—Recommendation—Where the mortgagee himself allows the rent to fall into arrears, it is just and fair that he should bear the liability. Sometimes, the intention may be that the land may be put up for sale, and the mortgagee may himself become the purchaser of it. This possibility is recognised by section 90 [illustration (c)] of the Indian Trust Act, 1882, which reads as follows :

> "(c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of the expenses properly incurred as mortgagee, B holds the land for the benefit of A."

Having regard to these considerations, we recommend that it should be provided in section 76(c) that—

(i) arrears of rent (towards the end) relate to the pre-mortgage period, but

(ii) this should not affect the provisions of section 72(b).

74.11. *Section* 76(*d*)—Under clause (d of section 76, the mortgagee is bound, in the absence of a contract to the contrary, to make such necessary repairs of the property as he can pay 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. In contrast, clause (c) seems to impose an absolute obligation. Clause (d) is limited to the extent of the rents and profits received by the mortgagee. The key word in this clause is the word "necessary". This is illustrated by a Madras case.[2] The mortgagee in possession laid down water pipes in the house mortgaged to him and claimed credit for the money spent thereon. It was held that this was not a "necessary" repair, and that he was not entitled to be credited with the amount so paid. On the other hand, expenditure incurred in preserving the irrigation system of a zamindari has been held to be necessary for keeping the property in good repair.[3]

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1 For further case law, see—
A.I.R. 1938 Pat. 196.
A.I.R. 1925 All. 189.
A.I.R. 1919 Cal. 309.

2 *Kuttuva Narayanaswami* v. *Sornammal*, A.I.R. 1914 Mad. 151, 152 (substantial repair).

3 *Rajendra Prasad* v. *Baluria*, A.I.R. 1916 Pat 96.

74.12. *Section* 76(*e*)—Section 76(e) prohibits the mortgagee from committing any act which is destructive of, or permanently injurious to, the property. Where the mortgagor is in possession, section 66 prohibits such acts by the mortgagor. Where a lessee is in possession, section 108(o) imposes on the lessee similar duty. The mortgagee must not only himself commit such acts, but must also not allow others to do so.[1-2] A striking illustration of this is furnished by a Madras case,[3] in which garden land was denuded of all fertility by cutting off the trees. For breach of this obligation and for breach of any other obligation of the mortgagee, the normal remedy is damages which would, of course, be assessed when accounts are taken between the parties.[4]

74.13. *Section* 76(*f*)—Under clause (f) of section 76, where the mortgagee has insured the whose or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary in re-instating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money.

Certain problems arising out of the inter-relation between section 72 and section 76(f) have been already deal with.[5]

74.14. *Section* 76(*g*)—Section 76(g) provides that the mortgagee must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported.

No comments are required on this clause.

74.15. *Section* 76(*h*)—Section 76(h) provides that the receipts from the mortgaged property in possession of the mortgagee shall be applied, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof shall, after deducting the expenses properly and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), "and interest thereon", be debited against him in reduction of the amount from time to time due to him on account of interest 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.

We have no comments on this clause. Ghose has criticised the use of different words "receipts, rents and profits" for indicating the same concept but, with respect, we think that the various expressions include different shades of meaning and may be left undisturbed.

74.16. *Discrepancy between clauses* (*c*), (*d*) *and* (*h*)*–Recommendation*—It would be noticed that in section 76, clause (d), there is a mention of the mortgagee making the necessary repairs from the rents

1 A.I.R. 1928 Pat. 17, 18.
2 (1894) I.L.R. 16 All. 386, 387.
3 (1954) 2 M.L.J. 665, 666.
4 Section 76, last paragraph.
5 See discussion as to section 72, *supra*.

and profits, after deducting furniture rents and profits, the payment mentioned in clause (c) *and the interest on the principal money*. Under clause (c), the mortgagee has to pay the Government revenue and public charges and arrears of rent which may entail a summary sale. When one comes to clause (h), one finds that whilst it mentions the "expenses" mentioned in clauses (c) and (d) and the interest "thereon" (that is to say, the interest on the expenses themselves, clause (h) is silent about the interest *on the principal money* which is mentioned in clause (d). It is apparently for this reason that Ghose[1] has made the comment—"clauses (d) and (h) do not fall in line with one another, for the repairs are only to be made out of the net income after deducting the interest". We agree with this comment, and we recommend that in clause (h), after the words "interest thereon", the words "*the interest on the principal money*" should be added.

74.17. *Section 76(h)–fair-occupation rent*—As regards the words "fair occupation rent" in clause (h), some difficulty seems to have arisen where the mortgagee personally cultivates the land instead of letting it out to tenants. The question arises whether the net profits of cultivation can be taken as occupation rent. The Allahabad High Court[2] has held in a Full Bench decision that the expression "net profits of cultivation" cannot be taken as covering occupation rent. This was a ruling under section 9(1) of the U.P. Debt Redemption Act which uses that expression, but it was held that the expression should be interpreted in the same sense in which "fair" occupation rent is used in section 76(h).

74.18. *Section 76, last paragraph*—Under the last paragraph of section 76, if the mortgagee fails 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. The words "under this Chapter", though not appropriate in that the decree is passed under the Code of Civil Procedure, are not, however proposed to be disturbed in view of the fact that in a certain sense, the decree embodies the remedy of *foreclosure*, allowed by the relevant sections contained in this Chapter.

An illustration of a case falling under this paragraph is furnished by an Oudh decision.[3] It was held that where a mortgagee fails to make any payment of the Government revenue which, in terms of section 76(c), he is bound to pay, he must be debited with the loss caused to the mortgagor, who would be entitled to compensation for the default.

74.19. *Estimate of loss-separate view—suit*—Ordinarily speaking, the estimate of loss caused to the mortgagor by the failure of the mortgagee is an item which is considered in determining the accounts in settlement of the mortgage when accounts are taken after the passing of the decree

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1 Ghose, Law of Mortgage in India (1902), page 870.

2 A.I.R. 1971 All. 643, 648, 651

3 A.I.R. 1943 Oudh 433.

for redemption. There appears to be some conflict of decisions on the question whether, if a mortgagor fails to get the matter of the loss settled at the time of the preparation of the decree for redemption, he can file a separate suit. The Bombay view[1-2] on the subject has always been that a separate suit is not permissible, the reasoning being that the liability of the parties to the mortgage in a redemption suit can be decided only once and it is not the policy of the Code of Civil Procedure to allow separate proceedings for determination of these questions.

74.20. The Madras view,[3] on the other hand, is that section 76 provides a cumulative remedy, and is not intended to operate as a bar to any other remedy which the mortgagor might have under the law. According to the Madras view, a subsequent suit for compensation at the instance of the mortgagor against the mortgagee for such loss would not be barred under Order 2, Rule 2, Code of Civil Procedure, 1908.

According to the Kerala view,[4] the remedy of accounting is not inextricably bound up with the remedy of redemption. If the former becomes unenforceable or cannot be granted from any supervening causes, it does not necessarily follow that the result of the accounting also becomes *non est.*

74.21. *Recommendation as to last paragraph*—So far as the language of the last paragraph of section 76 at present goes, there is, in our opinion, support for the Bombay view in the words—"*when account are taken* in pursuance of the decree made under this chapter." Adopting the Bombay view, which we find sound on principle and in conformity with the wording of the section, and to avoid any controversy, we recommend that at the end of the last paragraph, the words "*nothing in this section shall entitle the mortgagor to institute a separate suit in respect of such loss*" should be added.

74.22. *Section 76(i)*—Under section 76(i), when the mortgagor tenders, or deposits in the manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, *notwithstanding the provisions in other clauses of this section,* account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of a court, as the case may be, and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property. This clause also needs no comments.

74.23. *Conclusion*—We may close this discussion of section 76 by observing that the paramount duty of the mortgage is to spend money in the due management of the property with the right to claim an allowance for the money spent by him where the law so permits. The distinction between repairs or moneys spent for the preservation of the property—which are the main heads in section 76—on the one hand, and improvements and accessions to the property on the other hand, may often turn

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1 A.I.R. 1922, Bom. 156(2)
2 A.I.R. 1954 Bom. 417, 418.
3 *Shiv Chidambaram,* I.L.R. 33 Mad. 731.
4 A.I.R. 1971 Ker. 290.

out to be a fine one and not easy of application in a particular case. In general, "due management" of the property means management in the same way as person of ordinary prudence in the management of his own property—Compare section 76(a).

As Ghose has pointed out,[1] an owner who does not venture to make an immediate outlay on permanent repairs is not generally regarded as an ideally prudent man. He has also pointed out that undue emphasis on a distinction between improvements and repairs may paralyse the management of all estates in the possession of the mortgagee. This comment is made by him in the context of his criticism of a Madras case.[2] In that case, the judges laid down without any reservation that unless the expenditure was necessary to preserve the property from destruction no allowance whatever should be made to the mortgagee for his outlay. In the Madras case, the repairs effected were—raising a wall, renewal of tiling, putting up a tiled verandah for a thatched one, and building some "pials" for the protection of the house.

The Subordinate Judge was of the view that these were necessary for the preservation of the house, but the High Court held that the mortgagee was not entitled to the benefit of the expenditure unless it was necessarily incurred for the preservation of the property.

We are mentioning this case to show how fine is the line of distinction between necessary repairs substantial repairs, improvements and more decorations.

We have no change to recommend in section 76 on this point.

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1 Ghose, Law of Mortgage in India (1902), p. 644.
2 *Arunachella Chetty* v. *Sithayi Ammal,* (1896) I.L.R. 19 Mad. 327.

APPENDIX TO CHAPTER 74

Select Cases on Section 76(a)

1 *Sachalmal Parasram* v. *Ratanbai,* A.I.R. 1972 S.C. 637; (1972) 1 S.C.A. 527.

2 *All India Film Corporation Ltd.* v. *Sri Raja Gyan Nath,* A.I.R. 1969 N.S.C. 185; (1969) 3 S.C.C. 79.

3 *Prabhu* v. *Ram Deo,* A.I.R. 1966 S.C. 1721; (1966) 3 S.C.R. 676.

4 *Asa Ram* v. *Mst. Ram Kail,* A.I.R. 1958 S.C. 183; (1958) Bom. SCR. 986.

5 *Harihar Prasad Singh* v. *Deonarain Prasad,* A.I.R. 1958 Bom. 53.

6 *Mahabir Gope* v. *Harbans Narain Singh,* A.I.R. 1952 S.C. 206; (1952) S.C.R. 775.

7 *Tajammul Hussain* v. *Mirkhan,* A.I.R. 1974 All. 234 (F.B.).

8 *Kamlakar and Co.* v. *Gulaamshafi,* A.I.R. 1963 Bom. 42.

9 *Bhanshali Kheshal Chand Raniji* v. *Shamji Jivaraja,* A.I.R. 1958 Bom. 53.

CHAPTER 75

RECEIPTS TAKEN IN LIEU OF INTEREST

SECTION 77

75.1. *Introductory.*—The general rule contained in section 76 is not so absolute as would appear at the first sight. In the first place, the liability under some clauses of section 76 is subject to a contract to the contrary, by the very wording of the clauses—e.g., clauses (c) and (d). In addition, there may be created an exception to the general rule, where the case falls within section 77.

Section 77 provides that the liability under clauses (b), (d), (g) and (h) of section 76 does not apply where the parties have contracted that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money, or in lieu of interest and defined portions of the principal.

75.2. *Rationale.*—The section is virtually an exception to section 76. The rationale of the exception may be briefly explained in terms of the effect on the mortgagor. It is no concern of the mortgagor whether the mortgagee collects the rents and profits [section 76, clause (b)] or keeps an accurate account [section 76, clause (g)] or applies the receipts properly [section 76, clause (h)], if the parties have contracted as above. If the usufruct exceeds the interest (or the interest and the defined portion of the principal as the case may be) towards which the usufruct is to be apportioned, then it is the mortgagee who will be benefited thereby. If there is a loss, again, it is the mortgagee who must bear it.[1-2] Thus, the mortgagor is not concerned with the gain or loss. That is why an exception is allowed to be made for these specified situations. To put the matter briefly, where all that appears is a loan and a delivery of possession of land as security, no condition for an account can be engrafted on the transaction; and the mortgagor will not be permitted to redeem on payment of the principal sum.[3]

75.3. *Limitations of scope.*—At the same time, certain limitations of the scope of section 77 ought to be noted. In *Muhammad Sadiq* v. *Harakh Narain,*[4] Courtney Terrell, C.J. observed as follows :

> "Now the liability to account of a mortgagee in possession depends entirely upon whether under the contract he has to hand over from time to time anything of the rents and profits to the mortgagor, for, of such money he is a trustee for the plaintiff until it is paid over. In cases where only a portion, "fixed or proportionate, of such rents and profits is to be retained by way of interest, the liability to

1 A.I.R. 1947 Mad. 197, 200.
2 A.I.R. 1914 Nag. 16, 17.
3 *Madhu* v. *Bagirathibai,* (1877) Bom. P. J. 169, cited by Ghose, Law of Mortgage in India (1902), page 870.
4 *Muhammad Sadiq* v. *Harakh Narain,* A.I.R. 1936 Pat. 583, 585.

account is clear. Similarly, where the whole of the rents and profits are to be retained in reduction of a fixed rate of interest and the mortgagor must pay the balance of the fixed date from some other source, it is clearly necessary to account because the mortgagee is in possession and the mortgagor cannot otherwise know how much excess he may have from time to time to pay.....

Where, however, the mortgagee is entitled to retain the whole of the rents and profits and where, as in this case, his liability to make the stipulated payments to or on behalf of the mortgagor is *independent of the amount of such rents and profits as he may in fact receive from the property,* there can be no reason to call upon him to account. The failure to pay over the stipulated amounts to the mortgagor is the failure of a debtor and not the failure of a trustee to account satisfactorily for the property of another and there is no reason to hold him liable to account with yearly rents or to apply the sums which he annually fails to pay in reduction of the capital of the loan."

75.4. *Sections* 76 *and* 77.—Section 77 would apply so long as there is a certainty as to the purpose for which the profits are to be utilised. It is only in cases where there is uncertainty as to the amount of profits that section 67 comes into play. Section 77 applies to a case where it is agreed that the income from the mortgaged property is to be taken in lieu of interest on part of the amount secured by the mortgage, and in such a case there is no liability to render accounts. Where a mortgage deed provides that the mortgagee should appropriate the surplus profits towards interest and that the mortgagor has no claim for the profits while the mortgagee has no claim for interest, the mortgagee is not liable to account.[1]

75.5. *Section* 77 *and section* 76(c).—It would appear that in section 77, there is no exception overriding the provisions of section 76(c)[2]. It may be recalled that section 76(c) requires the mortgagee, in the absence of a contract to the contrary, to pay the Government revenue and public charges and rent etc. out of the income of the property. It would, therefore, appear that the obligation under section 76(c) is absolute, and not subject to the qualification, even where the income is to be adjusted towards the entire interest.

75.6. *No change.*—We have no change to recommend in section 76.

1 A.I.R. 1933 P.C. 136.
2 A.I.R. 1943 Oudh 433, 434.

CHAPTER 76

PRIORITY OF MORTGAGE

SECTION 78

76.1. *Introductory.*—The general rule is that transfers of interests in the same immovable property take effect in the order in which they are created.[1] This general rule applies as much to mortgages as to other transfers of interest in property. But equitable considerations may justify as departure from the general rule.[2]

According to section 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. Three different kinds of misconduct are mentioned in the section and each of them would make the section applicable.

It is obvious that fraud is not the only ground for relief under the section. However, it is necessary that the misconduct in question was the proximate cause leading to the advance of money by the subsequent mortgagee to the mortgagor.[3]

The principle of the section was thus explained in a Bombay case.[4] Where a person holding a prior title connives at, or asists in, a fraud or other conduct for the creation of a subsequent title in favour of a person who has no notice of the prior estate, the prior title is postponed to the subsequent one.

76.2. *Subsequent purchaser.*—Of course, section 78 does not apply there the alleged competition is between the mortgagee and a subsequent purchaser. The question of priority in such a situation is governed by section 48. Under section 48, where a person purports to create by transfer at different time rights in or over the same immovable 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 right previously created.[5] However, estoppel and similar considerations may modify this general rule.

76.3. *Notice.*—Reverting to mortgagees and their priority *inter se,* it has been held[6-7] that section 78 does not apply if the subsequent mort-

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1 Compare section 48.
2 I.L.R. 43 Cal. 105.
3 A.I.R. 1933 All. 299.
4 I.L.R. 18 Bom. 444.
5 A.I.R. 1961 Cal. 300.
6 I.L.R. 18 Bom. 444.
7 A.I.R. 1938 Mad. 161.

gagee had notice of the prior mortgage. This, in fact, is implicit in the words "where, through the fraud misrepresentation or gross neglect of a prior mortgagee, another person has been *induced* to advance money", occurring in section 78. If the subsequent mortgagee has notice, then he cannot plead that the misconduct of the prior mortgagee 'induced' him to advance money.

76.4. *Estoppel.*—The principle of section 78 is that priority is lost by fraud or misrepresentation or gross neglect. This seems to be an extension of the principle of estoppel, which is based on a misleading statement made either by act or declaration of the person concerned, Ghose[1] describes it as an elementary rule that if a person having a charge upon property encourages another to believe that he has got no charge and induces such other person to act on that belief, then the person who induces such belief shall be precluded from averring against the other person a different state of things as existing at the same time.

76.5. *No duty to give notice.*—The law, however, does not oblige the prior mortgagee to give notice of his charge to another person whom he knows to be negotiating for the sale or settlement of the property. It is of the essence of the concept of constructive fraud[2] that the person sought to be charged with such fraud should be proved to have concurred or co-operated in some deceit or should have been guilty of some gross negligence. As regards gross negligence, again the principle, as observed by Lord Romilly,[3] is that a person who puts it in the power of another to deceive and raise money must take the consequences.

76.6. The principle, then, is simple, but it is not always easy to apply such obstract concepts to concrete situations and a difference of views is bound to arise. There has been, as may be expected, a fairly large number of judicial decisions on section 78, particularly as to the scope and meaning of the three crucial expressions used in the section—fraud, misrepresentation and gross neglect. These expressions are not defined in the section, but the definitions of fraud and misrepresentation contained in the Contract Act, sections 17 and 18, would apply. In England, the corresponding concept of constructive fraud covers such situations.[4-5]

The term "gross neglect" is not defined in the Act.

It would seem to mean failure on the part of the prior mortgagee to take such reasonable precautions against the deception of a subsequent mortgagee as in the circumstances, renders it unjust that the prior mortgagee should retain his title.[6]

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1 Ghose, Law of Mortgage in India (1902), pages 487, 488.
2 *Salamat Ali* v. *Budh Singh,* (1876) I.L.R. 1 All. 303.
3 *Briggs* v. *Jones* (1871) Eq. 92, 98.
4 *Slamat Ali* v. *Budh Singh,* (1876) I.L.R. 1 All. 303.
5 *Briggs* v. *Jones,* (1871) Equity 92, 98.
6 *Dharam Mohan* v. *Pramatha Nath,* A.I.R. 1936 Cal. 283, 288 (M. N. Mukerji and S. K. Ghose, JJ.).

76.6. *Gross neglect.*—As stated above, the principle underlying section 78 is one of estoppel.[1] Some controversy has arisen by reason of the observations of Jenkins J.[2] to the effect that the gross neglect must amount to fraud. Principally, this view was based on English decisions, but it is now pertinent to refer to two aspects; first, that in England also the current view is different and secondly, the view of Jenkins J. has not, in general been followed by later decisions in India. Having regard to the fact that the section makes the three concepts distinctive, one concept cannot be defined in terms of other or others.[3] It is, therefore, not proper to read section 78 narrowly.

In the Lahore case,[4] it was specifically held that the gross neglect (in section 78) need not be neglect that amounts to evidence of fraud. On the facts of the case, however, gross, neglect was not proved. In that case, the mortgagor after creating an equitable mortgage of his house by deposit of title deeds in favour of B, mortgaged the same house to G by a registered deed. The mortgage deed made no mention of the earlier mortgage. G was not aware of the earlier mortgage, nor did he call for the title deeds from the mortgagor. Subsequently, the mortgagor mortgaged the same house to C, with title deeds, without disclosing the mortgage in favour of G. G then instituted a suit against the mortgagor to enforce this mortgage and obtained a decree. Pending this suit, the mortgagor mortgaged the same house to F. Subsequently F sued on the mortgage, obtained a decree and in execution of the same purchased the house himself and entered into possession, the question to be determined was the respective priorities to G and C. It was held that in the circumstances of the case, C's failure to call for the title deeds at the time of taking a registered mortgage could not, by itself, amount to gross neglect. Nor could it be regarded as a proximate cause of C's entering into the mortgage. Hence section 78 had no application. Further, as C took the mortgage during the pendency of the suit instituted at the instance of G, G's rights were not in any way affected by C's mortgage. The fact that C had entered into possession was immaterial, there being no rule of law or equity giving special protection to a person in possession in the circumstances of the case.

It will be noted that in this case the mortgage in favour of G was registered, and if C had taken the ordinary precaution of enquiring from the registration office, he would have become aware of the mortgage in favour of G. Therefore, it was C's own difference that was the proximate cause of his being "induced" to advance money, apart from the fact that there was no "gross" on part of prior mortgagee G so far as the position of C was concerned.

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1 A.I.R. 1934 Nag 31, 32.

2 *Mohindra Chandra* v. *Trovlokhi Nath,* (1898) Cal. Weekly Notes 750, 754.

3 *Nanda Lal* v. *Abdul Aziz,* A.I.R. 1916 Cal. 33, 36, 39 (Holmwood and Imam, JJ.).

4 *Gopal Devi* v. *Ghulam Fatima,* A.I.R. 1943 Lah. 113, (Tek Chand & Sale, JJ.).

76.8. Thus, it is necessary that misconduct must be the cause of the inducement, and not only one of the various contributory effects.[1] The contributory negligence of the subsequent mortgagee might, for negligence of the subsequent mortgagee might, for example, take away the protection conferred by the section—for instance, where the subsequent mortgagee fails to examine the title deeds of his mortgagor,[2] even though the mortgage deed makes a mention thereof.

76.9 *No change.*—We do not think that the above discussion calls for any amendment of the section.

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1 A.I.R. 1943 Lah. 113, 117.
2 A.I.R. 1933 All. 299, 301.

CHAPTER 77

MORTGAGE TO SECURE UNCERTAIN AMOUNT WHEN MAXIMUM IS EXPRESSED

SECTION 79

77.1. *Introductory.*—Section 79 reads—

> "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 debts not exceeding the maximum, though made or allowed with notice of the subsequent mortgage."

In the illustration to the section, A mortgages Sultanpur to his bankers, B & Co, to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 10,000; C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage, 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.

77.2. *Significance.*—We have referred to the general principle of law that where the equities are equal, the first in time shall prevail.[1] This rule has been enacted in section 48 with reference to transfer of property in terms that are applicable to all interests in immovable property. The same general rule is recognised by section 93, which provides specifically that a mortgagee *making a subsequent advance to the mortgagor,* whether with or without notice of an intermediate mortgage, shall not thereby acquire any priority in respect of his security for such subsequent advance. But this provision is made subject to the rule laid down in section 79, quoted-above.

77.3. *Rationale.*—As was pointed out in a Calcutta case,[2] section 79 follows the dissenting judgment of Lord Cranworth. Lord Cranworth, in his dissenting judgment in *Hopekinson* v. *Rolt*[3] observed :

> "Mortgages are but contracts; and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust. If the law is "once laid down and understood, that a person advancing money on a second mortgage,

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1 See discussion as to section 78.

2 *Durga Prasad* v. *Mario Galstaun,* A.I.R. 1955 Cal. 194, 204.

3 *Hopekinson* v. *Rolt,* (1861) 9 H.L.C. 539, 540; 11 E.R. 829.

with notice of a prior mortgage covering future as well as present debts, will be postponed to the first mortgagee, to the whole extent covered or capable of being covered by the prior security, he has nothing to complain of. He is aware, when he advances his money, of the imperfect nature of his security and acts at his peril."

77.4. *Conditions.*—The section, in effect, enables a prior mortgagee to tack on his mortgage a further advance made by him and thus gain priority over an intermediate incumbrance, provided two important conditions are fulfilled[1]:-

(a) the prior mortgage is one made to secure further advance, the performance of an engagement or the balance of a running account and expresses the maximum to be secured thereby, and

(b) the subsequent incumbrancer has notice of the prior mortgage.

77.5. *No Change.*—On an examination of the case law,[2] we do not think that the section needs any change.

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1 A.I.R. 1920 Pat. 251, 254.

2 *Durga Prasad* v. *Mario Galstaun,* A.I.R. 1955 Cal. 194, 199, 204, para. 39.
A.I.R. 1921 Mad. 459, 460.
Baijnath v. *Daleep Narain,* A.I.R. 1920 Pat. 251, 254.

CHAPTER 78

MARSHALLING OF SECURITIES

SECTION 81

78.1. *Introductory*—Still dealing with problems raised by conflict of interests between rival mortgagees and the adjustment of their claims, the Act, in section 81, deals with the interesting doctrine of marshalling, which is said to be based on the ethical principle[1] that one must so exercise one's right as not to prejudice that of one's neighbour. Under section 81, if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage debt satisfied out *of the property or properties not mortgaged to him,* so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

The general rule is that where two properties are mortgaged to a mortgagee, he can proceed against any of them unless he has contracted to the contrary. The doctrine of marshalling is an exception to this general rule.

Section 81 requires that the prior mortgagee shall first proceed against properties not mortgaged to a subsequent mortgagee. In this sense, it is not possible to understand the significance of section 81 without a background of the general rights of a mortgagee.

78.2. The right of marshalling is often[3] described as an exception to the rule of contribution enacted in Section 82. The last paragraph of section 82 expressly provides that nothing in that section applies to a property liable under section 81 to the claim of the subsequent mortgagee. It should, however, be noted that section 82 does not prejudice the mortgagee's rights as such[4].

78.3. *No Change*—We have no changes to recommend in the section.

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1 Story, Equity Jurisprudence.
2 Mulla (1973), page 557.
3 A.I.R. 1962 Pat. 236, 238.
4 See section 82.

CHAPTER 79

CONTRIBUTION

SECTION 82

79.1. *Section* 82—Section 82 provides as follows :—

> "82. Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.
>
> 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 81 to the claim of the subsequent mortgage."

The principle of the section is sound enough, but a few matters are worth clarifying in order to avoid a possible misconception as to the scope of the section.

79.2. *Three situations*—There are three situations to be separately considered when one is dealing with section 82. In the first place, there is the position of the mortgagee. In the second place, there is the question of adjustment of rights as between the co-mortgagors. In the third place, there is the question of adjustment of the rights of purchasers of shares in the mortaged property.

So far as the first situation is concerned, it is to be pointed out that the section does not prejudice the rights of the mortgagee. He is entitled to proceed against any property forming part of the mortgage security, unless there is a contract to the contrary, but such a contract must be one to which the mortgagee is a party.

So far as the second situation is concerned, it is not necessary that the mortgagee should be a party to the contract to the contrary. The co-mortgagors may enter into any contract which they think proper as to the proportion in which they will bear the burden, as amongst themselves.

It is the third situation which has given rise to problems in practice.

79.3. *Meaning of "Contract to the contrary"*—As to the first paragraph of the section, there is a certain amount of obscurity as to the meaning of the expression "in the absence of a contract to the contrary." Does the section intend that the contract must be between the mortgagor and the mortgagee ? If the contract is only as between the mortgagors *inter se,* then what is the effect of the stipulation so entered into, on the right of an assignee of the mortgaged property ? This and similar questions have arisen.

The Madras view[1] on the subject is to the effect that an agreement binding only as between the mortgagors is not a contract to the contrary within the meaning of section 82 so as to bind a purchaser of a share in the mortgaged property. On the other hand, there is the Allahabad view[2] to the effect that the expression is general, and may refer to any contract, and the mortgagee is not a necessary party to any contract which involves the right of contribution as between various portions of the properties mortgaged. The Allahabad case was not, however, concerned with the rights of assignees.

79.4. *Recommendation as to first paragraph*—It appears to us that the position would be,—and should be,—made more clear by providing that while the section as a whole would apply to every contract, yet it will not affect a transferee of the property. This was, in effect, the decision of the Full Bench[3] in a Madras case. The net result of the ruling of the Full bench of the Madras High Court is that a contract to the contrary between the co-mortgagors alone cannot exclude the operation of section 82 *as regards assignees.* We recommend that the section should be suitably amended for the purpose.

79. 5. *Second Paragraph*—The second paragraph of the section needs no comments. Ghose[4] has pointed out that section 82 merely refers to the liabilities of the owners of incumbered estates *inter se.* He observes (with reference to the section as it stood before 1929) :

> "It is not very carefully worded; but the meaning is that where several estates subject to the same mortgage either originally belonged to, or subsequently become the property of different owners, and one of such owners pays off the debt, he has the right to call upon the owners of the other estates to contribute rateably to the payment of the debt, according to a valuation of the several estates, taking into account any other incumbrances affecting them respectively. The principle that each parcel of the mortgaged property is liable rateably to its value applies equally where the mortgagee himself buys the equity of redemption in one or more of such parcels, or releases any part of the security."

76.6. As to the last paragraph of the section, Ghose observes[5] :

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1 *Rama Bhadhrachar* v. *Srinivasa Iyyangar,* (1901) I.L.R. 24 Mad. 85.

2 *Khalesan-fi-Sabil* v. *Narendra Nath,* A.I.R. 1936 All. 258, 261.

3 *Damodaraswami* v. *Govindarajulu,* A.I.R. 1943 Mad. 429 (F.B.).

3 Ghose, Law of Mortgage in India (1902), page 876.

5 Ghose, Law of Mortgage in India (1902), page 876.

"The last paragraph of this section seems to have been taken from Fisher, section 1349, where it is said that the right of contribution will be prevented by the right of marshalling from being applied against an estate which is liable to other creditors of the debtor, citing (1737) *Bartholomew* v. *May*, 1 Atk., 487. Mr. Macpherson thinks that this clause goes too far (Law of Mortgage, p. 687), *and as it stands, it is certainly not very intelligible.*"

79.7. *Section* 82, *last paragraph*—Mulla has also stated that the last paragraph of section 82 is somewhat cryptic.[1] But its gist can be set out by stating that the right of contribution is subject to the right of marshalling. Thus, to quote the illustration given by Mulla,[2] if the owner of two properties, X and Y.

Mortgages	X	to	..	..	..	..	A
„	Y	to	..	..	..	..	B
„	X and Y	to	..	..	..	..	C
„	X	to	..	..	..	..	D

then X and Y both contribute to C's mortgage in the proportion of their value, after deducting from X the amount of A's mortgage and from Y the amount of B's mortgage; but, under the right of marshalling (section 81), D could require C to proceed first against Y. This right of D to marshall would prevail against the right of contribution, according to Mulla.

We should, however, point out that section 82 does not affect the mortgagee's right at all. These rights are governed by the general rule. It is that rule which is overridden by marshalling.

1 Mulla (1973), page 566.
2 Mulla (1973), page 566.

CHAPTER 80

DEPOSIT IN COURT

SECTIONS 83-84

80.1. *Section* 83—Section 83 provides—

"83. At any time after the principal money payable in respect of any moregage has become due 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 mortgagor, the amount due on the mortgage.

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 and all documents in his possession or power relating to the mortgaged property, apply for and receive the money, and the mortgage-deed and all such other documents, so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument), have registered an acknowledgement in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished."

80.2. *Institution of suit*— If a suit for redemption is barred, the summary procedure for redemption is, of course, not available. But it is also not available, if the mortgagee has instituted a suit on his mortgage, and in that case the deposit would be treated as one made under Order 24, Rule 1, of the Code of Civil Procedure, 1908[1]. This would be so even if the mortgagor had not received notice of the mortgagee's suit.[2] A deposit in court pending a suit by the mortgagee was treated by the Privy Council as a deposit under Order 24, Rule 1 of the Code of Civil Procedure, 1908, in *Shib Chandra* v. *Lachmi*.[3—4]

1 *Thevarava Reddy* v. *Venkatachalam,* (1917) 40 Mad. 804; *Brij Gopal* v. *Mst. Masuda Begam,* A.I.R. 1935 Oudh 93.
2 *Thiagaraja* v. *Ramaswamy,* (1918) 95 Mad. L.J. 605.
3 *Shib Chandra,* v. *Lachmi,* (1929) 51 All. 686; 56 I.A. 889; A.I.R. 1929 P.C. 243.
4 Mulla (1973), page 567.

80.3. *Scope*—Thus, section 83 applies only to deposits made before a suit has been instituted on the mortgage, the general principle being that a tender of money must be made before the creditor institutes a suit for such money.[1] Deposits into court after the institution of a suit by the creditor to recover a debt are governed by the provisions of Order 24 of the Code of Civil Procedure,[2] even in the case of mortgage suits.[3]

80.4. *Notice*—The fact that the mortgagor had no notice of the institution of the suit will not affect the right of the mortgagee to proceed with the suit as instituted.[4]

80.5. The distinction between section 83 and Order 24 of the Code is that unless the entire amount due on the mortgage is deposited, interest does not, under this section, cease to run on the mortgage amount, whereas, under the provisions of Order 24, interest will cease to run on the amount deposited *whether such sum is in full discharge of the claim or falls short thereof.*

80.6. *Effect of deposit*—It is to be noted that a mere deposit by itself does not extinguish the mortgage.[5] It will be extinguished only in two cases, namely—

(1) by the mortgagee accepting the deposit in full satisfaction of the claim[6] and

(2) by redemption of the mortgage by the mortgagor or other persons mentioned in section 91 in a suit for redemption.[7]

As to proposition (1), the contrary observations in an Allahabad judgment[8] do not, with respect, appear to be correct.

80.7. *Section* 84—Under section 84, "when the mortgagor or such other person as aforesaid has tendered or deposited in court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender, or (in the case of a deposit, where no previous tender of such amount has been made), as soon as the

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1 1963 Ker. L.T. 1031, 1032.
(1912) I.L.R. 35 Mad. 209, 212, 213 (D.B.)
A.I.R. 1939 Mad. 200, 201.

2 1963 Ker. L.T. 1031, 1032.
A.I.R. 1918 Mad. 1360, 1362, 1363.
A.I.R. 1919 Mad. 948, 949.

3 A.I.R. 1935 Oudh 93, 94, 95.

4 (1912) I.L.R. 35 Mad. 209, 214 (D.B.).
A.I.R. 1919 Mad. 948, 949.

5 A.I.R. 1962 Mad. 308, 309.
A.I.R. 1960 Pat. 51, 52.
A.I.R. 1924 All. 26, 28.
(1907) I.L.R. 34 Cal. 223, 228.
(1907) I.L.R. 31 Bom. 527, 533.
A.I.R. 1941 Cal. 18, 19.

6 A.I.R. 1945 Cal. 370, 374.
A.I.R. 1941 Cal. 18, 19.

7 A.I.R. 1924 All. 26, 28; 45 All. 592.

8 (1905) I.L.R. 27 All. 178, 181, 188.

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 and the notice required by section 83 has been served on the mortgagee :

> "Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.
>
> Nothing in this section or in section 83 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, and such notice has not been given before the making of the tender or deposit, as the case may be."

80.8. *Quality of tender under section* 84—It should be noted that there is some conflict of views as to the quality of tender required under section 84. Is continued readiness to pay essential ? According to one view,[1] it is necessary, even in the case of mortgage-debts, that the tender should be kept good, and that the mortgagor should not profit by the refusal of the tender by the mortgagee,[2] where he (the mortgagor) does not keep the tender open.

A related question is whether deposit must follow tender. The Bombay High Court in *Haji Abdul Rahman* v. *Haji Noor Mohammad,*[3] *held that a* plea of tender must be accompanied by a deposit in Court in order to stop the running of interest. The decision was, however, before this Act was made applicable to the Bombay Presidency.

A similar view was taken in Calcutta.[4]

The Madras High Court has, on the other hand, taken a different view. In *Velayuda Naicker* v. *Haider Hussain Khan,*[5] the mortgagor utilised for his own purpose the money tendered, after refusal by the mortgagee; it was contended on the strength of English authorities that the money must be kept ready for payment in order to stop the running of interest. The High Court held :

> "We are bound by the terms of section 84 of the Transfer of property Act, and as already pointed out, under that section, "Interest shall cease from the date of tender". The word 'tender' does not, in itself, imply that he must have been always ready to pay the money."

Again, in a later case,[6] the same High Court observed :

> "It is clear from section 84, that, in mortgages, *a tender alone has the effect of stopping interest from the date of the tender*".

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1 I.L.R. 34 Cal. 223, 229.
2 A.I.R. 1918 Mad. 219.
3 *Haji Abdul Rahman* v. *Haji Noor Mohammad,* (1891) I.L.R. 16 Bom. 141.
4 (1903) 8 C.W.N. 153.
5 *Velayuda Naicker* v. *Haider Hussain Khan,* I.L.R. 33 Mad. 1003.
6 *Arunachalam Pillai* v. *Govindaswami,* A.I.R. 1932 Mad. 109, 111.

The Madras view may be correct on the language of the first paragraph of the section, as it is not provided expressly in the section that continued readiness to pay or deposit in Court following the tender is essential in order to stop interest from running.

80.9. *Recommendation*—While a deposit need not follow the tender in order to stop interest from the date of such tender, it seems just to provide that there must be continued readiness to pay in order that a tender may be valid for the purposes of section 84.

It should be noted that the rule that the creditor is not entitled to interest where a valid tender of the amount by the debtor has been refused by him, rests upon the equitable consideration that the debtor who has lost the use of his money by reason of the conduct of the creditor, cannot, at the same time, be called upon to pay interest to the creditor. Hence if the debtor does have the use of his money, the equitable consideration does not apply and the mortgagee ought to be entitled to interest. In the first proviso to section 84, the principle stated above has been expressly recognised for the case of deposit. We are of the view that the first paragraph, in so far as it relates to tender, should also so provide. We recommend that it should be so amended.

CHAPTER 81

PERSON WHO MAY SUE FOR REDEMPTION

SECTION 91

81.1. *Introductory*—The right of redemption and its limitations as well as other remedies having been dealt with, the Act proceeds to lay down who can redeem. Section 91 reads—

> "91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property, namely :—
>
> (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;
>
> (b) any surety for the payment of the mortgage-debt or any part thereof; or
>
> (c) any creditor of the mortgager who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property."

81.2. *Section* 91—*Co-mortgagor*—Under this section, besides the mortgagor, the other specified persons may also redeem the mortgaged property. The case of co-mortgagor is not dealt with in specified words, but there can hardly be any doubt that the co-mortgagor falls within the expression "mortgagor".[1] In general, when a mortgage is created jointly on property in which several persons are interested, each of the mortgagors is liable to pay the entire debt, unless there is a contract to the contrary.[2] Thus, a debtor, who is a co-mortgagor, is liable for the whole debt jointly and severally with the other mortgagors and is entitled to redeem the entire property on payment of the debt. It was so held in a Bombay case[3] and, with respect, this appears to be the correct view. If so, there can hardly be any doubt that a co-mortgagor falls within the principal expression "mortgagor" in section 91 and it is not necessary to relate his case to clause (a)—'Any person who has any interest in the property mortgaged or in or upon the right to redeem the same'.

The reason why, in section 92, after providing for the persons referred to in section 91, *other than the mortgagor,* a co-mortgagor is specifically mentioned, is that since the mortgagor was excluded by its very terms, the case of a co-mortgagor had to be provided for in the context of subrogation in that section. If the co-mortgagor is not mentioned specifically in section 92, then he would be excluded by the words excluding the mortgagor.

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1 *Cf.* section 95.

2 *Cf.* section 40, Contract Act.

3 *Ambu Ram Mhatra* v. *Bhau Halya Patil,* A.I.R. 1957 Bom. 6, 7, paragraph 6 (Shah J.).

81.3. *Section 91(a)—Interest in the mortgaged property*—In section 91(a), the words "interest in ..... property mortgaged ..... or in the right to redeem the same" have created considerable controversy. It is to be borne in mind that the interest must be in the property which is mortgaged and it, therefore, becomes necessary to determine whether the person claiming a right of redemption under section 91(a) is a person who is interested in such property. We are not concerned with the law as it was before 1929[1], although it would appear that the law was not in this respect, substantially different. The expression "property mortgaged" means the interest of the mortgagor which has been made the subject matter of the mortgage. Hence a person claiming paramount title has no interest in the property.[2] This is the reason why the landlord of a mortgagor lessor cannot redeem, nor can the puisne mortgagee redeem the subsequent mortgagee.

It is also well-settled[3] that the interest is a present interest, and not a contingent one, and further it must be a validly created one.[4]

It is immaterial how the interest came into being. Thus, where, by the law applicable to the last owner, there is a total failure of heirs, the property escheats to the Government as the *ultimus haeres*. If there is a valid and subsisting mortgage existing on the property, the Government will take the property subject to such mortgage,[5] and will, as owner of the mortgagor's interest, be entitled to redeem the mortgage.[6]

81.4. *Lessees*—Difficulty, however, seems to have arisen in the case of a lessee of a mortgaged property. The matter has been considered at length in a judgment of the Nagpur High Court, to which we shall refer later. On principle, it would seem that a lessee is entitled to redeem the mortgage, being a person who has an "interest in the property mortgaged" or in the right to redeem the same. There are, in fact, observations to that effect of the Supreme Court[7] though the case did not raise this particular question. However, decisions of the High Courts do not seem to be uniform in this regard.

81.5. *Case law*—According to one view, section 91(a) clearly confers the right of redemption on any other person than the mortgagee who has an interest in the mortgaged property and there is nothing in that clause to indicate that the right can only be exercised where the interest is likely to be or can be affected by the mortgage. No fetters have been imposed in the clause, as it stands, on the right of redemption by a person "who has any interest in the property mortgaged", and the words "any interest" are wide enough to cover an interest, however, exiguous and remote it may be.

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1 See A.I.R. 1953 Bom. 315, 316.
2 A.I.R. 1916 Bom. 923.
3 42 C.W.N. 1106, 1109.
4 (1861) 8 Moo Ind. App 500, 525, 526, 527 (P.C.) (Property of Hindu Brahman).
(1875) 1 Cal. 391, 401 (P.C.).
5 (1861) 8 Moc Ind. App. 500, 525, 527 (P.C.). (Property of Hindu Brahman).
(1875) 1 Cal. 391, 401 (P.C.).
6 (1866) 11 Moo Ind. App 619, 636 (P.C.).
7 *Mangu* v. *Taraknath*. A.I.R. 1967 S.C. 1390, 1395, para 11.

The Nagpur High Court, has, however, in an elaborate judgment which reviews the case law, taken a different view on the ground that the lessee is not affected by the mortgage.

81.6. *Criticism*—With respect, this view goes counter to the language of the section. *Prima facie,* as was held by the Madras High Court,[2] the word "interest" is not confined to a right of ownership, but is sufficiently large to include any minor interest such as that of a tenant. It is for this reason that a perpetual lessee[3] and other lessees have been held to have an interest within the meaning of section 91(a).[4-6]

81.7. Some decisions make a distinction between a lease for a term of years and a year to year lease.[7] There does not, however, appear to be any justification for such a distinction in the language of the section. Of course, if the lease is void, the lessee has no right to redeem, because then he does not acquire any lawful interest.[8]

In an Allahabad case,[9] it was held that a perpetual tenant was entitled to redeem. In the same case, it was observed that a tenant-at-will and a tenant on sufferance are not entitled to redeem.

In a Patna case,[10] Chatterji and Reuben, JJ. held that a lessee is always entitled to redeem the mortgage as a person "interested". In an Oudh case,[11] redemption was not allowed when the lease was binding upon the mortgagee. The extreme view on the side of redemption is expressed in a Calcutta case[12] where a person whose lease was void was allowed to redeem.

81.8. *Recommendation*—In this position, it is desirable to make the matter clear by adding an Explanation in section 91 to the effect that a lessee of property is a person interested in the property. We recommend such an amendment.

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1 A.I.R. 1947 Nag. (Majority view).

2 *Paya Mathathil Appu* v. *Koyamal Amina,* (1896) I.L.R. 19 Mad. 151, 153.
3 A.I.R. 1925 Oudh 270, 271.
4 (1880) I.L.R. 6 Cal. 317, 319 (Zaripeshgi).
5 (1882) I.L.R. 8 Cal. 79, 87 (Patnidar).
6 A.I.R. 1937 Oudh 146, 148.

7 A.I.R. 1925 Oudh 270, 271.
8 A.I.R. 1945 Pat. 106, 108.

9 *Raghunandan Prasad* v. *Ambika Singh,* (1907) 29 All. 679.

10 I.L.R. 23 Pat. 648.
11 *Kalu Singh* v. *Hansraj Upadhiya,* A.I.R. 1925 Oudh 270.
12 *Basanta Kumar* v. *Adarmani,* (1936) 40 C.W.N. 57.
See criticism in *Pundarikakshadu* v. *Kondayya,* A.I.R. 1940 Mad. 669.

CHAPTER 82

SUBROGATION

SECTION 92

82.1. *Introductory*—It is obvious from section 91 that not only the mortgagor, but also several other persons mentioned in that section, have—right to redeem the mortgage. Redemption by a person *other than the mortgagor* puts an end to the mortgagee's rights, and the mortgagee henceforward goes out of the picture. But this does not conclude the matter as regards the other consequences that may flow from redemption by a person who is not a mortgagor or who is one of the mortgagors. In certain cases, he may, as against the mortgagor, or the mortgagee, acquire substantially the same rights as the mortgagee had. He is, in other words, substituted in place of the mortgagee, in the specified cases. To this legal consequence of substitution, the law gives the name of subrogation. The principal provision on the subject is section 92, which reads as follows :

> "92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same right as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee."
>
> "The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems."
>
> "A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.
>
> "Nothing in this section shall be deemed to confer a right of subrogation on any person, unless the mortgage in respect of which the right is claimed has been redeemed in full."

82.2. *Nature of subrogation*—The section raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus explained by Mr. Justice Sutherland in *Ellisworth* v. *Lockwood*.[1] "Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forefeiture by the terms of the mortgage contact, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond assigned to it a party claiming a right to

1 *Ellisworth* v. *Lockwood*, (1870) 42 N. Y. 89 quoted by Mookerjee, J. in *Gurdeo Singh* v. *Chandrikah Singh*, I.L.R. 36 Cal. 193, 217.

redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operation of law."

Consequently, it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected.

82.3. *Origin*—The doctrine of subrogation,—at least in some of its aspects,—seems to have been derived from the Roman law. Thus, in Roman Law, a creditor who lent money to the debtor for paying off a mortgage on the condition that the creditor was to be substituted in the place of the mortgagee, was entitled to claim the benefit of the security that had been discharged with the aid of the money lent by the creditor.[1] No doubt, the particular situation of the creditor advancing money, as dealt with in third paragraph of section 92, has led to certain controversies.[2] But it should not be overlooked that this is a familiar instance of subrogation.

82.4 *Various situations*—Section 92 must be read with section 91. So read, it will disclose that several different types of subrogation are dealt with in section 92, though the arrangement of the matter in the section does not bring out distinctly these various types of situations.

In the first place, we come to persons other than the mortgagor and co-mortgagors, mentioned in section 91. Under section 91(a), a person having an interest in or charge upon the mortgaged property or the right to redeem the same can institute a suit for redemption and by virtue of section 92, first paragraph, such persons have the right to subrogation. Secondly, there is the position of sureties—section 91(b) and section 92, first paragraph. Thirdly, there is the creditor who in an administration suit obtains a decree for the sale of the mortgaged property–section 91(c) and section 92, first paragraph. Fourthly, there is the co-mortgagor, expressly mentioned in section 92, first paragraph.

Finally, there is under section 92, third paragraph, the case of a person who has advanced to a mortgagor money with which the mortgage has been redeemed. His subrogation to the rights of the mortgagee is dependent upon the existence of a registered instrument by which the mortgagor has agreed to such subrogation.

82.5. *Re-imbursement in other cases*—Of course, section 92 is not exhaustive of the law of subrogation or of the law of re-imbursement. At least two other topics may be referred to—the personal right of re-imbursement[3] and equitable charge claimed in the nature of salvage lien. On the

1 Ghose, Law of Mortgage in India (1902), page 397.
2 See *infra*.
3 Section 69, Contract Act.

second topic,[1] the law is unsettled. For example, where one of two co-sharers in a revenue paying estate pays the whole revenue to save the estate, has he, besides the personal right of re-imbursement under the Contract Act, a charge on the share of the defaulting purchaser? The position in this regard is not definite. The answer given by the High Courts of Kerala, Madras and Nagpur is in the affirmative, while the answer given by the High Court of Allahabad, Bombay, Calcutta and Patna is in the negative.[2] These cases need not detain us, because they are outside the subject-matter of subrogation *to the rights of a mortgagee created by contract*. They are referred to here only to show that the equitable principle of re-imbursement, which is the basis of the right of legal subrogation[3] has operation in other fields also.

82.6. *Persons interested*—Subrogation of persons interested in the property or in the security—the first situation mentioned above,[4] raises no problems.

82.7. *Sureties*—Turning to sureties, it is well established that a surety is entitled to every remedy which the creditor has against the principal debtor, to enforce every security and all means of payment. The observations of Markby J. in *Heeralal* v. *Oozeer Ali*,[5] are of interest. He observed that by the Law of England and Scotland and also by the general law of Europe, when a surety has paid off the debt of the principal, not only all the collateral securities are transferred to the surety, but, by what is called subrogation, the right is also transferred to him to stand in the place of the original creditor and to use against the principal debtor every remedy which the principal credior himself could have used.

82.8. We may pass over the case of creditors in an administration suit—the third situation—as not of pretial importance.

82.9. The co-mortgagor's case is the most interesting one, since he has a dual capacity to perform—he is mortgagor and yet is subrogated.

Redemption by a co-mortgagor is a case of subrogation and was known as such even before the Act. Not only can the owner of the equity of redemption or a part of an estate under mortgage redeem the whole, but, where he pays the entire mortgage debt, he also thereby puts himself in the place of the mortgagee whose mortgage has been redeemed and acquires a right to treat the original mortgagor as his mortgagor and a right to hold that portion of the estate in which he would have no interest but for the payment, as a security for any surplus payment which he may have made.

82.10. *Persons advancing under third paragraph*—The last situation of subrogation that dealt with in the third paragraph has come to assume considerable practical importance.

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1 Mulla (1973), pages 583. 584.

2 See case law reviewed in Mulla (1973), page 584.

3 Mulla (1973), page 585.

4 Para 82.4, *supra*.

5 *Heeralal* v. *Oozeer Ali*, (1874) 21 Weekly Reports 347 (Cal).

82.11. *Distinction between first and third paragraphs*—Although section 92 deals with more than one situation, the distinct characteristic of each ought not to be overlooked. There are numerous decisions of High Courts[1] on this aspect, and the distinction has been adverted to by the Privy Council also. In *Lala Manmohan Das* v. *Janki Prasad*,[2-3] the Privy Council recognised the distinction between the first and third paragraphs of the section, the former dealing with persons having an existing interest in property, and the latter with strangers who acquire an interest in the property.

The weight of authority in the High Courts also clearly seems to be in favour of the view that the two paragraphs[4] of section 92 are mutually exclusive, and that the first paragraph of section 92 deals with persons who have a *pre-existing interest,* and that a person who acquires an interest only by advancing money with which the prior mortgage is satisfied, does not come *within the first paragraph,* even though he secures his advance by a mortgage or becomes a purchaser. Such a person comes, if at all, within the third paragraph, and can claim subrogation only if there be an agreement between him and the mortgagor, in writing registered. The right of subrogation is denied to such a person on a variety of ground,[5] e.g.—

(i) that such a person, when he pays over the retained money, either himself or through the mortgagor, does not pay his own money and cannot be said to redeem the prior mortgage himself,

(ii) he only performs his own obligation under his covenant,

(iii) he pays the mortgagor's money as his agent and the redemption is by the mortgagor.

According to Mulla,[6] the real reason seems to be that such a person, *having no pre-existing interest,* does not come within the first paragraph and that although he is a person who comes within the third paragraph, he cannot claim subrogation because there is no registered agreement giving him that right as required by that section. Prior to the amendment of 1929, such a person could claim not legal but only conventional subrogation, i.e., subrogation based on agreement, express or implied. After the amendment, he cannot claim legal subrogation as laid down in the first paragraph, but can only claim conventional subrogation as modified by the third paragraph if he satisfies the requirements of the paragraph. The third paragraph, by requiring the agreement to be in writing registered, has restricted the application of the doctrine of equitable or conventional subrogation.[7]

We may, however, add that the claimant must show not only that he had a pre-existing interest or charge on the property,[8] but also that he

1 E.g. *Sita Ram* v. *Sharda Narain,* A.I.R. 1950 All. 683 (F.B.) (reviews cases).
2 *Lala Manmohan Das* v. *Janki Prasad,* A.I.R. 1945 P.C. 23. 28, 29.
3 Mulla (1973), pages 596, 597.
4 Mulla (1973), pages 597. 598.
5 Mulla (1973), page 598.
6 Mulla (1973), page 598.
7 Mulla (1973), page 598.
8 *Laxmidas Ramji* v. *Smt. Lokana Bai Savita Tulsidas,* A.I.R. 1970 Guj. 73.

paid the amount from his own pocket and his own money for the protection of his interest. If the money paid belonged to the mortgagor, the case cannot fall under section 92.

82.12. *Section* 92, *Explanation relating to redemption*—There seems to be some difficulty caused by the expression "redeeming property subject to the mortgage", used in the first paragraph of section 92, the expression "the mortgage has been redeemed" used in the third paragraph and the expression "the mortgage..... has been redeemed", used in the fourth paragraph. In a Privy Council case,[1] the expression "the mortgage has been redeemed", appearing in the third paragraph of section 92, was interpreted as "payment off of the mortgage money". In that case an argument was advanced that redemption was not complete until the reconveyance took place. The argument was rejected by the Privy Council, which made a distinction between redemption of a "mortgage" and redemption of the "property mortgaged". According to the Privy Council, in section 92, third paragraph, the words "mortgage has been redeemed" refer merely to the payment of the mortgage money and not to an extinction of the mortgagee's rights over the mortgaged property. If such rights had become extinguished, the Privy Council observed, there would be none to which the person advancing the money could be subrogation. The Privy Council further pointed out that the fourth paragraph, which contemplates that a mortgage may be redeemed *in part,* shows that by redemption is meant no more than payment of the mortgage money.

82.13. *Questions to be considered*—If this approach is correct, two important questions arise—one relating to theory and the other relating to legislative drafting. Of course, both relate to the same query, but they are concerned with different aspects of the query. The point to be considered is this. Is the expression "on redeeming property subject to the mortgage" to be construed in the sense which the Privy Council indicated in the case cited above ? If so, and if, following the Privy Council, it is assumed that on redemption of the property the mortgagee's rights are extinguished, then how does one explain the language of the second paragraph of section 92, where it is stated that a person acquiring "the same" is said, to be subrogated *to the rights of the mortgagee* ? If the "rights of the mortgagee have already been extinguished by redemption of the mortgaged property under the first paragraph, there would be none to which the persons now claiming subrogation could be subrogated. Perhaps, it could be said in support of the Privy Council reasoning that under the first paragraph the person redeeming *gets new rights*—compare the use of the expression "acquiring" in the connected paragraph. But, in that case, the use of the expression "subrogation" is not appropriate in regard to the first paragraph, since subrogation means substitution.

With great respect to the Privy Council, it appears to us that while the construction placed by the Privy Council on the third paragraph is sound in so far as the Privy Council rejected the contention that the conveyance was needed, it appears to us that on that reasoning, the words "on redeeming property subject to the mortgage" require some elaboration. Do they mean anything more than mere payment of the mortgage money ? If so, the fourth paragraph of section 92 also requires elabora-

1 *Janki Nath* v. *Promotha Nath,* A.I.R. 1940 P.C. 38, 44 (Lord Romer).

tion in regard to its application to the first paragraph. Perhaps, in reply to our query, it can be stated that redemption of the mortgage is the entire property on payment of the debt. It was so held in a Bombay case[3] If so, it is worthwhile to make the section clear on this point by making two amendments, namely—

(a) The third paragraph should be revised so as to adopt the construction placed by the Privy Council on the expression "mortgage has been redeemed";[1]

(b) the fourth paragraph should be amplified by making specific references to (i) redemption of the property mortgaged under the first paragraph, and (ii) redemption of the mortgage by Payment of mortgage money under the third paragraph. This will bring out that redemption of the mortgage is the genus, of which redemption of the mortgaged property is a species.

This may sound to be a mere verbal change, but it is necessary in order to maintain the theoretical symmetry of the section.

82.14. *Recommendation*—We recommend that the section should be amended as above.

82.15. *Recommendation as to section* 92—In the light of the above discussion, we recommend that section 92 should be revised as under :—

"92. (1) Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any of the mortgagees.

(2) The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

(3) A person who has advanced to a mortgagor money with which the mortgage has been redeemed by *paying off the mortgage money* shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such person shall be so subrogated.

(4) Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full —

(a) *by redeeming the property subject to the mortgage, under sub-section* (1), *or*

(b) *by paying off the mortgage-money, under sub-section* (3).

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1 *Janki Nath* v. *Promotha Nath*, A.I.R. 1940 P.C. 38, 44, *supra.*

CHAPTER 83

PRIOR AND SUBSEQUENT MORTGAGES

SECTIONS 93 TO 95

83.1. *Section* 93—This brings us to certain provisions more immediately concerned with the respective rights of prior and subsequent mortgages. Tacking is prohibited by section 93 which provides as follows :—

> "93. 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 79, 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 the security for such subsequent advance."

Section 93 does not require any change.

83.2. *Rights of mesne mortgages*—According to section 94, where a property is mortgaged for successive mortgages, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

The familiar maxim—redeem up, foreclose down—is now divided into section 91(a) and section 94. Section 91(a) gives the right of redemption of a prior mortgage to a puisne mortgagee. Section 94 gives the right of foreclosure of a puisne mortgage to a prior mortgagee. It is to be noted, however, that there is one inaccuracy in the wording of section 94,[1] where the section refers to a "mesne mortgagee". The word "prior" is more appropriate, because the section does not refer to rights *against earlier mortgagees*.[2] That aspect is dealt with in section 91(a), a puisne mortgagee being the assignee of the equity of redemption.[3] We, therefore, recommend that in section 94, for the word "mesne", the word "prior" should be substituted.

We have no further comments on section 94.

83.3. *Right of redeeming co-mortgagor to expenses—Section* 95 reads—reads —

> "95. Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property".

The section needs no change.

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1 **Mulla (1973), page 605.**
2 *Dhanwanti* v. *Hargovind,* A.I.R. 1924 Pat. 484.
3 *Amba Prasad* v. *Maniram,* A.I.R. 1930 All. 523.

CHAPTER 84

MORTGAGE BY DEPOSIT OF TITLE DEEDS

SECTION 96

84.1. *Section* 96—In order to deal with the rights and remedies applicable to a mortgage by deposit of title deeds, section 96 provides that the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

A simple mortgage and a mortgage by deposit of title deeds are equated to each other. In particular, the result of this provision is that in a mortgage by deposit of title deeds, the mortgagor is treated as binding himself personally to pay the mortgage money.[1]

We have no further comments on section 96.

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1 *Nitya Nand* v. *Rajput Chaya Bani Cinema Ltd.*, A.I.R. 1950 Cal. 208.

CHAPTER 85

ANOMALOUS MORTGAGES

SECTION 98

85.1. *Section* 98—Section 98 provides that in the case of an anomalous mortgage, 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.

85.2. Of course, this section, in so far as it permits freedom of contract, is subject to the mandatory provisions in the chapter on mortgages, or for that matter, in the entire Act. For example, the right of redemption is an indispensable attribute of a mortgage, and no contract can take it away even where the mortgage is an anamalous one.[1]

However, procedural and minor matters may, it seems, be regulated by contract so that, for example, under the terms of an anomalous mortgage a separate suit for the recovery of interest appears to be maintainable.[2]

We have no further comments on section 98.

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1 *Mohammea Sher Khan* v. *Sethi Swami Dayal*, A.I.R. 1922 P.C. 17.

2 *Chan Yin Sein* v. *Mg. Aung Thein*, A.I.R. 1934 Rang. 159.

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CHAPTER 86

CHARGE

SECTION 100

86.1. *Introductory*—Section 100 defines a "charge", and also provides that all the provisions of the Act which apply to a simple mortgage shall, so far as may be, apply to a charge. Under the defining portion, where immovable 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. According to the operative portion, which is also contained in the same paragraph, all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Two kinds of charges are excluded from the operation of the section by the second paragraph. That paragraph provides, first, that 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,[1] and, secondly, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

86.2. *Meaning of transfer–Recommendation*—With reference to this provision, it may be noted[2] that the "transfer" mentioned in this portion includes an auction purchase. Some controversy has arisen on the question whether a simple mortgagee can be regarded as a transferee, it being the Madras view that the property is not "in the hands" of such a person.[3] With respect, we think that this is too narrow a construction of the relevant words, and we would agree with the contrary view of the Bombay High Court,[4] holding that a mortgagee, whether or not he takes possession, prevails over the prior charge without notice created on the same property. We recommend that the Bombay view should be adopted by an express amendment, since the point is of a recurring nature.

86.3. *Formalities–Recommendation*—The words "provisions hereinbefore contained..... so far as may be", which occur in section 100, raise an interesting question, namely, whether, for the creation of a charge, it is necessary to comply with the formalities laid down by section 59 in relation to the creation of a mortgage. There is a Madras case[5] holding that the words "so far as may be" do not exclude the

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1 *C.f.* section 32, Trusts Act.

2 *Lakshmi Devi* v. *S. N. Kanwar*, A.I.R. 1965 S.C. 834.

3 *Surayya* v. *Venkataramanamma*, A.I.R. 1940 Mad. 701.

4 *Raichand Gulabchand* v. *Dattatraya*, A.I.R. 1964 Bom. 1.

5 *Shiva Rao* v. *Official Liquidator*, A.I.R. 1940 Mad. 140.

application of section 59. On the other hand, the Supreme Court has held that section 100 does not lay down any[1] *particular formality* for the creation of a charge; section 59 is not attracted and attestation is not required. It may also be noted that according to a Madras case,[2] attestation is not required for creating a charge.

It seems to us that in such an important matter, the law should not be obscure. It is desirable to make it clear beyond doubt that nothing in section 59 shall apply for the creation of a charge. This could be inserted as a proviso to section 100. We recommend accordingly.

86.4. *Mortgage and charge*—The Act draws a clear distinction between a mortgage and a charge, and restricts the latter to cases where the security does not create an interest. Both are encumbrances but the principal distinction is that an interest is not created by a charge, with the result that the charge is not enforceable against a purchaser for value without notice.[3] Of course, there are other differences. While a charge can be created by an act of parties by operation of law, including a decree, a mortgage can be created only by an act of parties, according to the usually accepted view,[4] though, occassionally, there are observations to the contrary. In fact, sometimes, a mortgage can be created by express words of statute.[5]

86.5. *Purpose–Recommendation to expand the scope as to purpose*—The wording of section 100, in so far as it relates to the purpose for which a charge is created, is somewhat limited, since the expression used is "security for the payment of money to another", but there can hardly be any doubt that an engagement *which may give rise to a pecuniary liability* is as much a permissible purpose for section 100, as it is for the purposes of the creation of a mortgage under section 58. A charge need not necessarily secure a debt or loan.[6] It will be conducive to clarify if the language of section 100 is brought into line with section 58 in this regard, and we recommend accordingly.

86.6. *Charge created by decree–controversy*—On the question whether section 100 applies to a charge created by a decree, there seems to be a divergence of opinion in the various High Courts —

(a) Some of the High Court[7] have held that a decree creating a charge would fall within the provisions of section 100.

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1 *Abdul Jabbar Sahib* v. *Venkata Sastri*, A.I.R. 1969 S.C. 1147, 1152, para 14.15

2 *Ramasami Iyengar* v. *Kuppusami Iyer*, A.I.R. 1921 Mad. 514, followed in *Sikandar* v. *Hasan*, A.I.R. 1936 Oudh 196.

3 I.L.R. 35 Cal. 837, 844.

4 I.L.R. 35 Cal. 837, 844.

5 A.I.R. 1918 Lah. 98, 102.

6 A.I.R. 1915 Cal. 478, 480.

7 *Mahesh Prasad* v. *Mt. Mundar*, A.I.R. 1951 All. 141, 145, 150, para. 14, 15, 42 (F.B.).

(b) According to some High Courts,[1] such a charge is outside the provisions of this section, as it is not a charge created by "act of parties" or "operation of law".

(c) Some decisions[2-3] take the view that certain types of decrees—for example, a compromise or an award—fall within the provisions of section 100, treating a decree as an "act of parties". Many of the judicial decisions on section 100 are reviewed in the undermentioned cases.[4] It will be useful to refer to a few important cases.

86.7. In illustration of the first view, a judgment of the Nagpur High Court[5] may be cited :

"When a charge is created by a decree, there is no priority of estate between the charge-holder and the judgment debtor, and therefore, the judgment-debtor is free to deal with the property, and a person taking bona fide without notice from such a person ought to be protected. There is no difference in principle between *a charge created by a decree and one created by contract.* If a charge does not create any interest in immovable property, it should make no difference whether it is created by a decree or one created by contract. A charge as defined in section 100 is either created by act of parties or by operation of law. Its being embodied in a decree does not make it anything but a charge.

In one case,[6] the Calcutta High Court has held :

"A charge created by a decree would be one by *operation of law only where the decree merely embodies a charge which exists in law apart from the decree itself. If a decree embodies a charge* which has no existence in law independently of the decree itself, this *would be outside the definition of section* 100.[7] A Hindu widow's right to maintenance is not, however, in the fullest sense of the term, a charge on her husband's estate, though she has a right to be maintained out of that estate because it does not necessarily bind any part of such property in the hands of a purchaser. It becomes a complete charge if it be fixed and charged upon such property or a portion thereof by a decree or by an agreement or by a will. That being so, a charge for the payment of maintenance of a widow out of her late husband's estate, *though created by a decree, may, from one point of view, be said to be one by operation of law* and from

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1 *Seethalamshmi* v. *Srinivasa*, A.I.R. 1958 Mad. 23;
A.I.R. 1951 All. 141 (F.B.);
A.I.R. 1948 Pat. 199.

2 *Manmohan Das* v. *Bhagwan*, A.I.R. 1957 Cal. 575, 582, para 29.

3 A.I.R. 1957 All. 575, 582.

4 (a) *Tnangavelu* v. *Tirumalswami*, A.I.R. 1956 Mad. 67.
(b) A.I.R. 1941 Pat. 95, 98;
(c) A.I.R. 1943 Oudh 354, 359;
(d) A.I.R. 1958, Mad. 23.

5 *Goswami Maheshpuri* v. *Ramchandra*, A.I.R. 1944 Nag. 1, 6.

6 *Jata Bhushan* v. *Krishna Bhamini*, A.I.R. 1957 Cal. 204.

7 Emphasis added.

another point of view, one not by operation of law but by a decree only. Where a charge is created by a decree, the instrument creating the charge is, at the same time, a decree. Therefore, it has a double character and it distinguished from one which is merely an instrument creating a charge. If it were merely an instrument creating a charge, it would be enforced only by a suit according to the first paragraph of section 100, but as it is at the same time a decree, it is capable of execution according to the provisions of law. That makes a charge created by a decree enforceable in execution."

In one Madras case,[1] properties were specified in the decree and it was stated that future maintenance was to be recovered from these properties by selling them without attachment and that that method was to be resorted to "in default of measuring the paddy on the due date". It was held that the decree made the future maintenance a charge on the said properties. It was also held that where a decree makes maintenance a charge on specified properties, the decree-holder was entitled to realize the maintenance by executing the decree, without having recourse to any suit.

These decisions either assume or hold that section 100 applies to decretal charges, at least in some cases, though they also hold that being a decree, it can be enforced in execution.

86.8. *Second view*—The second view is illustrated by an Allahabad case,[2] holding that a Hindu widow's right to maintenance as against persons other than her own son is not *ipso facto,* a charge upon the property. It is this right,—which is not yet a charge,—to receive maintenance out of the profits of immoveable property which is spoken of in section 39. Section 39 does not apply to a charge created by a decree. Where there is no compromise or award and the decree, passed after contest (as in the case of maintenance decree declaring a charge in favour of a Hindu widow), creates a charge for the first time by its own force, it cannot be said that the charge was created by "act of parties" or by "operation of law" within the meaning of the first paragraph of section 100, according to this view.

Where a direction for sale of the property in enforcement of the charge is made in the decree, a definite interest is created in favour of the judgment-creditor. Such an order is binding not only against the judgment-debtor, but also against his privies. *including purchasers for value without notice.*[3] Though, a charge created by a decree is like any other charge and *is not enforceable against a transferee for consideration without notice,*[4] where the decree directs the sale of the property, the property can be sold in execution even in the hands of a transferee from the judgment-debtor and the transferee cannot plead that he had no knowledge that a decree for sale had been passed against his transferor.

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1 *Abdul Md. Rowther* v. *Seethalakshmi,* A.I.R. 1931 Mad. 120.

2 *Mahesh Prasad* v. *Mt. Mundar,* A.I.R. 1951 All. 141, 145. (F.B.), overruling A.I.R. 1939, All. 687.

3 Emphasis supplied.

4 This observation does not rely on s. 100.

A declaratory decree, though creating a charge, does not order the sale of the property and, *so long as an order for sale has not been passed,* the interest created by the charge remains a nebulous one,[1] not available against a purchaser for value without notice.

In a suit filed by a Hindu widow, claiming that she was entitled to maintenance out of the income of specified properties and asking for a charge to be created on the said property, a right to immovable property is directly and specifically in question. Where a decree is passed specifically creating a charge on specific immovable property and the decree is not merely a declaratory decree but an executable one, directing sale, a transferee of the property before the decree is fully satisfied, is affected by the decree, *irrespective of the fact that he had no notice of the charge created by the decree.*[2] The doctrine of the binding nature of a decree creating a charge, either by way of *res judicata* or otherwise, will have no application as against transferees for valuable consideration and without notice, in the case of a merely declaratory decree. Where, however, the decree is executable and the property charged under the decree can be sold in execution of the decree, the transferees will be bound by the decree and in such a case it is wholly immaterial whether the decree itself created a charge or the charge was created by a compromise or an award which was embodied in the decree.

Where a decree contains directions for a declaration that the maintenance allowance shall be a charge on the joint family property and for the recovery of the maintenance allowance, the decree is executable at least for the recovery of the allowance by sale of the property charged. As the decree itself creates a charge, 0.34, Rules 14 and 15, Civil Procedure Code, does not apply in such a case.

In one case,[3] the Madras High Court has held that a charge would fall under section 100, when it can be realised by a suit for sale as it[3] were a simple mortgage.[4] *A charge created by a decre would not fall within sction* 100.[5]

Even in cases of charges created by decrees, a distinction has to be borne in mind with regard to the mode of enforceability. If the decree is executable, a charge created by it can be enforced in execution. If, on the other hand, the decree creating the charge is merely declaratory, the decree holder is not entitled to sell the property in execution, but must file a suit to enforce the charge. Therefore, the charge created by the maintenance decree which, on the facts of this case, did not fall under section 100 could be enforced by sale of the properties in execution.

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1 *Mahesh Prasad* v. *Mt. Mundar,* A.I.R. 1952 All. 141, 150, para 48 (Agarwala J.).

2 A.I.R. 1943 Oudh 354 (F.B.) not followed.

3 A.I.R. 1956 Mad. 167 followed; (1954) 2 Mad. LJ. 13 not followed.

4 *Seethalakshmi* v. *Srinivasa.* A.I.R. 1958 Mad. 23.

5 Emphasis added.

The petitioner in this case had obtained a maintenance decree in a particular suit in which a charge was created on certain properties. He now sought to bring these properties to sale. *The question to be decided was whether a separate suit should be filed, or whether the right can be enforced in execution.* The lower court held that a separate suit should be filed. On appeal, the High Court held that there was no doubt that a separate suit *should have been filed if a charge created in this case fell under section* 100. The Court referred to the difference of opinion on the question whether section 100 was exhaustive of all kinds of charges and referred to the case law on the subject.[1]

86.9. *Third view*—The third view, which applies section 100 to awards and compromise decrees, treating them as analogous to act of parties, may now be dealt with. In one case,[2] the Allahabad High Court has held :

> "Coming to the .... point viz., whether this charge is one to which section 100, Transfer of Property Act, applies, one finds that the said section has been made applicable to cases where the charge is created by act of parties or operation of law".

This was held by a Full Bench of this Court,[3] but the same authority goes on to say *that if the decree is passed on the basis of a compromise or is passed on an award,* it does amount to an "act of parties". It was held that the decree in suit was passed on the basis *of an award,* which amounted to an act of parties, and so section 100 would apply to this decree.

In one case,[4] the Nagpur High Court held that a charge which is created by a decree is not created by act of parties, nor can it be said to have been created by operation of law. Such a charge does not fall under section 100, nor does the principle underlying it apply to it. However, it also held that the Act does not purport to be exhaustive, but purports to deal only with certain specific matters (transfers by act of parties), and that a charge could be recognised apart from the Act.

"Charges are created in two ways and both are included in this section". It noted the argument of counsel for the purchaser-defendants. "He argues that if a charge of this kind does not fall under section 100, then it cannot be a charge at all so far as India is concerned, because

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1 A.I.R. 1924 Cal. 645;
A.I.R. 1916 Pat. 252;
A.I.R. 1935 Nag. 129;
A.I.R. 1934 Nag. 83;
A.I.R. 1945 Pat. 278;
A.I.R. 1939 All. 579.
A.I.R. 1926 Pat. 31;
A.I.R. 1919 Bom. 227;
A.I.R. 1934 Nag. 147;
A.I.R. 1948 Pat. 199;
A.I.R. 1940 Nag. 163;

2 *Manmohan Dass* v. *Bahauddin,* A.I.R. 1957 All. 575 (D.B.).

3 *Mahesh Prasad* v. *Mundar,* A.I.R. 1951 All. 141 (F.B.)

4 *Ghasiram* v. *Kundanbai,* A.I.R. 1940 Nag. 163 (D.B.).

the Act is exhaustive of all matters with which it deals. We are unable to agree, because it appears from the preamble that the Act is one to "define and amend certain parts of the law relating to the transfer of property by act of parties". It is clear then that the Act does not purport to be exhaustive but only to deal with certain specific matters, and also that primarily it was enacted to deal with transfers by act of parties."

86.10. *Recommendation*—It appears to us on a consideration of all aspects of the matter that the conflict of decisions discussed above obviously shows the need for clarification. We do not see any reason why section 100 should not apply to charges created by decree of court (on compromise or otherwise). We recommend that section 100 be so amplified. Of course, this would mean that the charge[1] would not bind a bona fide purchaser for value without notice, but this is just and fair.

The reasons for such a limitation have been convincingly set out in the Nagpur case[2]—

> "But if a charge does not create any interest in immovable property and if the property covered by the charge is not thus the subject-matter of the suit, we find it difficult to understand how an innocent transferee, who had absolutely no notice and had no means of having notice as the charge was not created by a registered document, can be regarded as a privy of the judgment-debtor by the mere fact that the decree as passed mentioned some property as charged. There is no privity of estate between the charge-holder and the judgment-debtor, and therefore the judgment-debtor was free to deal with the property, and a person taking bona fide without notice from such a person ought to be protected. It is for these and similar reasons that their Lordships of the Lucknow High Court in the Full Bench case reported in 13 Luck 101 held that there was no difference in principle between a charge created by a decree and one created by contract. If a charge does not create any interest in immovable property it should make no difference whether it is created by act of parties or by terms of a decree."

One possible device for implementing our recommendations would be to add an Explanation to section 100 to the effect that for the purposes of this section, a charge created by a decree or order of the court, whether such decree or order is passed on compromise or otherwise, is a charge created by the operation of law.

Of course, it can also be provided that this section shall not affect the procedure for the enforcement of decretal charges or the doctrine of *lis pendens* (section 52).

We recommend such an amendment.[3]

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1 Right of execution to be saved.

2 *Goswami Maheshpuri* v. *Ramchandra*, A.I.R. 1944 Nag. 1, 6.

3 Also see para 86.5, *supra*.

86.11. *Section* 100–*Subsequent transferee from a transferee if protected*—In regard to the enforcement of charge, difficulties arise where a transferee of the charged property for consideration with notice of the charge, transfers it to another who takes it for consideration without notice of the charge. The subsequent transferee being a transferee without notice, the property in his hands will not be subject to the charge[1] The rationale in this case is that equity must look to the state of mind of the subsequent transferee whose rights are now in issue.

Take the converse case. A, a transferee for consideration (without notice of a charge), transfers it to a person *who has notice of the charge.* The subsequent transferee would take the property free from the charge, since the general rule is that a purchaser for valuable consideration without notice can give a good title to a subsequent purchaser from him with or without notice.[2]

The only exception is that a trustee who has sold property in breach of trust or a person who acquired property by fraud cannot protect himself by purchasing it from bona fide purchaser for value without notice. A purchaser without notice takes the property free of the charge[3] and he is perfectly entitled to transfer his rights to any person whether the latter had notice of the charge or not.

The reason for the law is evident. If it were not so, the right of the person who purchased the property without notice would be limited, for his market would be limited.

We should, at this stage, note a contrary decision. In *Harnam Singh* v. *Akbar Khan,*[4] a property subject to charge was purchased by H *without notice.* He transferred it to K who *had notice* of the charge. It was held that K could not avail himself of a defence under the proviso to section 100, that the mere fact that K claimed through H could not change the situation and that K took subject to the charge. In our opinion this judgment does not, with respect, take a correct view, for the reasons given above.

Redraft—The following redraft of section 100 is recommended in the light of what we have stated above[5] :

> "100. (1) When immovable property of one person is, by act of parties, or operation of law, made security for the payment or money *advanced or to be advanced by way of loan, an existing or*

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1 A.I.R. 1915 Cal. 478, 481.

2 (a) *Wilkes* v. *Spooner,* (1911) 2 K. B. 473, 483; 80 L.J.K.B. 1107; 104 L.T. 911.

(b) *In re Stemple Fort Colliery Co.,* (1880) 14 Ch. D. 432, 445; 28 W.R. (Eng.) 270; 41 L.T. 755; 49 L.J. Ch. 488.

3 *Attorney General* v. *Biphosphated Guano Co.,* (1879) 11 Ch. D. 327, 334; 27W.R. (Eng.) 621; 40 L.T. 201; 49 L.J. Ch. 68 (per Fry, J.).

4 *Harnam Singh* v. *Akbar Khan,* A.I.R. 1937 Pesh 76, 78.

5 See paragraphs 86.3, 86.5 and 86.10, *supra.*

future debt, or the performance of an engagement which may give rise to a pecuniary liability, in favour of another and the transaction does not amount to a mortgage, the person for *whom it is so made security* is said to have a charge on the property and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Provided that nothing in section 59 *shall apply to the creation of a charge.*

(2) Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred for the execution of his trust and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

(3) *For the purposes of this section, a charge created by a decree or order of a court, whether passed on compromise or otherwise, is one created by act of parties, by operation of law but nothing in this section shall affect the provisions of section* 52 *or the procedure for the enforcement of such charge."*

CHAPTER 87

MERGER

SECTION 101

87.1. *Section* 101—Section 101 practically abolishes the doctrine of merger in relation to a subsequent encumbrance. The section reads as follows :

> "101. Any mortgagee of, or person having a charge upon immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto."

87.2. *Possession*—With reference to this section, it is necessary to refer to one matter on which there has arisen a controversy. Where a charge is kept alive under section 101, it can always be used as a shield against subsequent in cumbrancer.[1] This general proposition is clear enough. What is to happen where the charge-holder has obtained possession as a purchaser or in some other manner; that is to say, not *qua* charge-holder but in another capacity? Can he retain the possession so acquired until the charge is redeemed? This controversy can arise in regard to mortgagees as well as in regard to charge-holders. Now, according to one view, the mortgagee can retain possession in such circumstances until he is redeemed. This seems to be the view of Calcutta,[2] Nagpur,[3] and Oudh[4] Courts, whilst the Madras[5] and Allahabad[6] decisions show a fluctation of views. The Madras cases are discussed in the under-mentioned judgment.[7] The Bombay High Court has taken the view[8] that a prior mortgagee entering into possession as purchaser under a money decree obtained by third party is bound to account for the rents and profits of the property when accounts are taken between the prior mortgagee and a puisne mortgagee. We have to counterbalance the considerations of equity relied upon by the Calcutta and other High Courts against the other consideration that a person cannot get a better right than what he would have had if the change had been

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1 A.I.R. 1922 P.C. 11, 13, followed in A.I.R. 1944 Nag. 163, 171.
2 (1903) 7 C.W.N. 11, 20.
3 A.I.R. 1933 Nag. 241, 244.
4 A.I.R. 1935 Oudh 411, 412.
5 Contrast I.L.R. 7 All. 568 with A.I.R. 1939 All. 660, 612.
6 Contrast A.I.R. 1940 Mad. 646, 649 with (1910) 5 Indian Cases 490, 491
7 A.I.R. 1922 Mad. 249, 252, 253 (Madras).
8 A.I.R. 1948 Bom. 379, 380.

kept alive, so that if the mortgage or charge did not give him right to retain possession as against a particular person, he cannot resist the delivery of possession as against that person or his successors in interest or persons deriving title under him.

87.3 *Recommendation*—On principle, it appears to us that the latter argument is more convincing and juristically sound. Having regard to the conflict of decisions it may be desirable to make it clear, say, by adding an Explanation, that nothing in this section shall entitle a person to retain possession of the property by virtue of this section as against a person against whom he could not have retained possession under the mortgage or charge, as the case may be.

CHAPTER 88

PROVISIONS AS TO SERVICE OF NOTICE AND TENDER

SECTION 102—103

88.1. *Introductory.*—Substantive rights arising out of mortgages and charges, and remedies applicable thereto have now been disposed of. Certain provisions of a procedural character follow. Two sections—sections 102—deal with matters of detail concerning the service of notice and tender.

88.2. *Section* 102—*Service or tender on or to agent.*—According to section 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 person or otherwise duly authorised to accept such service or tender shall be deemed sufficient.

Where no person or agent on whom such notice should be served can be found or is known to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient :

Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.

Where no person or agent to whom such tender should be made can be found or is known to a person desiring to make the tender, he latter person may deposit, in any Court in which a suit might be brought for redemption of mortgaged property, the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Section 102 generally follows the corresponding English statutory provision—previously, section 67 of the Conveyancing Act, and now section 196 of the Law of Property Act, 1925. The Law Commissioners observed that these provisions, though novel, were suggested by difficulties which had occurred in practice.

88.3. *Significance.*—The significance of section 102 may be briefly explained. It may be recalled that tender of the mortgage money is contemplated by section 60 which deals with the right of the mortgagor to redeem. So far as is relevant, section 60 provides that the mortgagor has

a right, on payment or tender of the mortgage money, to require the mortgagee to deliver to the mortgagor the mortgage deed etc. and to do other acts referred to in that section in connection with the right to redeem. Under section 69, notice is to be given to the mortgagor before the mortgagee can exercise his power of sale under that section. Section 83 provides for notice being given to the mortgagee of the deposit of the mortgage amount in court. In view of these and other similar provisions relating to notice and tender, it was considered necessary to lay down certain matters of detail which is what section 102 seeks to do.

The section does not seem to need any change.

88.4. *Section* 103—*Notice, etc., to or by person incompetent to contract.*—Section 103 reads—

> "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 on or by 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 guradian *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 Order XXXII in the first Schedule to the Code of Civil Procedure, 1908 shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder."

88.5. *Section* 103—*Recommendation as to "legal curator".*—Certain observations must be made in regard to the expression "legal curator" used in section 103—an expression perhaps suggested by the Succession (property Protection) Act (1841), previously in force. It is well-known that while the Civil Procedure Code deals with the appointment of guardians for the purpose of litigation, that Code is not concerned with the appointment of guardians for non-contentious legal business. Guardians of property are appointed under the general law, including the Guardians and Wards Act, 1925. The precise question to be considered is—what is the exact scope and meaning of the expression "legal curator" as employed in section 103.

On principle, it would be a reasonable construction to place that a legal curator within section 103 is a person appointed under any provision of law to protect this property of any person.[1] At the same time, it seems

1 *Cf.* Wharton, Law Lexicon, 14th Ed.

to be necessary that the person must not be a mere natural guardian, such as a father or a mother of a Hindu minor,[1] Some kind of appointment by the Court is necessary.[2]

88.6. *Deceased person.*—Having regard to this position, it seems to be desirable to give a definite meaning to the expression. It is also desirable to cover cases where there is no one to look after the estate of a *deceased person.*

88.7. *Expression "requisite or desirable".*—We may note that section 103 uses the expression "requisite or desirable" (in the middle of the section). In a Bombay case,[3] it was suggested by counsel in the course of the argument that these words obscure the meaning of the section. Jenkins C.J. observed that on a fuller consideration he was of the opinion that this was not so, and that the words are designedly used in reference to distinct events. He put as illustration two situations, namely, the mortgagee is a minor and the mortgagor decides to proceed under sections 83 and 84 (deposit of mortgage money in court). In such a case, it is *requisite* that notice should be served under section 103. On the other hand, where the *mortgagor* is an infant and those entrusted with the care of his affairs consider that the mortgage money should be tendered or paid, then it is *desirable* in the interests of the minor mortgagor that notice should be served under section 103.

88.8. *Recommendation.*—In view of what is stated above, we recommend revised section 103 as follows :—

"103. (1) 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 *or in relation to the property of a deceased person,* such notice may be served on or by or a tender or deposit made, accepted or taken by, the legal curator of the property of such person.

(2) Where there is no such curator and it is requisite or desirable *in the interests of such person incompetent or contract,* that 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

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1 *Sheo Saran* v. *Ram Lagan Das,* A.I.R. 1922 All. 355, 356.
2 Compare (1903) I.L.R. 27 Bom. 23, 29.
3 *Pandurang* v. *Mahadji,* (1903) I.L.R. 27 Bom. 23, 28. followed in A.I.R. 1959 Pat. 457, 459.

which could or ought to be done by such person if he were competent to contract; and the provisions of Order XXXII in the first Schedule to the Code of Civil Procedure, 1908 shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

"Explanation.—For the purposes of this section, *'legal curator means a person appointed under any provision of law to protect the property of any other person or vested under any such provision with authority to look after the property of any other person, and includes—*

(a) *the guardian of the property of a ward appointed under the Guardians and Wards Act,* 1890;

(b) *a Court of Wards in charge of the property of a disqualified proprietor;*[1]

(c) *the manager of the estate of a lunatic appointed under the Indian Lunacy Act,* 1912; *and*

(d) *a curator appointed by the court to take charge of the estate of a deceased person under part VII of the Indian Succession Act,* 1925."

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1 *Cf.* section 207, Succession Act.

CHAPTER 89

RULES

SECTION 104

89.1. *Section* 104—This takes us to the last section in the group of sections dealing with mortgages and charges. Section 104 empowers the High Court, from time to time, to 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.

89.2. *Scope*—One would have thought that such a simple provision should hardly need any comments. However, the section seems to have given rise to quite a few problems. That the section is an enabling provision is, of course, obvious, but some questions arise where the rules have *been framed* as contemplated by the section. What is the precise scope of the power to make rules for "carrying out the provisions contained" in this Chapter? According to the view of Bhashyam Ayyangar J.,[1] the rule making power conferred on the High Court by this section is principally intended to regulate *the procedure to be* adopted for carrying out these and similar provisions contained in the Chapter.

89.3. *Consistency with the Code*—It is a moot question whether the rules to be framed under section 104 can be inconsistent with the provisions of the Code of Civil Procedure, 1908. The view generally taken is that while rules applicable[2] to proceedings on the original side of High Court can be inconsistent with the Code, the rules made for the lower courts cannot be inconsistent with the Code, the reason being that section 104 must be read subject to section 15 of the Charter Act, under which rules to be made by the High Court must not be inconsistent with the provisions of any law for the time being in force[3] It is worthwhile codifying this position in so far as it relates to rules made for subordinate courts.

89.4. *Previous approval*—It also seems desirable to provide that the rules made under section 104 should be made with the previous approval of the Government, where they relate to subordinate courts. It may be noticed that under article 227(2) of the Constitution, the High Court has, *inter alia,* power to make and issue general rules and prescribe forms for regulating the practice and proceedings of courts over which it has superintendence, but, under Article 227(3), proviso, rules so made or forms so prescribed shall not be inconsistent with the provisions of any law for the time being in force and shall require the previous approval of the Governor.

1 *Mallikar Janadu* v. *Lingamurli* (1902) I.L.R. 25 Mad. 244, 273 (F.B.).
2. A.I.R. 1928 Bom. 123, 128.
3 (1902) I.L.R. 25 Mad. 244, 254.

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A similar provision can be made in section 104, in so far as rules for courts subject to the superintendence of the High Court are concerned.

89.5. *Recommendation*—We recommend that section 104 should be so amended, that is to say, to require such previous approval as well as consistency with other laws, where the rules relate to subordinate Courts. A proviso will do.

CHAPTER 90

DEFINITION OF LEASE

SECTION 105

90.1. *Introductory*—We now come to the other type of transfer dealt with in the Act, namely, lease. We shall come to the precise text of the definition later. But at the outset it is necessary to emphasise that the essence of a lease is the transfer of the exclusive possession of the immovable property. In English law, this is usually stated by pointing out that it is essential for the establishment of the relationship of landlord and tenant that there should be a "demise".[1] Demise is the grant of a right to the exclusive possession of land.[2] There must be a lessor and a lessee, so that there cannot be a demise from one person to himself, except, of course, by way of trust.

A lease transfers only a limited interest in the property. It follows, therefore, that there must be reserved to the landlord a reversion upon the lease. A reversion is that estate in the land which remains vested in the landlord during the continuance of the term granted to the tenant.[3]

90.2. *Codification*—This Act codifies for the first time the law relating to landlord and tenant. Prior to the passing of this Act, the Hindu law was held to be strictly applicable to a tenancy created by express contract between Hindu,[4] and the English rules regarding the relation of landlord and tenant were applied whenever no precise rule regarding the subject was to be found in Hindu law or other laws.[5]

Even in the case of a tenancy created after the passing of the Transfer of Property Act, if it does not come strictly within this Act, the rule of English law may be applied.[6] But it has been held by the Privy Council that the Act,[7] though founded on English law and drafted in the first instance by eminent lawyers in England, has only applied the English law so far as it was considered to apply to India. Before therefore resorting to English decisions for determining the relations of landlord and tenant, it should be seen what the law in India is.

Before the Act, "lease" meant that if the owner of land consented by deed that another person should occupy the land for a certain time, there was a lease.[8]

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1 Woodfall, Landlord and tenant (1968), Vol. I, page 2. paragraph 2.
2 Woodfall, Landlord and tenant (1968), Vol. I, page 2, paragraph 3.
3 *General of Onterio* v. *Mercer*, (1883) 8 Appeal Cases 767, 772.
4 *Russick Lall* v. *Lokenath*, I.L.R. 5 Cal. 688.
5 *Tara Chand* v. *Ram Gobind*, I.L.R. 4 Cal. 778.
6 *Kishori Mohan* v. *Nand Kumar*, I.L.R. 24 Cal. 720, 723.
7 *Hansraj* v. *Bejoy Lal*, A.I.R. 1930 P.C. 59. 60.
8 *Nagindra* v. *Jurna*, 39 C.W.N. 96.

90.3. *Contractual tenancy*—In the scheme of the Act, the lease can arise only out of contract, although once a lease is created, certain incidents may be annexed by law. It is well-known that Rent Acts impose restrictions upon the recovery of possession by landlords of certain classes of buildings. When a tenant continues in occupation solely by reason of the protection afforded by the Rent Act, he becomes, according to the parlance usually adopted, "statutory" tenant—an expression conveniently coined[1] to denote a person enjoying a statutory relationship distinct from the *contractual relationship* previously existing.

The following passage from Megarry's Miscelleny-at-Law[2] makes interesting reading :—

> "The Rent Acts, too ('a byword for confused draftsmanship') have evoked a rich volume of judicial vituperation. In this 'extraordinary and unique legislation' the Acts were passed in a hurry, "the language used was often extremely vague, and the language 'resembles that of popular journalism rather than terms of the art of conveyancing'. It is a patchwork legislation, has not been framed with any scientific accuracy of language, and presents great difficulties of interpretation to the Courts that have to give practical effect to it..... In one case, Scratton, L.J. said, 'I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restrictions Acts, and the members of the Legislature who passed them and are responsible for the obscurity of the Acts'."

90.4. *Exclusive possession—lease and license*—Since the grant of exclusive possession is of the essence of a lease, it follows that a lease is distinct from a licence to use the premises.[3] Nothing, of course, turns merely on the phraseology adopted in the document. Even the fact that there are certain special restrictions or reservations as to possession may not be conclusive. However, if there is no intention, in substance, to grant exclusive possession, it is not a lease. In England, the distinction becomes of particular importance, not only in the context of Rent Control Legislation, but also in regard to special types of premises such as theatre refreshment rooms, advertisement boardings, furnished rooms and the like. Here again, the test of exclusive possession, though not decisive in itself, is a consideration of a first importance—a matter dealt with at length in a judgment of the High Court of Australia of great learning.[4]

90.4A. *Importance of the distinction*—The distinction between lease and license may have important repercussions not only in the law of property, but also in the law of civil wrongs,—and sometimes in the criminal law. For example, where rooms are let to a tenant and the relationship is one of lease, then it is a trespass on the part of the land lord who enters and excludes the tenant from the rooms, but not so if the person concerned is merely a lodger having only a licence to sleep in one room and to eat and during in another room.[5]

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1 *Fumasli* v. *Comyn and Wish,* (1924) Law Times 490.
2 R. E. Megarry, Miscellany-at-Law, page 351, 352.
3 *Cf.* Section 52, Indian Easements Act, 1882.
4 *Radach* v. *Smith,* (1959) 101 C.L.R. 209 (Australia).
5 *Lane* v. *Dixon,* (1847) 3 C.B. 776.

This does not, of course, mean that a person who is a licensee has no legal rights. Even a gratutious licence revocable by the licensor may involve an obligation to give notice,—a proposition which became material in an Australian case. [1] Again, the arbitrary revocation of a licence may, in the circumstances of the case, lead to legal liability. Thus, in a West Indies case[2] cited by Woodfall, the Crown had granted a licence at an annual rent during Her Majesty's pleasure. On failure by the licensee to pay the "rent" when due, the Governor revoked the licence without making a demand for the rent. It was held that the licence in the circumstances conferred an interest in land and the interest was terminable for good cause only, and the revocation was therefore invalid.

This preliminary discussion, it is hoped, will enable us to deal more conveniently with the text of the definition of lease and certain matters of detail.

90.5. *"Lease" defined*—Lease is defined in section 105 as follows :—

> "105. A lease of immovable 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.
>
> 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."

90.5A. *Analysis*—The essential features of a lease under section 105 are :—

(a) Transfer[3] of a right of enjoyment of immovable property.

(b) The transfer must be made for a certain time, express or implied or in perpetuity. This is subject to section 106, as we shall discuss later.

(c) The transfer must be one for consideration.

(d) The consideration must be (i) premium or rent as defined by the section, (ii) either or both of them.

The first requirement raises no problems, except that where it is not clear whether exclusive possession is transferred,[4] the question may arise whether it is a lease or licence.

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1 *Australian Blue Metal* v. *Hughes,* (1963) A.C. 74 (P.C.).

2 *Attorney-General* v. *McDoom,* (1960) 2 West Indies Reports 373, cited by Woodfall.

3 A.I.R. 1954 Assam 45, 48.

4 See *supra.*

90.6. *Term of the lease*—Let us now consider the second requirement the term of a lease. According to section 105, a lease must be made for a certain time, express or implied, or in perpetuity. Mulla has pointed out[1] that the words "a certain time" seem inconsistent with the phrase "a lease of uncertain duration" which occurs in section 108(i), where that phrase is used to describe yearly or monthly tenancies. A lease from month to month is a lease for uncertain duration, properly speaking.[2] Centainty, however, according to Mulla,[3] need not be ascertained at the time of creation because, if in the fluxion of time a day will arrive which will make it certain, that is sufficient.

90.7. *Inconsistency*—After all is said and done, however, one does feel that there is a certain amount of inconsistency between section 105 and section 106 read with section 108(i). Under section 106, the duration of leases, in the absence of contract or local law or usage to the contrary, is fixed by a fiction of law, with reference to the purpose for which the property is let. The "implication", if any,[4] is not by contract regarding the duration of such leases, but is brought in by the terms of section 106. That section lays down a rule of construction which applies to cases where no period is agreed to between the parties.[5] A tenancy from year to year or from month to month really arises *in the absence of a contract, and by presumption* of law under section 106.[6]

90.8. *No change*—Having regard to this position, it was suggested to us that the best course would be to make the provisions of section 105 (in regard to certainty of time) expressly subject to the provisions of section 106, and we recommend accordingly. The limit of the lease in the case of a transaction falling under section 106 *is not by its terms* capable of being ascertained. It is only by virtue of the section that the limit is created. As was pointed out by the Assam High Court,[7] a lease from year to year is for an uncertain duration, which does not purport to be a definite period, as the interest of the lessee does not terminate at the end of a definite period. It is for this reason that the suggestion was made but we do not consider it necessary.

90.9. *Tenancy at will*—It is to benoted that a tenancy at will being an interest in property like any other lease, it must be determined before the lessor can sue for the ejectment of the tenant from the property.[8] The rationale is that the term is, in this case, capable of being made certain later.

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1 Mulla (1973), page 650.
2 *Collector of Bombay* v. *Laxmi Bai*, I.L.R. 48 Bom. 342.
3 Mulla (1973), page 650; citing *Goodright* v. *Richardson*, (1789) 3 Term. Reports 462.
4 (a) *Ram Kumar* v. *Jagdish Chander*, A.I.R. 1952 S.C. 23;
(b) A.I.R. 1960 Pat. 344.
5 See (a) A.I.R. 1950 Cal. 23, 29, para 23;
(b) A.I.R. 1959 Cal. 181, 185, para 26.
6 Mulla (1973), page 652.
7 *Mafuzuddin* v. *Manindra*, A.I.R. 1951 Assam 141.
8 (1875) 24 Suth. W.R. 172. 173.

90.10. There still remains to be considered another question concerning the term of a lease. Can there be a lease for the period so long as lessee pays rent? A discussion of this question renders necessary an examination of the relevant aspects of English law and Indian law.

90.11. *Tenancy at will*—Another question to be considered is in connection with the term of a lease. Although there appears to be some misconception on the subject, it cannot be disputed that a tenancy which is terminable at the will of one party is not theoretically inconsistent with the concept of a lease: Provided the interest transferred is the right to exclusive possession of the property, and provided the right is transferred for consideration, it does not matter that the term is to end at the volition of one party.

90.12. *Certainty of term in England*—In England, the general rule is that the duration of leases for years ought to be ascertained either by the expressed limitation of the parties at the time of making the lease, or by a reference to some collateral act which may with equal certainty measures the continuance thereof; otherwise they are void.[1] For this purpose, a collateral matter does not measure the continuance of the term with sufficient certainty unless that matter is itself capable of being rendered certain before the *lease takes effect*.[2] It was for this reason that during the war time special legislation had to be passed in England to validate a grant of tenancy for the duration of the war.[3] This legislation became necessary because at common law the grant of a tenancy for the duration of a war did not create an interest for "a certain term" because the duration depended upon a collateral matter which itself was incapable of being rendered certain *by the time the lease took effect*.[4]

90.13. *Duration how determined*—In India, a combined reading of sections 105-106 would show that with reference to their duration, leases fall into three principal categories, leaving aside, for the present, certain minor categories met with infrequently and also leaving aside leases which present features combining more than one of these categories. The three principal categories are—perpetual lease, leases for a specified period (capable of certainty) and periodic tenancies (section 106). A determination of the category in which is particular lease falls is of importance with respect to heritability, procedure for termination and other features. A lease which does not create a definite term is void.[5] But the question whether a particular lease is for a definite term is not always easy to decide.

90.14. *Lease for the period for which lessee pays rent*—A case in point is that of a lease which is expressed to be for some such period as—"so long as the lessee pays rent". Is it a perpetual lease—first category?[6]

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1 Woodfall, Landlord and tenant (1968) Vol. I, page 217, para 511.
2 *Lace* v. *Chancler*, (1944), K. B. 368.
3 Validation of War-time Lease Act, 1944, section 1(2) and section 7(3).
4 Woodfall, Landlord and tenant (1968), Vol. I, pages 222, 223, paragraph 529.
5 *Municipal Corporation of Bombay* v. *Secretary of State*, I.L.R. 29 Bom. 580.
6 Para 90.13, *supra*.

Or is it a lease for a definite duration—second category? Or does it fall in any other class? The precise status of a lease for so long as the lessee pays rent, is at present obscure.

90.15 *Various views*—Some earlier cases regard such a lease as for perpetuity.[1] According to some cases, such a lease is permanent and heritable one.[2] In a Bombay case,[3] Macleod, C.J. held that such a lease was a permanent lease, differing with an early Bombay case[4] where a lease for so long as the lessee pleased to hold the land was said to be transferable, but is not necessarily heritable.[5]

90.16. According to another Bombay case, such a lease may be transferable, but is not necessarily heritable.[5]

90.17. Some High Courts [6-8] take the view that such a grant enures for the lifetime of the grantee unless there are words showing the intention that a heritable grant is made, and they hold this view notwithstanding the terms of section 106.[9] It is construed as a lease for life in many other decisions.[10-11] The reason given is that[12-13] the continuation of the lease depends on the will of the lessee, which cannot be exercised after the lessee's death.

A lease for life, it may be noted, is a lease for a certain time, for it terminates with the death of the lessee.[14]

90.18. According to another view, such a lease is a tenancy at will.[15] The reason given is that such a lease is really a tenancy at the will of the lessee, which, by implication of law, is a tenancy at the will *of both the parties*.[16-17]

90.19. According to yet another view,[18] where the lease is totally silent as to duration, section 106 will apply.

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1 *Bai Sona* v. *Bai Jiragavri*, A.I.R. 1926 Bom. 374.
2 A.I.R. 1926 Bom. 374.
3 *Bai Sona* v. *Bai Piragavri*, A.I.R. 1926 Bom. 37 .
4 *Vaman Shripad* v. *Makt*, (1880) I.L.R. 4 Bom. 424, *Abdulrahim* v. *Sarafalli*, (1928) 30 Bom. L.R. 1596.
5 *Donkangowda* v. *Revanshidappa*, A.I.R. 1943 Bom. 148.
6 *Ashutosh* v. *Chandicharan*, A.I.R. 1927 Cal. 179.
7 *Jogesh Chandra* v. *Maqbool Ali*, I.L.R. 47 Cal. 979.
8 *Chandicharan* v. *Ashutosh*, 40 C.W.N. 52.
9 Para 90.19.
10 *Pool* v. *Secretary of State*, (1886) P.R. 68.
11 *Mania* v. *Lallubhai* (1900) 2 Bom. L.R. 488.
12 A.I.R. 1964 Bom. 287, 291.
13 A.I.R. 1929 Bom. 66.
14 Section 105.
15 A.I.R. 1957 Pat. 490.
16 (1913) I.L.R. 36 Mad. 557, 558.
17 (1886) I.L.R. 8 All. 198, 200.
18 *Rajib* v. *Umeshwar*, A.I.R. 1937 Nag. 321, 322.

90.20. *Convicting views summed up*—To sum up, there is, at present, a multiplicity of views, and the lease under consideration is regarded as :—

(i) perpetual and heritable,[1]

(ii) transferable but not heritable,[2]

(iii) for life,[3]

(iv) a tenancy at will,[4] or

(v) governed by section 106.[5]

90.21. *Difficulties*—Not only does this multiplicity of views create uncertainty, but also it is legitimate to point out that some of these views present their own theoretical or practical difficulties. For example, if the lease is for the lifetime of the grantee only but is heritable, then it conflicts with the general rule that an interest in immovable property is heritable. On the other hand, if the lease is taken as falling under section 106, then its term is precarious in the scheme that it can be terminated by notice. Then, the argument that the lease is perpetual in such circumstances has been rightly rejected by some courts,[6-7] but the view that the lease is not a lease within section 105 may create difficulties.[8-9]

90.22. *English law*—In England, a lease of lands for such a term as both parties shall think fit is a *lease at will.*[10] An agreement to let from year to year *and so long as the tenant pays rent* and the landlord has power to let, confers no particular estate beyond a tenancy from year to year.[11] The English law has been discussed in a Madras case.[12]

90.23. *Recommendation to amend section* 106 *in regard to a lease for payment of rent*—It appears to us that instead of considering which view would be correct within the present statutory frame-work, the better course would be to consider what approach would be just and practical. On a careful consideration of the multiple aspects which normally are relevant whenever such a question arises, we have come to the conclusion

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1 Para 90.15.
2 Para 90.16.
3 Para 90.17.
4 Para 90.18.
5 Para 90.19.
6 *Ram Mohan Rai* v. *Somabhai,* A.I.R. 1950 Bom. 161.
7 *Donkangowda* v. *Revanshidappa,* A.I.R. 1943 Bom. 148.
8 A.I.R. 1940 Cal. 89.
9 *Anwar Ali* 43 C.W.N. 797.
10 Woodfall, Landlord and tenant (1968), Vol. I, pages 219, paragraph 513.
11 *Wood* v. *Beard,* (1876) 2 Ex. D. 30; Woodfall, Landlord and tenant (1968), Vol. I, page 218 paragraph 512.
12 (1913) I.L.R. 36 Mad. 557, 558.

that the best course would be to lay down that a lease which is by its terms to enure so long as the lessee pays rent should, by a statutory fiction (to be newly inserted), be deemed to be a lease for *the lifetime of the lessee*, terminable by reasonable notice *by the lessee*. It would not then be in the precarious condition of a lease terminable by notice *by either party present* (section 106). The lessee's interests would be sufficiently protected, since only he can terminate the lease. There would be no injustice to the lessor, since it would be a reasonable view to take that the phraseology used did not contemplate unilateral termination by the lessor by mere notice. Of course, termination for a valid cause—e.g. non-payment of rent—would be available as in the case of any other lease. This recommendation will apply only where there is no contract or local law or usage to the contrary.[1] As to its placing,[2] it can be conveniently placed as part of section 106, being a statutory presumption by its nature, though applicable to circumstances slightly different from those to which section 106 applies at present.

1 *Cf.* section 106.
2 To be carried out in section 106.

CHAPTER 91

LEASES FOR INDEFINITE DURATION

SECTION 106

91.1 *Introductory*—Parties do not often define the duration of the lease with reference to a particular period or event. Sometimes, the period initially provided for has expired and the relationship of lessor-lessee continues without any further definition of period. In these and similar cases, where the term of the lease has not been specified, the law must supplement the gap and provide a rule to regulate the duration of the lease. Local law or usage may occasionally deal with the matter, but otherwise there must be a guiding rule of uniform application. Section 106 seeks to create one such guideline. It treats the lease as from year to year or month to month, terminable by the notice of specified period. But the section does not apply in so far as a contract to the contrary makes a different provision on any point. Thus, even where the parties do not define the duration so that section 106 is potentially attracted, yet the parties may increase or decrease the period or mode of notice or the date of expiry or other ingredients or add thereto or modify them, it is only in so far as a contract or local law or usuage does not provide to the contrary that the section applies.

91.2 *Object*—The primary function of the section, then, is to supplement the parties' contract, and the primary aim is to avoid difficulties that might arise by reason of the insufficiency in the content of the contract. That a provision so intended to remove difficulties has led to certain practical hardships in relation to the notice contemplated by the section[1] is one of the ironies of life.

We propose to make certain recommendations[2] which are intended to minimise such difficulties. In view of past experience of the section, we are not unduly optimistic that after the proposed amendment the law relating to notice to quit will be a model of perfection. But we shall at least have the satisfaction of having tried our best to analyse and, where necessary, to reform the most important topic in the law of landlord and tenant in India.

91.3. *Analysis.*—The section is not divided into numbered sub-sections, but consists of un-numbered paragraphs, and the first parapraph itself combines a pretty large number of ideas. Such a structure of the section has obscured the significance and impact of several important phrases in the section and led to an incomplete realisation of the wealth of statutory mandatory provisions enacted by the section For this reason we propose to discuss the section not necessarily with reference to its text, but with reference to its important ingredients.

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1 See *infra.*

2 See *infra.*

91.4. *Dichotomy based on purpose.*—The section makes a dichotomy between agricultural and manufacturing leases (on the one hand) and other leases. In the former case, the lease is deemed to be a lease from year to year, terminable with six months notice on either side. In the latter case, according to the latter part of the first paragraph of the section, the lease is 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—of course, this provision applies only where there is no contract or local law or usage to the contrary. We are not, at the moment, concerned so much with the duration of the lease or the period of notice, as with the broad question as to the transactions to which the second part of the first paragraph in general applies. What we would like to point out is that this is an omnibus provision, applying to all leases which are not for agricultural or manufacturing purposes, and requires consideration.

The question to be considered is whether at the present day, this omnibus provision is enough as it stands, or whether some kind of distinction ought to be made, within this category, between leases may, for the purposes of office or business or profession and leases of residuary purposes ? Would it not be more in consonance with reality to provide that a lease of immovable property, any, for the purposes of office or business or profession shall be deemed to be a lease from quarter to quarter, terminable by a month's notice expiring with the end of a quarter of the tenancy ?

At present, they are deemed to be from month to month, terminable by fifteen days notice. This is hardly realistic,—particularly, the period of notice. Perhaps, the same amendment could be made for residential leases also, but that question does no have much practical importance, since rent control legislation, which is primarily concerned with residential premises, takes care of the matter in regard to areas where it applies. The point to which we wish to draw attention is that a lease of immovable property for the purposes of office, business or profession is normally intended to be of a more permanent duration than a residuary lease or a residential lease in a locality not highly urbanised. Therefore, the provision to be applied primarily, in the absence of a contract etc., ought to be one prescribing a longer duration than a mere month to month tenancy.

91.5. *Recommendation as to lease for business etc.*—We recommend that the section should be so amended. The amendment is not intended to show any special favour to men belonging to a profession or carrying on a business, but to bring the law nearer to realities by substituting a provision which, one may presume, would have been made by the parties if their attention had been focussed on it.

91.6. *Applicability to building leases.*—It is to be noted that the rule of construction embodied in section 106, first paragraph, would apply even to a building lease, according to the generally accepted view,[1-3] though occasionally one comes across a view that a building lease is to be construed as having a duration co-terminous with the period for which the building stands.[4]

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1 *Ram Dhari Sarma v. Jogendra Kumar Biswas,* A.I.R. 1959 Assam 174, 175.
2 *Ram Kumar Das* v. *Jagdish Chander Deo,* A.I.R. 1952 S.C. 23, 27.
3 *Bajrang Sahai* v. *Mt. Mulia* A.I.R. 1941 All. 399, 400.
4 *Kanhaiya Lal* v. *Abdullah* A.I.R. 1936 All. 385, 386.

In fact, even a lease by the Government for building purposes has (on the anatogy of the English common law) been held to be a yearly tenancy determinable by six month's notice.[1-2]

In Bombay case,[3] a tenancy for building purposes was, on the facts, held to be a tenancy not at will, but either permanent or one for the lifetime of the lessee.

91.7. *Recommendation as to building lease.*—In our view, a lease for building purposes should be co-terminous with the period for which the building is to stand in the absence of a contract or local law or usage to the contrary. We recommend that the section should be so amended.

91.8. *Agricultural purposes.*—Now, a few matters of detail, Section 106 though it refers to agricultural leases, does not apply to them unless made applicable by notification under section 117. Most agricultural tenures in India arose before the Act, and are regulated not by this Act but by local Acts or custom.

91.9. *Manufacturing purposes.*—The phrase "manufacturing purposes" is used in section 106 in its popular sense, and means the making of articles of trade and commerce by means of machinery.[1] If the main or substantial purpose was manufacturing, the lease is for a manufacturing purposes; whether it should be the exclusive purpose has been left open by the Supreme Court,[4] in the case of *MacKertich.*

If the lessee, to the knowledge of the lessor, required and used the land for manufacturing purposes, then, in the absence of a contract, he is a yearly tenant, and entitled to six month's notice.[5]

A tenancy for residential purposes and for stacking timber is a tenancy for a commercial purpose.[6]

91.10. Questions arise where more than one purpose is combined. It has been held[7] that a lease partly for agricultural and partly for manufacturing purposes only requires a notice of fifteen days. But this case may require consideration[8] in view of the judgement of the Supreme Court in the case of *MacKertich.*[9]

91.11. *Common feature.*—While the dichotomy based on the purpose of the lease, discussed above, leads to a difference in the duration of the lease and the period of notice, it should not obscure the fact that cases falling on either side of the dichotomy share, in the scheme of the section, one broad common feature, namely, notice for the specified period and expiring with the specified date.

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1 *Secretary of State* v. *Babu Rajindra Prasad & others* A.I.R. 1937 Pat. 391, 395.
2 *Secretary of State* v. *Babu Beni Prasad Sahu,* A.I.R. 1937 Pat. 444, 646.
3 A.I.R. 1954 Bom. 257, 258, 259, 261.
4 *MacKertich C.* v. *Stauart & Co. Ltd.,* A.I.R. 1970 S.C. 839, reversing *Stauart Rupeshwari Debi* v. *M/s. Kokanath Hosiery* (1962) 414; A.I.R. 1962 Cal. 608.
5 *Jacks & Co.* v. *Joosab Mohamad* (1924) 48 Bom. 38; AIR 1924 Bom. 115; *& Co. Ltd.* v. *MacKertich,* A.I.R. 1963 Cal. 198.
6 *Himataingka* A.I.R. 1952 Assam 100.
7 *L.A. Saunders* v. *Corporation of Calcutta* (1955) 93 C.L.J. 354, 355 A.C. 169.
8 See Mulla.
9 *MacKertich C.* v. *Stauart & Co. Ltd.* A.I.R. 1970 S.C. 839 *Supra.*

91.12. *Analysis.*—The case law as the notice is legion and we shall satisfy ourselves with a discussion of those decisions which relate to important and controversial points relating to this topic. The provisions can be analysed as follows :[1] In this analysis, we have not adhered to the precise wording of the section.

(i) The notice must be in writing, signed by or on behalf of the person giving it;

(ii) The notice must be sent by post to the party who is intended to be bound by it, or it must be tendered or delivered personally to such party or to one of its family or servants at his residence or, if such tender or delivery is not practicable, affixed to a conspicuous part of the property;

(iii) Itm ust be 'a notice', that is to say, it must really indicate the intention to terminate the tenancy;

(iv) The notice must satisfy the requirement of minimum period—15 days or 6 months, as the case may be, and

(v) The notice must expire with the end of the year of the tenancy or the month of the tenancy.

91.13. *Writing*—The requirement of writing and signature is obviously intended to record, in unimpeachable terms, the intention to terminate the tenancy.

91.14. *Service*—Service of the notice is either by post or by personal delivery. Although the section is silent as delivery to agent, it seems that delivery or service of the notice through or to an agent is permissible.[2]

In the case of joint tenants delivery to one of them seems to be sufficient.[3] Of course, the notice must be addressed to all the tenants.[4]

As regards the place of delivery, it must be at the residence if the delivery is to a member of the family or servant, but this does not seem to be necessary where the notice is served on the tenant himself. The notice can be delivered to the tenant prsonally at any place.

We need not go into various questions as to service by post, since we have had an opportunity of discussing this aspect in more than one of our earlier Reports[5] dealing with cognate provisions on other Central Acts. Nor do we propose to deal in detail with what a notice ought to contain or how it should be drafted.

The more difficult questions that arise concern the period of notice and the date of its expiry.

91.15. *Section* 106—*Periodic tenancies—essence*—First as to the scheme of the section in regard to periodic tenancies. In *Queen's Club Gardens Estates Ltd.* v. *Bignel,*[6] Salter, J., observed :

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1 Section 106, first paragraph latter-half and second paragraph.
2 I.L.R. 22 Bom. 754.
3 *Woman* v. *Khandelawal*, A.I.R. 1935 Bom. 245.
4 A.I.R. Cal 752, 754 distinguished in A.I.R. 1965 All. 285.
5 Report on Evidence Act, discussing as to section 114;
Report on the General Clauses Act, discussion as to section 27
6 *Queen's Club Gardens Estates Ltd.* v. *Bignel* (1924) 1 K.B. 117, 134, (1923) All. E.R. Rep. 165.

"In the case of all periodic tenancies, whether from year to year, or from quarter to quarter, or from month to month or for any other period, the law, as I find it stated in the authorities, appears to be that the tenancy is from period to period, from one fixed date to another. It is a tenancy for so many years, or quarters, or months, or weeks, as the parties may think fit. If a new period be allowed to begin, the tenancy must, in the absence of course of any other arrangement between the parties, continue until the period ends, and neither party can, against the will of the other, put an end to the tenancy during the currency of the period."

Following this Beaumont, C.J., in the undernoted case[1] observed :

"A monthly tenancy, that is, a tenancy subject to a month's notice, creates in the first instance a tenancy for two months certain. But as soon as the third month commences, that is not a new tenancy; it turns the original tenancy into a three months' tenancy and when the fourth month begins, the tenancy becomes a four month's tenancy and so on so long as the tenancy continues, until that is to say, notice to quit is given."

A month's notice is mentioned in this passage because according to local usage in Bombay in a month's notice is necessary.[2] Gentle, J., in a Calcutta case[3] observed :

"A monthly tenancy in my view is not a tenancy which commence or begins in one month and on its expiry a fresh tenancy is created in the following month or months, but is a tenancy *for an unstated period* which is determinable by one or other of the parties giving a notice to quit."

To the like effect are the observations of the Patna High Court in *Ganesdas Ramgopal* v. *Jamuna.*[4]

91.16. *Period.*—The period of notice provided by section 106 is six months or fifteen days. We have already recommended an extension of the period to one month[5] in certain cases. Whatever the period, certain points are common. What we say below as to computation of period applies to all periods—six months or fifteen days or (if so substituted) one month.

91.17. *Fifteen days' notice.*—For brevity, we confine ourselves to the period of 15 days. The 15 days' notice referred to in section 106 means 15 clear days' notice. Thus, where the plaintiff served his notice on the defendants on the 16th Falgoon, and required them to quit the land on the 30th

1 *Utility Articles Manufacturing Co.* v. *Raja Bahadur Motilal Mills*, A.I.R. 1943 Bom. 306 (Beaumont, C.J. and Kania, J.).
2 Mulla.
3 *Usharani Debi* v. *The Research Industries Ltd.* (1945) 50 C.W.N. 461.
4 *Ganesdas Ramgopal* v. *Jamuna* (1945) I.L.R. 24 Pat. 449.
5 See *supra.*

of the same month, so that the defendants had only fourteen clear days, the notice to quit was held to be bad.[1] In other words, the day on which the notice is given is excluded from calculation.[2] But the day on which the notice is to expire is not to be excluded. And, therefore, a notice served on the 16th Baisakh calling on the tenant to quit on the 31st is a good notice, as it gives 15 days clear time (the 31st Baisakh not being excluded from calculation).[3] The date on which the notice is received is included in computing the period of 15 days.[4] In the case of a monthly tenancy according to the English calendar, the notice asking the tenant to quit by the morning of 1-10-49 was held to be valid.[5]

91.18. *Recommendation as to computation of period.*—In this respect, we think that the section should be made more precise by inserting the words "clear" before the word "days" in the section and by making a change similarly designed where the expression used is in terms of month. We recommend accordingly.

91.19. So much as regards the period of the notice.

91.20. *"Expiring with the end of a year or month".*—It is not sufficient that the duration of the notice should be six months or 15 days, as the case may be; it is also required that the notice should expire with the end of the year or month. Thus, if the year of a tenancy is computed from the 1st Baisakh to the end of Chaitra, a notice given on the 26th Jaistha, calling upon the tenant to quit the land on the last day of Agran is not valid (even though the duration of the notice is more than 6 months). It ought to have required the tenant to vacate on the end of Chaitra.[6] So also, in the case of a monthly tenancy, the notice to quit must require the tenant to vacate *at the end of the month,* and not before. Thus, if the tenancy is regulated according to the English calendar, the notice must require the tenant to vacate on the 31st January, or 28th February or 31st March and so on. A notice asking the tenant to quit *before the end of the month* would be invalid, as the law stands at present, even though it gives 15 days' time or even a longer time. Hence a notice given on the 1st January requiring the tenant to quit on the 20th January (or even on the 20th February) is invalid. This is so even if there is an interval of more than 15 days between the date of notice and the date of the required surrender.[7]

Thus, in a Calcutta case,[7] a notice was given on the 9th June that the lessee should vacate the premises after the lapse of a month from that date. It was held that the notice was inoperative in law, as it did not expire at the end of a month although it was of a longer duration than 15 days. If the tenancy commences from any day in the middle of the calendar month (e.g. 10th or 12th or 15th), the month of the tenancy must be calculated as ending *on the corresponding day of the next month.*

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1 *Subadini* v. *Durga Charan,* I.L.R. 28 Cal. 118.

2 *Cf.* Section 110.

3 *Gobinda* v. *Dwarka,* 19 C.W.N. 489, 493.

4 *Mt. Natho* v. *Sital Prasad Sahu,* A.I.R. 1969 Pat. 310.

5 *Bharat Sahu* v. *Gudadhar Ramanui Das,* A.I.R. 1956 Orissa 128.

6 *Hemangni* v. *Gobinda* I.L.R. 29 Cal. 203, 205, 206.

7 *Bijay Chandra* v. *Howrah-Amta Rly. Co.,* A.I.R. 1923 Cal. 524.

Thus, if a monthly tenancy commences from the 6th of one month to the 5th of the next month, a notice given on the 30th June requiring the tenant to quit at the end of July is bad.[1-2] But where a house was taken on three years' lease but no lease-deed was executed and the house was occupied in the middle of a month and the first amount of rent paid was for the period during which the house was occupied prior to the 1st of the following calendar month, the tenancy, must be deemed to begin on the 1st of each calendar month.[3]

91.21. *Indian calendar.*—If the tenancy is created according to the Indian calendar, the notice must be given in accordance with that calendar. Thus, in an Allahabad[4] case, a house was let on a monthly tenancy, the month being calculated from the 27th of one month of to the 26th of the next month of the Hindu calendar. Notice was served on the 31st December, 1915 (11th Pous) directing the tenant to vacate on the 31st January, 1916 (12th Magh). It was held that the notice was invalid. The notice, in order to be valid, ought to have directed the tenant to vacate on the 26th day of a month, the day on which every month expired according to the terms of the tenancy. A notice to vacate on the 31st July tenancy commencing from 1st day of an English calendar month, is valid.[5]

91.22. *Range of controversy.*—The propositions called above from a few judicial decisions and the situations discussed therein show, in a fair measure, the range and freqency of the controversy raised by the requirement that the notice must expire with the end of the month of the tenancy. A few other selected cases are listed below—

Section 106—*Other cases on notice*
Mangilal v. Suganchand Rathi, A.I.R. 1965 S. C. 101;
Lachminarayan v. Shillong General Public, A.I.R. 1965 Ass. & N. 16;
Harihar Banerji v. Ramsashi Roy (1919) I.L.R. 46 Cal. 458;
Secretary of State v. Madhu Sudan Mukerji A.I.R. 1933 Cal. 260;
Gulabchand v. Kurji Bhagwanji A.I.R. 1962 Guj. 229;
Gayaprasad v. *S. C. Munilal,* A.I.R. 1962 Guj. 229;
Aidew Sandique v. R. R. Bharadaj A.I.R. 1956 Ass. 96;
Avisabeevi v. Aboobacker A.I.R. 1971 Ker. 231;
Kamalaksha v. Keshava A.I.R. 1972 Kar. 110;
Vishunn Namjoshi v. *Laxminarayan* A.I.R. 1959 M.P. 293.

91.23. *Calcutta case*—The hardship caused by the present law has not gone unnoticed. In one Calcutta case,[6] there was an oral agreement between the parties to the effect that the defendant would take a lease of the plaintiff's godown for a period of three years "from 1st June, 1936" on a monthly rent of Rs. 250/-. The defendant went into possession on 1st June, 1936, and had been in possession ever since. A written lease had been contemplated, but none was actually executed. The rents had all along been paid according to the months of the English calendar. On 13th November, 1940, the plaintiff served a notice upon the defendants to give up possession of the premises "on the expiry of 1st December, 1940".

1 *Bengal National Bank* v. *Janoki,* I.L.R. 54 Cal. 813;
31 C.W.N. 973; A.I.R. 1927 Cal. 725, 730.
2 *Carrara Marble etc.* v. *Charu Chandra Guha,* A.I.R. 1957 Cal. 357.
3 *Ramji Lal* v. *Secretary of State,* AIR. 1936 Oudh 306, 307, 162 I.C. 712.
4 *Sheoti Bibi* v. *Jagannath,* 18 A.L.J. 854; 57 I.C. 593.
5 *Tolaram* v. *Ayaldas,* A.I.R. 1965 Madh. Prad. 140.
6 *Calcutta Landing & Shipping Co.* v. *Victor Co. Ltd.* A.I.R. 1944 Cal. 84 (D.B.).

It was held that as the lease in question could be created only by a registered instrument and as no such instrument was executed, the oral agreement for a term of three years from 1st June, 1936 must be ignored. As no time was fixed by the lease itself, there would be no question of expressing it to begin from a particular date, and hence section 110 had no application. The tenancy was governed by section 106, being from month to month according to the English calendar by virtue of the general Clauses Act. As the defendant went into possession on the first day of a calendar month, namely, 1st June, 1936, the notice to quit should have ended with a calendar month. As the plaintiff's notice was expressed to end on the expiry of 1st December, 1940, it was invalid.

Rau J. held :

> "There is no dispute that the defendant company went into possession on the first day of the calendar month, namely, 1st June, 1936. The notice to quit should therefore have ended with a calendar month. Instead of this it was expressed to end on the expiry of 1st December. *Much as I regret to have to decide the case on a technicality,*[1] I do not think that there is any alternative but to dismiss the appeal."

91.24. *Object of the requirement as to expiry*—We need not multiply the case law, since it is common knowledge that considerable time of the courts is taken up in determining the validity of notices to quit under section 106. Whether the pleas taken are or are not successful, is not material. What is material is the fact that such pleas are taken and occupy the time of the courts. The question to be considered is whether anything could be done whereby less judicial time may be consumed in deciding such questions. This is not to say that the giving of a notice is to be regarded as a formality or as a merely technical requirement that should be lightly disregarded in every case. The object of the requirement that the notice—

(i) must be given; and

(ii) must expire with the year or month of the tenancy.

is that each party should have at least this much certainty that—

(i) if, by a particular date, such notice *is not received* from the other side, then the relationship is certainly to endure for the rest of the year or month, as the case may be; and

(ii) if, by a particular date, such notice *is received,* the tenancy will terminate on a particular date only.[2]

Arbitrary termination or termination on an arbitrary date is thus avoided in the case of tenancies from year to year or month to month.

91.25. *Stability and uniformity*—Of course, we are at the moment concerned with the second aspect—date of termination. Its object, stated in non-legal language, is to define, with certainty, from the very beginning of the tenancy, what are the permissible dates on which a tenancy would

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1 Emphasis supplied.
2 See para 91.25 *infra.*

be terminated. Non-terminability on any other date is, thus, ensured. Not only does this position introduce a stability in the relationship of the particular lessor and lessee—a stability much needed in view of indefinite duration—but also it tends to introduce a uniformity in the dates of termination and commencement of tenancies of a particular class in particular areas. The last mentioned proposition may be thus explained. Take residential tenancies. Ordinarily, such tenancies in big cities are so entered into that the month ends with the calendar month, and new tenancies commence on the first day of the calendar month. Nothing, of course, prevents a tenant from taking up vacant premises in the middle of a month, but by and large —people in residential localities in big cities change their premises on the 1st—or sometimes the 16th—of a month, computed according to the Gregorian calendar.

91.26. *Uniformity how achieved*—Now, the rule in section 106 requires that the notice must expire with the end of the month. This rule, taken with the above mentioned practice[1] of changing residences on the 1st or 16th, to a large extent, ensures that premises vacant by reason of termination through notice are likely to be available for occupation on convenient dates—1st and 16th. Of course, section 106 does not enact a mandatory rule. It can be varied by contract. Also, it does not require that the parties must go by the Gregorian calendar—or for that matter, by any particular calendar at all. But it is a known fact that, by and large, in big cities the Gregorian calendar furnishes the basis. Even this *de facto* practice would have been insufficient to lead to uniformity if notices were not expected to expire with the month of tenancy. A party could then give a notice on, say, 10th June, terminating the tenancy from 20th June. But notices are expected to expire with the end of January or February,—though this is not a mandatory requirement, as we have already stated. The result, then, is that the end of each month according to the Gregorian calendar becomes the usual date for termination of a number of residential tenancies in big cities, ultimately leading to the uniformity to which we referred above.[2]

91.27. *Recommendation*—In the light of the position stated above, we recommend that the relevant portion of section 106 should be amended so that a notice which is otherwise valid should not be rendered void by reason of a defect in the date of its expiry.[3]

91.28. *Amendment*—It should be noted that in the U.P., two amendments have been made in section 106.[4] The words "expiring with the end of a year of the tenancy" and the words "expiring with the end of a month of the tenancy" having been deleted. Further, for the words "15 days' notice", the words "30 days' notice" have been substituted.

91.29. *Meaning of 'month' and year*—It is to be noted that the expression 'month' occurring in section 106 has not been defined in the section. If taken according to the definition in the General Clauses Act, this

1 Para 91.25 *supra*
2 Para 91.24 *supra*.
3 For draft, see para 91.43 *infra*.
4 U.P. Act 24 of 1954.

expression would mean the month according to the Gregorian Calendar. Of course, there may be circumstances in the tenancy document or otherwise indicating the system of calendar which is intended, or there may be something in the local usage. The same discussion applies to the expression 'year'. On the basis of section 3(35) and 3(66) of the General clauses Act, 1897 which apply to the Transfer of Property Act, by reason of section 4 of that Act, the expressions "year to year", "month to month", "six months' notice", "year of tenancy" and "month of tenancy" should, in the absence of a contract or local usage to the contrary, be construed according to the Gregorian calendar.[1] Of course, implied or express contract or local law or usage often furnishes a different test. This particularly so where the tenancy commences according to Hindu calendar.[2] But it would appear that the onus of proving the contrary lies on the party so asserting.[3]

91.30. *Change suggested not likely to impair uniformity or cause injustice*—We have discussed these aspects in some detail in order to give an indication that if the twin objectives of the present law—stability and uniformity—can be preserved in substance, it is permissible to devise amendments that will dispense with needless controversies as to defects in regard to the date of expiry of notices. To anticipate what we are going to recommand,[4] we may state that a possible amendment could be to the effect that if a notice does not expire with the end of the year, or month, but expires on any other date, is shall, *if otherwise valid,* be taken as expiring on the end of the year or month of tenancy in which it is given. To take an illustration, a tenancy is expressed to commence on the 1st of the month (not 'from' the 1st), according to the Gregorian calendar. The notice is given on, say, the 10th January so as to expire on the 26th January. Under the present law, it is totally void since it does not expire with the end of the month. Under the proposed amendment, it will expire with the midnight of the 31st January and will be valid on that basis. Such an amendments, maintains the twin objectives of the present law, and also does substantial justice to the parties, because it allows the party receiving the notice the minimum time that he might require for making alternative arrangements. At the same time, it prevents the notice from being totally invalidated by reason of defects which should be of no consequence for the recipient.

91.31. *Other defects not saved*—The amendment, as already stated, postulates that the notice is otherwise valid. For example, a notice given on the 17th of the month to expire on the 30th of January would not be saved by the proposed amendment, as it does not give 15 clear days either with reference to the stated date of expiry (30th) or with reference to the substituted date of expiry under the amendment (31st January).

91.32. *Effect of proposed Amendment period*—Here a question of detail may be considered. If the notice allows a period which does not amount to (clear) 15 days (or clear six months), according to the date of expiry mentioned therein, but which amounts to (clear) 15 days (or

1 (1955) 59 C.W.N. 1150, 1156, following A.I.R. 1944 Cal. 84, 86.
2 A.I.R. 1963 S.C. 120, 127.
3 (1966) 1 Mad. L.J. 71, 74.
4 See para 91.43 *infra.*

clear six months) if the date is *substituted* under the proposed amendment, should it be treated as valid ? We think that it should be treated as valid, since the considerations that apply where the interval[1] allowed is valid according to the stated date, apply in this case also, and the deficiency in the interval makes no material differences to the recipient of the notice. The twin objectives,[2] of stability and uniformity are preserved and in other respects also there is no injustice to the recipient[3] of the notice.

The failure of the giver of the notice to allow clear 15 days' interval causes no prejudice, once the effect of the amendment is to substitute the required interval. In other words, both as regards the interval (period of notice) and as regards the point of termination (date of expiry), the recommended amendment has the effect of allowing the recipient the required interval and point of termination. The amendment thus carries out the policy of the present law and the recipient should have no cause to complain. Once the amended date is substituted, his interests are not affected. Of course, he will not have the right to complain of invalidity which he has at present. But that is the very object of the amendment, which is based on the reasoning (already elaborated)[4] that there is no reason why he should have such a right.

91.33. *Recommendation as to sec.* 106—Having regard to these considerations, we recommend[5] that the relevant portion of section 106 should be revised so as to incorporate the following propositions :—

(i) where the period given in the notice does not expire with the year or month of the tenancy, but expires on any other date, it shall be deemed to expire with the end of the year or month of[6] the tenancy in which it would otherwise expire.

(ii) If the period stated in the notice does not amount to the requisite period—at least 15 days or 6 months—but amounts thereto after substituting the date as per proposition (i) above, the notice shall not be invalid merely by reason of deficiency in the period.[7]

(iii) Nothing in this amendment shall cure defects[8] in the notice except those cured by propositions (i) and (ii) above.

91.34. *Notices with alternative*—We should now discuss the question notices offering alternatives to the person receiving them. Sometimes a notice may offer an alternative to the recipient of enhanced rent. It was held in an earlier case[9] of the Allahabad High Court that a notice to quit must not be coupled with a demand for enhanced rent from the tenant A notice in these terms "If you do not quit within a month from this, I will sue you for rent at an enhanced rate" was held to be a conditional one, and therefore not a valid notice to quit. Subsequent cases, however, take a different view, as will be seen later.[10]

1 Para 91.25, *supra.*
2 Para 91.30 *supra.*
3 Para 91.25 *supra.*
4 a. Para 91.30 *supra.*
5 This is not a draft.
6 Para 91.25 *supra.*
7 Para 91.27 *supra.*
8 Para 91.26, *supra.*
8 *Bradley* v. *Atkinson,* I.L.R. 7 All. 899 (F.B.).
10 Para 91.36. *infra.*

91.35. *English law*—In England, a notice otherwise sufficient, is not rendered insufficient by its being accompanied with something else, and therefore, where the lessor gave the lessee notice in writing to quit upon a specified day and then went on to say, "and I hereby further give you a notice that should you retain possession of premises after the day before mentioned, the annual rent of premises now held by you be £150," it was held/ that the explicit first portion of the notice was not impaired, or rendered nugatory, by the alternative given by the second portion of continuing to hold the premises at an increased rent.

91.36. *Later cases*—We have referred above to the earlier Allahabad case.[2] In a later case, the Allahabad H'gh Court has laid[3] down that a notice to quit with a condition super added for the enhancement of rent on failure to quit in accordance with the notice, is good enough to terminate the tenancy, and is not to be treated as a mere offer of a new tenancy at a higher rent. The landlord is therefore entitled to a decree for ejectment.

91.37. The Patna High Court has[4-5] held that a notice of ejectment is quite distinct from a notice of enhancement; in the former case the lease is determined by the notice and thereafter the lessee becomes a trespasser. If, in the notice, an alternative course enhancing the rent from the date mentioned in, it is proposed alongwith the date on which the defendant is required to vacate the premises, the continuance of the tenant to hold over implies an acceptance of the term proposed. This judgment by implication holds that both parts of the notice are legally valid.

91.38. *Recent cases*—According to some recent Allahabad cases,[6] a demand for arrears of rent and termination of the tenancy can be made by the same notice. But one of them holds that a notice asking the tenant to pay rent by the end of a particular month and also to vacate on the expiry of the period of the notice, if preceded by a number of notices demanding rent, cannot be treated as a notice to quit,[7] since the earlier notices merely demanded rent. According to a Kerala case,[8] a notice to quit with a demand for enhanced rent if the tenant stays is not sufficient to terminate the tenancy, because it amounts to an offer of a fresh tenancy.

91.39. *Recommendation as to notice with alternative*—It appears to us that the law should be clarified by providing that a notice offering an alternative does not cease to be a notice to quite merely on that ground.

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1 *Athearn* v. *Bellman,* (1879) 4 Ex. 201, 207.

2 Para 91.34, *supra.*

3 *Shankar Lal* v. *Babu Ram,* I.L.R. 43 All. 330, 332 (following *Athearn* v. *Bellman,* supra). See also *Sahir Hussain* v. *Sirajul Haq,* A.I.R. 1951 All. 853. The Bombay High Court has also taken this later view in *Vaman* v. *Khanderao,* A.I.R. 1935 Bom. 247.

4 *Farzand Ali* v. *Motilal,* 2 P.L.T. 282; 62 I.C. 421, 422.
See also *Madan Mohan* v. *Ram Lal,* A.I.R. 1934 All. 115, 117, where the same view has been taken.

5 For a contrary view, see *Md. Noor* v. *Ashik Beg,* A.I.R. 1933 Oudh 465.

6 *Mushtak Hussain* v. *Mahomad Saddiq* (1967) All. L.J. 764.

7 *Sunder Lal* v. *Ram Kishan,* A.I.R. 1960 All. 544.

8 *Mohammad Nineave* v. *Neelachandan.* A.I.R. 1960 Ker. 216.

The same should apply to a notice coupled with a demand for rent.

91.40. *Recommendation as to structure Arrangement into sub-section*—Apart from the amendment of substance that we have recommended in section 106, we must state that the section is badly in need of structural improvement—at least by arrangement into sub-sections. We have already stated[1] that the present structure of the section obscures the number of propositions enacted in the section. To facilitate understanding of the section, it is absolutely necessary that it should appear in proper form.

91.41. *Conclusion*—In concluding this Chapter, we may stated that section 106 is one which is most often restored to by laymen—both landlords and tenants—and often competent legal advice is not available. It is not only necessary that the law should be just in its content—and we would say that there is no justice where mere technicalities serving no higher purpose have the final word—but it is also necessary that the law should be easy of understanding and application. Its format should facilitate and not obstruct, understanding. The Transfer of Property Act is an important measure. In that Act the Chapter on leases is very important. Section 106, of all sections in the Chapter, is of the most frequent application. And the paragraph relating to notice raises questions which are the most numerous as well as the most difficult. Our recommendations should be viewed in that light, and we hope that they will receive ready acceptance.

91.42. *Provision in the lease for notice*—It would appear that there is a conflict of decisions on the question whether, where the contract of lease provides a period for notice, the requirement *as to expiry at the end of the month* of tenancy is to be complied with. The majority view is to the contrary. But the High Courts of Bombay, Saurashtra and Lahore hold that the section still applies. The case law is reviewed in a recent judgment of the Delhi High Court.[2] We think that it is desirable to give effect to the *Minority view* by an express amendment, which we recommend.[3] The minority view is in harmony with the objectives which we have discussed—stability and certainty.

91.43. *Redraft of section* 106—The following rough draft of revised section 106 is recommended in the light of the above discussion.

"106.(1) In the absence of a contract or local law or usage to the contrary—

(a) a lease of immovable 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;

(b) *a lease of immovable property for purposes of office, business or profession shall be deemed to be a lease from quarter to quarter, terminable, on the part of either lessor or lesee, by one month's notice expiring with the end of a quarter of the end of a quarter of the tenancy;*

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1 Para 91.1 to 91.3, *supra.*

2 *Harbhajan Singh* v. *P. N. Chopra.* A.I.R. 1977 Notes of cases 161; (1977) Rent Control Reporter 266 (Delhi) (Reviews case law) (Yogeshwar Dayal, J.).

3 Para 91.43 *infra.*

(c) a lease of immovable property for any other purpose, *not being a lease for the purposes of building,* 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.

(2) *In the absence of a contract or local law or usage to the contrary, a lease for the purposes of building shall be deemed to be a lease for the period for which the buildings are to stand on the land or if the period for which the buildings are to stand cannot be ascertained with reasonable certainty, ninety-nine years.*

(3) Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is *intended to be bound by it or be tendered* or delivered personally to such party, 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.

(4) *Where a notice under this section is so worded as to expire before the end of the year, quarter or month of the tenancy, as the case may be, it shall instead be demed to expire with the end of that year, quarter or month of tenancy, and for the purpose of determining its validity for the purpose of this section, the date on which the year, quarter or month ends, shall be deemed to be substituted for the date on which it would have expired but for the provisions of this section.*

(5) *A notice otherwise valid shall not be invalid merely because it offers an alternative to the person receiving it, or because it is coupled with a deemed for arrears of rent.*

(6) *Where the lease provides for termination by notice and specifies a period, the provisions of this section shall, in the absence of a contract or local law or usage to the contrary, nevertheless apply as to the date of its expiry and other matters.*

Explanation—In computing the period of notice for the purpose of this section, the day on which it is sent, tendered, delivered or affixed, as the case may be, shall be excluded".

The amendement recommended in section 106 as to building leases is subject to dissent by two of us.[1]

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1 Shri Dhavan and Shri Sen-Varma.

CHAPTER

FORMALITIES FOR LEASE

SECTION 107

92.1. Introductory.—The formalities for leases are prescribed by section 107. To quote the section :

> "107. A lease of immovable property from year to year, or for term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.
>
> All other leases of immovable property may be made either by a registered instrument or by lessee agreement accompanied by delivery of possession.
>
> Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee :
>
> Provided that the State Government may, from time, to time by notification in the official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

92.2. *Section* 107—*formality of registration and formality of execution of both the parties*.—The section thus deals with certain points relating to the formal requirements of a lease. The Amendment of 1929 made a radical change in the law by providing for the compulsory registration of instruments of lease even for a period of less than a year—unless the lease was made by oral agreement accompanied with delivery of possession. The amendment further provided that an instrument of lease should be executed by both the lessor and the lessee

On both these points, the amendment has not been accepted by the citizens. We shall refer to the practice later,[1] but it is enought to point out at this stage that even when the amendment was on the anvil, the legislative proposals were strongly criticised in knowledgeable circles. By way of example, a comment published in the Madras Law Journal may be[2] cited in this context—

"We do not think it is necessary to make any change in the old section 107. The clause providing for compulsory registration even in the cases of leases for less than a year is likely to cause an unnecessary hardship, especially in the cause of leases of dwelling houses in towns which form a large class of transactions. Again, there is no case made out for insisting on the execution of the lease by both lessor and the leases. In this part of India, at any rate, the general *practice* is only to have a rent deed executed by the lessee, the same being delivered to and accepted by the lessor."

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1 Para 92.3, *infra*.
2 S. P. Shastri, "The Transfer of Property Amending Bill" (1928) 55 Madras Law Journal (Journal Section) 143.

In the same comment, reference is made to a Madras Full Bench decision justifying the validity of a lease executed by the lessee and accepted, though not executed, by the lessor.[1] It was pointed out in the same comment that there was no necessity "to modify an existing usage which had not been found to involve any particular hardship".

92.3. *Current practice.*—As to the actual practice, it would be proper to point out that in the Transfer of Property Act, the chapter on leases, particularly, the provisions relating to formalities—does not accurately reflect the present practice. In practice, in India, agreements of leases are almost invariably executed by the party taking the property for use and occupation.[2] The deed executed by the party taking the property is termed as rent deed, rent chit, *Kirayanama, Kabuliat or Karar.*[3]

It is well-known that leases of small dwelling houses in the cities are effected by a written but an unregistered rent-note (or similar document), *not signed by the lessor.* The third paragraph of section 107, inserted by the Amending Act of 1929, is not in conformity with this practice. We are not so much concerned with the judicial decisions prior to the amendment, as with the hardship resulting from the present stringent provisions. In general, the public has found it difficult to comply with them. Of course, the fact that a law has not been complied with is not, in itself, a reason for modifying it in every case, but it is certainly one relevant factor for considering whether it is not possible to evolve another alternative which could cause less inconvenience. One cannot disregard the fact that even citizens who are ordinarily law abiding find it inconvenient,—and sometimes even harsh,—to comply with the present law. Although some courts have tried to relax the rigidity of the section by holding that an instrument executed by the lessee and accepted by the lessor is valid,[4] or by holding that if there is no registered instrument but only an unregistered note (Kabuliyat), it does not come within the mischief of section 107, third paragraph[5-6] yet it must be stated, with respect, that such a view is not strictly justified by the language of section 107, and the hardship caused by the present provision should be more appropriately remedied by amendment. If substantial justice is to be achieved, it is desirable to modify both these requirements by providing that leases falling within the third paragraph of section 107 can be executed (besides the modes already provided by an unregistered writing signed by the lessee accompanied by possession.

92.4. *Recommendation.*—Having considered all aspects of the matter, we recommend an important modification in section 107, namely, leases other than those falling within the first paragraph should be permissible by an unregistered instrument if signed by the lessee and accompanied by possession.

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1 *Syed Ajam Saheb* v. *Ananthanarayana Aivar,* (1910) I.L.R. 35 Mad. 95 (F.B.).
2 Gour, Transfer of Property Act, (1974), Vol. 4, page 3542.
3 *Hasan Sait* v. *K. P. Mirchandani,* A.I.R. 1951 Mysore 24.
4 *Maninder Nath* v. *Pancha Nand,* I.L.R. (1951) 2 Cal. 444.
5 *Ram Avtar* v. *Shantabala,* A.I.R. 1954 Cal. 267.
6 *Abdul Kadir* v. *Noor Mohammed,* A.I.R. 1959 Ker. 400.

92.5. *Rent notes how far to be regarded as leases.*—While on section 107, third paragraph, we may state that rent notes may fall under the wider definition of lease in the Registration Act, which definitely includes a Kabuliyat and an undertaking to cultivate or occupy. The rent note or agreement to lease may be in counterparts signed by both parties, or it may be in correspondence.[1-5] Or it may be an application for a lease accepted by the endorsement of the world "granted"[6], or it may be an application for a lease accepted orally or by the conduct of the lessor putting the applicant into possession[7-8]

If there is no present demise, the agreement may be effected by an unregistered instrument, or even orally. So when a tenant agreed orally to take three successive yearly leases after the expirty of his term, it was held that the agreement was valid, as the oral agreement did not operate as a transfer of property.[9] If there is a present demise, the rent note operates as a transfer by way of lease and if the term does not exceed one year, registration is not necessary.[10] But if the term exceeds one year, registration is necessary not under section 107, but under the Registration Act. A transfer by way of lease must be made by a person who owns the interest to be transferred. A rent deed which is executed by the transferee of the interest to be conveyed by a lease, and reciting that the transferee had taken the premises from the transferor and the transferee merely agrees by the terms of the deed to pay certain rent for a certain period, cannot be considered to be a lease.[11] This is because it merely records a past transaction.

92.6. *Rent note whether a lease under the Registration Act.*—A rent note or a Kabuliyat signed only by the intending lessee is not a lease under this Act, as the law now stands, but would be a lease under the Registration Act and the question of its registration would be decided under that Act.[12] A rent note not compulsorily registrable under the Registration Act, executed by a tenant in favour of a landlord, if not registered, can be relied upon to establish the relationship existing between the parties.[13]

92.7. *Section* 107—*whether applicable to section* 106.—We should now deal with one question which involves three sections—sections 105 to 107. Where a lease is silent about its duration, the question arises whether it can be held to be a lease "from year to year" *for the purposes of section* 107. It may be recalled that section 106 lays down that " a

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1 *Boyd* v. *Kreig*, (1890) I.L.R. 17 Cal. 548, 554.
2 *Morgan* v. *Fernandez*, (1916) 30 Mad. L.J. 519.
3 *Sir Mahomed Yusuf* v. *Secretary of State*, A.I.R. 1921 Bom. 200.
4 *Ramanna* v. *Rangaswamy*, A.I.R. 1951 Mys. 13.
5 *Hassan Sait* v. *Mirchandani*, A.I.R. 1951 Mys. 24.
6 *Syed Sultan* v. *Amzad Ali*, (1881) I.L.R. 7 Cal. 703, 707; *Ramaswamy* v. *Thirunathi*, (1904) I.L.R. 27 Mad. 43.
7 *Moro* v. *Tukaram*, (1868) 5 Bom. H. C. 92 (A.C.); *Hiralal* v. *Collector of Surat* (1876) P.J. 36.
8 Mulla (1973), pages 663-664.
9 *Syrian Land Co.* v. *J. D. Bodrigues*, A.I.R. 1933 Rang. 220.
10 *Hirachand* v. *H. H. Hammond*, A.I.R. 1934 A. Pesh 81 (rent note of a bungalow for five months signed by the lessee only).
11 *Tai Din* v. *Abdul Rahim*, A.I.R. 1939 Lah. 423.
12 *Jagadish Chandra Deo* v. *Bisheswar Lal* A.I.R. 1942 pat. 323; *Tulsiram Rajaram* v. *Gobinda Ramji* A.I.R. 1940 Nag. 143.
13 *Mohan Lal* v. *Genda Singh*, A.I.R. 1943 Lah. 127.

lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year". Can a lease which is governed by the deeming provision in section 106 be treated as a lease from year to year under section 107 also? The position has in this regard been clarified by a Calcutta case,[1] which in 1950 held :

> "Section 107 deals with the creation of tenancy *by act of parties,*[2] while section 106 provides for the case where the lease is for manufacturing purposes but the contract is silent as to its duration. In such a case *the law supplies the omission and enacts* that the lease shall be deemed to be a lease from year to year. The attachment of this incident to the lease by operation of law is a very different thing from the creation of a lease from year to year by act of parties."

Thus, according to judicial construction, section 107 does not control section 106.[3-4] Hence such a lease is not a lease from year to year for the purposes of registration under section 107, though it may be a lease from year to year for the limited purposes of notice under section 106. On this point also, we recommend that the section should be made clear[5] by codifying what has been held in the Calcutta judgment of 1950, and reiterated[6] subsequently.

92.8. *Revised section* 107.—In the light of what we have stated above, we recommend the following re-draft of section 107:

"107. (1) A lease of immovable 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.

(2) All other leases of immovable property, including a lease *deemed to be a lease from year to year only by virtue of the provisions of section* 106, may be made either by a registered instrument or by oral agreement accompanied by delivery of possession or *unregistered instrument signed by the lessee and accompanied by delivery of possession.*

(3) Where a lease of immovable property is made by a registered *instrument, such instrument or, where there* are more instruments than one, each such instrument, shall be executed by both the lessor and the lessee.

(4) Notwithstanding anything in this section the State Government may, from time to time by notification in the Official Gazette, direct that leases of immovable property, other than those falling within *sub-section* (1), may be made by unregistered instrument or by oral agreement without delivery of possession."

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1 *Ram Pratap v. National Petroleum Co.*, A.I.R. 1950 Cal. 23, 29, para 23; (1950) I.L.R. 2 Cal. 443, (R. C. Mitter & P. N. Mitra, JJ.).
2 Emphasis supplied.
3 *Krishnadas v. Bidhan Chand.* A.I.R. 1959 Cal. 181, 185.
4 *J. A. Mirande v. Datha Nair.* A.I.R. 1971 Mys. 365
5 This recommendation is subject to reservation by Sh. Sen-Varma.
6 Para 92.7, *supra.*

CHAPTER 93

RIGHTS AND LIABILITIES

SECTION 108 AND PROPOSED SECTION 108A.

93.1 *Introductory*—The rights and liabilities of the lessor and lessee as against each other are dealt with in Section 108. The opening paragraph provides that the section applies in the absence of a contract or local usage to the contrary. There is no express exception for local law—e.g. the local Rent Control Act—but it is obvious that a local law, if constitutionally competent, can modify the section.

93.1A. *Section* 108 *Clause* (*a*).—Under clause (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.

As to this clause, we may observe that it does not cover defects in the title of the lessor, though there may be other covenants—e.g., the covenant for quite enjoyment—which may involve the lessor in difficulties if there are serious defects in his title.

93.2 *clause* (*b*).—Under clause (b), the lessor is bound on the lessee's request to put him in possession of the property. The obligation in clause (b) to put the lessee into possession *at his request* re-inforces the nature of the lease[1]—transfer of excusive possession of the property.

93.3. *Clause* (*c*).—Clause (c) provides that the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contract 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.

93.4. *Clause* (*c*) *how linked with clause* (*b*).—The covenant, under clause (b) would be an incomplete and bare one unless it was also provided that subsequently also the lessee shall have uninterrupted possession without interference. For, if a lessor, having put the lessee into possession under clause (b), subsequently disregards the lessee, right to continue in possession, then the performance of the initial covenant under clause (b) would be of no consequence, and would bring no substantial benefit to the lessee. Section 108, therefore, in clause (c), provides, in effect, that assuming that the lessee performs his own obligations, the lessor shall see to it that throughout the period of the lease, the lessor shall not interrupt the possession nor shall be allow it to be interrupted by persons who can establish a title superior to the lessor or detract from the lessor's title. In this sense, clause (c) so operates

1 See discussion as to section 105, *supra*.

that the initial covenant under clause (b) is made to speak at every moment of the lease. We are, of course, stating in broad terms the gist of clause (c); our principal object being to show the essential link between clause (b) and clause (c).

93.5. *Suspension of rent for deprivation of possession*—An important question with reference to clause (c) concerns the suspension of rent for deprivation of possession. Substantial interference, short of actual dispossession, by the landlord with quiet possession of the tenant entitles the tenant to claim suspension or abatement.[1] Thus, if the landlord keeps logs of wood in one room of the house let out, to the great inconvenience of the tenant, the entire rent can be suspended until the mischief is removed.[2]

93.5A. *Applicability of English doctrine*—The English doctrine of suspension of rent has, however, no application in India[3] in its amplitude. There will be suspension of rent in cases where the landlord has, by his act, dispossessed the lessee or where the lessee has not, owing to his action, been able to take possession of a part of holding. If the tenant is evicted from[4] *a portion* of the property, the tenant is entitled to repudiate the lease; but if, instead of rescinding the lease, he elects to retain possession of the remaining portion, he cannot refuse to pay proportionate rent for that portion; he is bound to pay the rent for the portion retained, and is entitled to sue for damages in respect of the portion of which he has been deprived.[5-6]

93.6. *Proportionate abatement.*—In other words, the tenant cannot claim total suspension of rent, but can claim only a portionate abatement of the rent in respect of the portion from which he has been evicted. It should be noted that this rule of proportionate abatement of rent applies not only where the rent is fixed at *a certain rate per bigha,* but also where the rent is fixed in a *lump sum* for the whole land leased, treated as an indivisible subject.[7]

In *Ram Lal* v. *Dhirendra Nath,*[8] it has been laid down that "as a matter of broad general principle, the law of India no longer proceeds upon the notion that where a contract is for an entire sum, there is a necessity of reason which prevents a party from recovering anything where his full obligations under a special contract is for an entire sum.

The divergence of judicial opinion in Indian was set at rest in *Ram Lal's case,* holding that in the case of a lease for a lump sum rent the English common law rule of suspension of the entire rent *should not be*

1 *Ahmad Marocair* v. *Muthuvalliappa Chettiar,* A.I.R. 1961 Mad. 28.
2 *Jatindra* v. *Raimohan,* A.I.R. 1961 Assam 52.
3 *Surendra Nath* v. *Stephen Court,* 63 C.W.N. 922.
4 *Jovram* v. *Bishnu Charan,* A.I.R. 1925 Cal. 805
5 *Meenakshi* v. *Chidambaram,* (1912) 23 M.I.J. 119, followed in A.I.R. 1928 Mad. 380.
6 *Ahmad Marcocair* v. *Muthuvalliappa Chettiar,* A.I.R. 1961 Mad. 28, 30, 31, para 8—10.
7 *Katyavani* v. *Udey Kumar,* A.I.R. 1925 P.C. 97;
Dhirendra v. *Bhabatarini,* A.I.R. 1929 Pal. 395, 396.
Deoki Kaur v. *Shiva Prasad,* A.I.R. 1939 Pat. 356.
8 *Ram Lal* v. *Dhirendra Nath,* (1942) 47 C.W.N. 489 (P.C.);
A.I.R. 1943 P.C. 24.

applied, where the lessor has failed to give possession of only a part of the premises leased.[1] This decision clearly establishes[2] that where the lessor fails to put the lessee in possession of the whole of the demised premises; then, whether the premises were leased at a lump sum rent or at a rent at so much per acre or per bigha, there will not be a suspension of the entire rent, but the lessee will be entitled to a proportionate reduction or abatement of the rent.

93.7. *Supreme Court case.*—This decision has been approved and followed by the Supreme Court in *Bibra S. N.* v. *Stephen Court*[3], in the case of the tenancy of a dwelling house. Sikri, J. (as he then was), observed :

"On the one hand it does not seem equitable that when a tenant enjoys a substantial portion of the property of the landlord, leased to him, without much inconvenience, he should not pay any compensation for the use of the property, in other words, to borrow the language of Sir George Rankin, that he should enjoy a windfall. On the other hand, it is unfair that if a tenant is not given possession of a substantial portion of the property, he should be asked to pay any compensation for the use of the property while he is taking appropriate measures for the specific performance of the contract. It seems to us that it will depend on the circumstances of each case whether a tenant would be entitled to suspend the payment of the rent or whether he should be held liable to pay proportionate part of the rent."

93.8. *Payment of rent—whether a condition precedent.*—In England, the payment of rent and the performance by the lessee of the contracts binding on him are not conditions precedent to the covenant for quiet enjoyment. This has been held in English cases[4] relating to express covenant.

In a Madras decision,[5] apparently following these English cases, it is stated that the effect of a different construction would be to give the lessor a right of re-entry in the case of every breach by the lessee.[6] We are not, however, with respect, convinced that this is a corrupt approach. The English cases related to express covenants, and not to statutory conditions. Mandatory language in a statute cannot, we apprehend, be readily dispensed with.

93.9. *Repudiation by lessee—Recommendation as to clause (c).*—The section is silent on the question whether the lessee can repudiate the lease on the ground of—

(a) partial failure by the lessor to deliver possession, or

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1 *Ram Lal* v. *Dhirendra Nath*, A.I.R. 1943 P.C. 24.
Also see *Surendra Nath* v. *Stephen Court Ltd.*, A.I.R. 1960 Cal. 346; (1959) 63 C.W.N. 922.
2 Mulla (1973), page 668.
3 *Bibra S. N.* v. *Stephen Court*, (1966) 2 S.C.R. 458, 460; (1967) 1 S.C.J. 12; A.I.R. 1965 S.C. 1361.
4 *Edge* v. *Boileau* (1885) 16 Q.B.D. 117;
Dawson v. *Dyer*, (1833) 5 B. Ad. 584.
5 *Meenakshi* v. *Chidambaram*, (1912) 11 Mad. L.J. 119.
But see *Abdul* v. *China*, A.I.R. Assam 62.
6 Mulla (1973), page 694.

(b) eviction from a part of the premises.

Judicial decisions[1]-[2] have recognised the existence of such a right.

We are of the view that the law should be made self-contained on this important matter. We, therefore, recommend that there should be inserted in clause (c), a suitable Explanation recognising such a right which is obviously required in the interests of justice.

93.10. *Recommendations as to suspension of rent.*—It may also be provided that in case of partial eviction there will be partial suspension of rent. We recommend accordingly.

93.10A. *Explanation to be added to section* 108(*e*).—To carry out our recommendations on the two points discussed above,[3] we suggest that the following Explanation should be inserted below clause (c) of section 108 :

"Explanation.—Where the lessor fails to deliver to the lessee possession of a material part of the property, or where, by reason of a breach by the lessor of the provisions of this clause, the lessee is evicted from a material part of the property, the lessee at his option—

(a) *may repudiate the lease; or*

(b) *shall be entitled to deduct from the rent such amount as bears to the total rent the same proportion as such part of the property bears to the entire property".*

93.11. *Clause* (*d*).—Clause (d) of section 108 reads—

"If during he 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".

We have no comments on the clause.

93.12. *Clause* (*e*).—Clause (e) provides that if by fire, tempest or flood, or violence of an army or of a mob or other irresistable force, any material part of the property is 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.

The proviso to the clause is as follows :—

"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 provisions."

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1 *Ahmed Marocair*, A.I.R. 1961 Mad. 28, 30, para 8, citing *Meenakshi* v. *Chidambaram*, (1912) 23 M.L.J. 119.
2 *Dhunpul Singh* v. *Mahomed Kazim*, I.L.R. 24 Cal. 296.
3 Paragraph 93.9 and 93.10, *supra*.

The clause does not apply where the parties have specifically agreed that in spite of land being lost by diluvion or damage being caused by flooding, the lessee would be liable to pay the whole rent.[1] Where the property leased is not destroyed or rendered substantially or permanently unfit, the lessee cannot avoid the lease on the ground that he does not, or is unable to use the land for purposes for which it was let out to him.[2]

93.12A.—*English law.*—Clause (e), it may be noted, differs from the English law.[3] In England, in the absence of an express contract, destruction does not free the land.[4]

93.13. The clause applies the principle[5] underlying section 56, contract Act, to leases.

Lessee's option.—Clause (e) clearly indicates that where a material part of the property has been destroyed, it is the lessee's option to treat the lease as void. This clause is obviously based on the assumption that there is no *frustration* as such in the sense of the lease automatically coming to an end,[6] for, it is left to the volition of the lessee only, and not to that of the lessor, to put an end to it, provided that he is not in default. In this sense, therefore, the clause only partially accepts the doctrine of frustration in its application to a lease.[7]

93.14. *Requisition.*—Cases have recently arisen in India in which demised premises have been requisitioned by the Government for long periods of time.[8]

Thus, it has been held that where a part,[9] or where the whole, of the demised premises have been requisitioned, there is no frustration of the lease. No reference was made in these cases to section 108, clause (e). If reference had been made to it, interesting questions would have arisen, as has been pointed out by Mulia.[10] First of all, it would have had to be considered whether the Governmental action of requisition amounted to "other irresistible force" within clause (c), or whether these words are to be read *ejusdem generis* with the preceding words so as to mean some physical force.

93.15. *Demolition.*—Another interesting situation is of demolition. A single judge of the Allahabad High Court has held that clause (e) can have no application where the premises are demolished under the orders of a municipal authority.[11] It would appear that such a case is one in

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1 *Surpat* v. *Sheo Prasad,* A.I.R. 1945 Pat. 300.
2 *Raja Dhruv Debchand* v. *Raja Harmohinder Singh.* A.I.R. 1968 S.C. 1024.
3 (a) A.I.R. 1914 Sind 75, 78.
(b) A.I.R. 1936 Mad. 664.
4 *Cricklewood Property Act* v. *Leightons Trust,* (1945) All E.R. 252.
5 A.I.R. 1966 All. 225, 226.
6 *Munnuswamy* v. *Muniramaiah,* A.I.R. 1965 A.P. 167.
7 Mulla (1973), page 697.
8 Mulla (1973), page 697.
9 *Abdul Hashem* v. *Balahari,* A.I.R. 1952 Cal. 330.
10 *Tarabia Jivanlal* v. *Padmachand,* (1949) 51 Bom. L.R. 797; A.I.R. 1950. Bom. 89.
11 Mulla (1973), page 697.
Rahim Bux v. *Mohammed Sharif,* A.I.R. 1971 All. 16.

which the expression "irresistible force" could possibly be applied. In this case the question would have been[1] whether the property had been "rendered substantially and permanently unfit for the purpose for which it was let". In *Purshottam* v. *Batala Municipality*—and as East[2] Punjab case—A obtained a lease of tonga stands from the Municipality for Rs. 5,000, but, during the whole period of the year, the tongawallas refused to use the stands for no fault of A. It was held that the contract was frustrated. No question was raised as to whether a lease could be frustrated at all.

93.16. *Recommendation as to clause* (*e*)—For the reasons stated above, we think that it is desirable to add in clause (e), requisition[3] and demolition[4] specifically. We recommend accordingly. The following rough redraft is recommended—

Revised section 108(e)

(a) If by fire, tempest or flood, or violence of an army, or of a mob, *demolition under the orders of a public authority* or other irresistible force, any material part of the property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, or

(b) *as a result of requisitioning by a public authority, any material part of the property is taken from the possession of the lessee.*

The lease shall, at the option of the lessee, be void.

(proviso as at present)

93.17. *Clause* (f)—Under clause (f) of section 108, 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 such repairs with interest from the rent, or otherwise recover it from the lessor.

93.18. *Obligation to repair when arising*—The scope of clause (f), it should be noted, is narrow. The clause itself does not impose any obligation to repair on the landlord. It assumes that such an obligation may exist. If the obligation exists, the clause deals with the consequences of non-preformance of the obligation by the lessor.

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1 Mulla (1973), page 697.

2 *Purshottam* v. *Batala Municipality*, A.I.R. 1959 E.P. 301.

3 Para 93.14, *supra*.

4 Para 93.15, *supra*.

The lessor is under no liability to repair in the absence of an express contract making him liable.[1] Indeed, section 108(m) implies that the liability is that of the lessee.[2]

93.13. *English law as to repairs*—The law is the same[3] in England, for that law implies no covenant by the landlord to do repairs of any kind, either at the commencement of the tenancy[4] or during the term.[5] Nor does it make any difference that the tenant has covenanted to repair "fair wear and tear excepted"[6] or given the landlord notice that the premises are in a dangerous condition.[7] Indeed, in the absence of an express stipulation, the lessor's entry for the purpose of repairs would be a trespass in England.[8]

93.20. *Lessor's express covenant to repair*—The words "any repairs which he is bound to make to the property" in the section thus refer to a covenant to repair undertaken contractually. The onus of proving such a covenant is on the lessee. If the lessor commits a breach of his express covenant, the lessee is not entitled to terminate the tenancy; for the section gives him the right after notice to the lessor, to do the repairs himself and deduct the amount from the rent.[9] The lessor's covenant to repair and the lessee's covenant to pay the rent are independent covenants.[10]

93.21 *No change*—Although the cryptic form of the present clause does not readily disclose this position, it is clear that the obligation of the lessor must arise by express or implied contract. Judicial decisions[11] mostly relate to express contract, implied contract need not be ruled out.

93.21A. *Clause* (f)—*Recommendation to override covenant against deduction*—The tenant is entitled to deduct from the rent the expenses of necessary repairs done by him, *even though there is a covenant in the lease to pay rent without deduction.*[12] Where the landlord fails to carry out the

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1 *Bijoi Chandra* v. *Howrah Amta Light Co.*, A.I.R. 1933 Cal. 524/525, 526 (Mookerjee & Chotzner JJ.);
Lakhmichand v. *Ratanbai*, (1927) I.L.R. 51 Bom. 274;
Narayan Rajaram v. *Shankar Diwakar*, A.I.R. 1955 Nag. 202, 203 (para 6);
Steuart & Co. Ltd. v. *Mackertich*, A.I.R. 1963 Cal. 198;
Slaefer v. *Lambeth Borough Council* (1959) 3 All. E.R. 378;
Dorapandi Konar v. *Sundara Pathar*, (1970) 1 M.L.J. 62.

2 *Lakhmichand* v. *Ratanbai*, (1927) I.L.R. 51 Bom 274.

3 *Bijal Chandra* v. *Howrah Amta Rly.*, A.I.R. 1923 Cal. 524.

4 *Chappell* v. *Gregory*, (1864) 34 Beav. 250.

5 *Arden* v. *Pullen*. (1942) 10 m & W 321;
Gott v. *Gandy*, (1853) 2 E & B 845, 847.

6 *Arden* v. *Pullan*, (1842) 10 M & W 321.

7 *Gott* v. *Gandy* (1953) 2 E & B 845.

8 *Barker* v. *Barker*, (1829) 2 C & P 557;
Stocker v. *Planet Building Society*, (1879) 27 W.R. 793, 877.

9 *Bijay Chandra* v. *Howrah Amta Light Rly.*, (1923) 38 Cal. L.J. 177; 72 I.C. 98;
Compare *Granada Theatres Ltd.* v. *Freehold Investment (Leytonstone) Ltd.* (1959) 2 All. E.R. 176, 184.

10 *Taylor* v. *Webb*, (1937) 2 K.B. 283; (1937) 1 All. E.R. 590.

11 Para 93.17 *supra*.

12 *Graham* v. *Colonial Government*, 12 C.L.J. 351; 61C 131,
See in this connection *Abdul Sahid* v. *China Lee Hing*, A.I.R. 1951 Ass. 62 and *Augustina* v. *Chandi*, A.I.R. 1953 Tr Coch. 462.

repairs which the Rent Act requires him to do, the tenant is not entitled to suspension or abatement of rent.[1] Both these points may be provided for in clause (f), to make it comprehensive, and we recommend that the clause should be suitably amended for the purpose.

93.21B. *Statutory obligation to repair*—Upon a breach of a covenant to repair by the lessor, the lessee's remedy is only deduction from rent, or damages or re-imbursement of money spent in repairs. There is no question of specific performance[2] of the covenant. Further, where the Rent Act imposes a duty on the landlord to repair, the tenant cannot invoke the remedy provided by section 108(f), Transfer of Property Act.[3]

93.22. *Clause* (g)—Under clause (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 the said payment himself and deduct it with interest from the rent, or otherwise recover it from the lessor.

For example, a putnidar making a certain revenue payments due by his defaulting superior landlord is entitled to recover the same from the latter, even though a separate account had been opened for such payments.[4] Where the lessee pays the land revenue payable by the lessor, the lessee can recover it from the lessor.[5] In a suit for rent the tenant can ask for the deduction of water-tax and property tax paid by him.[6]

93.23. *Recommendation as to clause* (*g*)—While no change in principle is required in the clause, it sounds reasonable to provide for notice to the lessor on the lines of clause (f) and we recommend accordingly.

Under the English law, a lessee who, under actual or implied compulsion, has paid any revenue or tax which the landlord is liable to pay, may deduct the amount from the amount from his rent, unless there is an express contract to the contrary. This is the principle which is found enacted in clause (g). Clause (g) is, however, in some respects, wider than the English law. (i) It is not limited to the payment of rates and taxes. (ii) Further, unlike the English law, it is not necessary that the deduction should be made only from the rent of the current year and not afterwards.

93.24. *Clause* (*h*)—Under clause (h), the lessee may, even after the determination of the lease, remove, at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth; provided he leaves the property in the state in which he received it.

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1 *N. M. Industries Ltd v. Virendra Nath.* A.I.R. 1957 Cal. 232. 233, para 4-5. (He can sue for damages).

2. *Bansi v. Krishna,* A.I.R. 1951 pat. 508.

3 *Behari* v. *Kunjar Lal,* A.I.R. 1963 All. 439.

4 *Smith v. Dinonath,* I.L.R. 12 Cal. 213.

5 *Faiyazunnissa* v. *Bajrang* A.I.R. 1927 Oudh 609.

6 *Acharya, T. K. S. v. Satyamma, S.,* (1966) 1 An L.T. 11.

The clause was amended in 1929. The old clause (h) read thus : "The lessee may remove at any time during the continuance of the lease, all things etc." That is, the old clause allowed the tenant to remove only "during the continuance of the lease," all things which he might have attached to the land, and nothing was said as to the rights of the parties in respect of such *things after the* determination of the lease, if they had not already been removed by the tenant.

On the old clause, the question arose whether the tenant forfeited all his rights in such things if he had not so removed them ;and it was held that according to local usage, the option was with the lessor either to take the building on paying compensation, or, if he was unwilling to pay compensation, to allow the tenant to remove the building.[1]

Where the terms of the lease did not provide for payment of compensation to the tenant, the Court had a discretion, in a proper case, to allow reasonable time to the tenant after the expiry of the tenancy to remove his superstructure from the land.[2]

While the broad features of the clause do not require amendment, it is necessary to point out that there are certain special circumstances in which the present restriction to the effect that removal of the fixtures can be done only while the tenant is in possession may cause hardship. For example, sometimes the tenant is not able to retain possession for removing the fixtures, because the premises have been compulsorily acquired by the Government, such acquisition leading to termination of the lease. In such circumstances, the law should, in our opinion, allow even after delivery of possession, a reasonable time within which the tenant may remove the fixtures erected by him.

93.24A. *Recommendation as to clause* (*h*)—In the light of what is stated above, we recommend that a proviso should be added to clause (h) to the effect that[3] where the lessee has not been able to remove the fixtures before delivery of possession by reason of circumstances beyond his control, he shall be entitled to remove them within a reasonable time after termination of the lease and delivery.

In this connection we may note that the point had been raised when the Bill of 1927 was under consideration. The following is from a contemporary comment[4] :—

> "Clause (55) of the Bill deals with the right of tenant to remove all things which he has attached to the earth. The Indian Law has in this instance differed considerably from the English Common Law *Quicquid Plantatur Solo Cedit* has had from the beginning only a limited application in India. The rules of Hindu and

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1 (a) *Ismati Mani* v. *Nazarali*, I.L.R. 27 Mad. 211, 217;
(b) *Angammal* v. *Aslami Sahib*, I.L.R. 38 Mad. 710, 735;
(c) *Kanai Lal* v. *Rassik Lal*. 19 C.W.N. 316.

2 (a) *Raja Avergal* v. *Noor Mohamed*, A.I.R. 1922 Mad. 349;
(b) *Govinda* v. *Chaussila*, A.I.R. 1933 Cal. 875.

3 This is not a draft.

4 S. P. Shastri, "The Transfer of Property Amendment Bill" (1928) M.L.J. (Journal) 143, 145.

Mahomedan Law on the point are more liberal to the tenants and other persons who have made improvements etc. on the lands of others.

"The Transfer of Property Act, section 108, clause (h), has simplified the rules and abolished the distinctions of the English Law as regards what are fixtures and what are not and the differences in rights according to the tenancy was for trade purposes or agricultural purposes and so forth. The new clause proposes to permit the tenant to remove the fixtures so long as he is in possession and not afterwards even after the determination of the lease. It does not seem to be a satisfactory solution to confine the rights of the tenant only to the period of his actual possession. Even under the existing law as settled by the decision of the Privy Council in *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury*,[1] the tenant will be entitled to a reasonable time for such removal even after the termination of the lease. The proposed alteration would in some cases operate to deprive the tenant of his undoubted right to remove the fixtures even during the continuance of the lease as for instances where during the terms of the lease the lands are acquired by the Government under the Land Acquisition Act and possession is taken by the authorities in pursuance of the statutory notification. We would therefore suggest "that the new section should run as follows : "The lessee may remove, at any time during the continuance of the lease, and until the lapse of a reasonable time even after the determination 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."

93.25. *Clause* (*i*)—So much as regards clause (h). Clause (i) provides that 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 agrees to gather and carry them.

The clause needs no comments.

93.26. *Clause* (*j*)—Clause (j) provides that 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 to the lease.

Nothing in this clause shall be deemed to authorise 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 the lease of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

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1 *Narayan Das Khettry* v. *Jatindra Nath Roy Chowdhury*, (1927) L.R. 54 I.A. 218; I.L.R. 54 Cal. 669; 53 M.L.J. 158 (P.C.).

Despite the permission contained in this clause as to the alienability of lessee, it is open to the parties to covenant against such alienation and a sub-lease given an contravention of such covenant is invalid as between the original lessor and lessee, though it is valid as between the original lessee and the sub-lessee[1] and the landlord will be entitled to bring a suit for damages.[2] A covenant not to sub-let premises is, however—not broken by the subletting of part only of the premises.[3]

A permission granted by the tenant to others to use the premises does not amount to sub-letting.[4]

There is to be found in a Calcutta judgment[5] a useful summary of the effect of subletting. In the case of a lease containing a covenant against sub-letting without the landlord's consent; (1) There can be at law a sub-lease without the previous consent of the lessor. The sub-lease is not *ab initio* invalid, but it is liable to be affected by the forfeiture of the head lease. (2) Upon the sub-lessee taking possession on the expectation of the head lessor recognising the sub-tenancy, the lessee becomes responsible to the sub-lessee on a covenant for quiet enjoyment. (3) On the other hand, the transaction is to be regarded as an agreement to grant a lease with the landlord's prior written consent and the lessee may protect himself against possible claims of damages by making the contract subject to the landlord's consent. (4) Where the lessee does not apply for the landlord's consent at the time fixed or after a reasonable time (fixing the same by due notice), the sub-lessee repudiates before that time, the lessee is entitled to relief. An absolute demise by sub-lease for the unexpired residue of the term operates not as an assignment of the term, but only as a sub-lease, and is not a breach of the covenant against assignment.

93.26. *Clause* (*k*).—This disposes of cause (j). Under clause (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.

We have no comments on this clause.

93.28. *Clause* (*m*).—Under clause (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 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.

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1 *Abdulla* v. *Mohammed*, I.L.R. 26 Mad. 156;
2 *Sital Prasad* v. *Dildar Ali*, 1 P.L.J. 1; 33 I.C. 408.
3 *Medaile* v. *Lewis*, (1956) 2 All. E.R. 357.
4 *Petroleum Workers Union* v. *A. Mohamed & Co.*, A.I.R. 1967 Mad. 33.
5 *Battersby* v. *De Cruze*, (1936) I.L.R. 63 Cal. 31, 45. 46 (Ameer Ali J.) (See headnote in the I.L.R.).

In *East India Distilleries* v. *P. F. Mathies*,[1] the defendants company took a lease of a building from the plaintiff for the purpose of storing alcohol and other spirits for the purpose of their distilling business. The lease contained a covenant that the "lessees on the expiry of the period of this lease ... should restore the building at their own cost to the condition to in which they took the same on lease from V, the predecessor-in-title of the lessor ..... That in case the lessees fail to remove the additions and alterations made by them to suit their purposes and at their costs and fail to restore the building to the original and habitable condition the cost thereof .... shall be paid by the lessees to the lessor". The defendants, to the knowledge of their plaintiff, made internal structural alterations in the building to suit their own purposes for use as a liquor ware-house. The building was subsequently burnt down, and the plaintiff sued the defendants for damages and for re-instatement of the building.

It was held, that the plaintiff was not entitled to recover, because he did not bring home *negligence* to the defendant company.

It was pointed out that in India, section 108 of the Transfer of Property Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden upon his shoulders by his covenant. The covenant in the lease in question did not contemplate the case of fire at all. It merely provided for the obligation that the lessee would incur to restore premises which he had altered to their original use as a dwelling house at the termination of the lease. The principle of *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330 was not applicable to the case, because—(1) there was no evidence that power alcohol was a dangerous thing which a man could reasonably be held to store at his peril owing to its dangerous nature, and (2) the lessor knew from the beginning for what purposes the lessees required the building and to what use they proposed to put it.

93.29. *Recommendation as to clause (m).*—This case, and many other cases,[2-4] show that again and again, questions as to the liability of the lessee *for fire* are raised. The controversy arises primarily because the cryptic expression "irresistible force" is used in clause (m), instead of the more elaborate and explicit phraseology used in clause (e). We recommend that clause (m) should be amplified on the lines of clause (e) to improve the position from the point of view of drafting.

The following re-draft of clause (m) is accordingly recommended :—

"(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 by fire, tempest or flood or violence of*

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1 *East Indian Distilleries Co.* v. *P. F. Mathies*, A.I.R. 1938 Mad. 1140. See also A.I.R. 1970 Mad. 291.

2 *Doraipandi Konar* v. *Sundara Pathar*, A.I.R. 1970 Mad. 291.

3 A.I.R. 941 All. 37.

4 *Sri Gurupada* v. *Sri Haripada*, A.I.R. 1962 Cal. 263, 265, para 6.

an army or of a mob or other 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."

93.30. *Clause (n).*—Clause (n) provides that 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.

The clause needs no change.

9.31. *Clause (o).*—Under clause (o), the lessee may use the property and its 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 or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.

The clause needs no change.

93.33. *Clause (q)*—Under clause (q), on the determination of the lease, the lessee is bound to put the lessor into possession of the property. Of course, if the lessor is not prepared to accept possession, the obligation of the lessee is adequately discharged by offering possession, because the law does not expect the impossible.

The clause needs no change.

93.34. *Section 108A (New)*—As recommended[1] by us under section 12, a new section should be inserted as follows, after section 108 :

> 108A. *The breach of any such condition as is referred to in the Explanation to section* 12, *renders the assignment or subletting voidable at the instance of the lessor, whether or not the lessor reserves a power to re-enter on such breach."*

This recommendation is subject to reservation by Shri Dhavan.[2]

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1 See discussion as to section 12, *supra.*
2 Reservation by Shri Dhavan as to section 108A.

CHAPTER 94

TRANSFER OF LESSOR'S INTEREST

SECTION 109

94.1. *Section* 109, *first paragraph*—Under section 109, the rights attached to the property which arise out of possession and control of property will pass with the property, wherever the lessor transfers his interest in the property. The section is divisible into three portions represented by the first paragraph, the proviso and the last paragraph respectively. The first paragraph itself deals with two topics, namely, the transferee's rights and the transferee's liabilities. The transferee from the lessor acquires the original lessor's rights. But a distinction is made, in the case of liabilities, in so far as, until the lessee agrees, the transferee does not become liable for the lessor's liability and the original lessor continues to be liable for the lessor's liability. The section thus makes a distinction between the lessor's rights and the lessor's liabilities.

Of course, personal obligations of the lessor do not pass with the transfer.

94.2. *Proviso*—It is to be noted that a letter of attornment is not necessary to complete the title of the transferee. However, by virtue of the proviso to section 109, the transferee is not entitled to arrears of rent due from the transfer. Moreover, if the lessee, in ignorance of the transfer, pays the rent to the lessor, the lessee is not liable to pay such rent over again to the transferee.

94.2A. *Rights and liabilities*—An important consequence of the proposition enacted in the first paragraph of the section is that for a transfer of the rights of the lessor to the transferee no notice of assignment is needed so that, as was held in a Bombay case,[1] surrender of the tenancy by the lessee to the original lessor is invalid after the lessor has assigned the premises. This, in fact, is an inevitable consequence of the principle of the section that all the *rights*, primary as well as auxiliary, of the lessor stand transferred to the lessee, except as otherwise specifically provided by the section.[2]

94.3. *Section* 109, *second paragraph*—When a person sells a portion of the property, the question of apportionment of the benefit of the obligation on severance arises. The rule, in general, is to be found in section 37, under which the share of each part owner to the performance of the obligation depends on the value of his share in the property. This rule, of course, is subject to the condition that the obligation can be severed and that the severance does not substantially increase the burden of the obligation. In regard to transfer of the lessor's interest in leases, section 109 contains a more specific provision.

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1 *Rama Chandra* v. *Sheikh Hussain*, 3 Bom. L.R. 679.
2 I.L.R. (1961) 2 All. 554.

94.4. *Section* 109, *last paragraph*—That there can be a partial transfer of the leased part of the premises is recognised by section 109, both in the first paragraph and in the last paragraph. The first paragraph specifically deals with a case where the single obligation to pay the rent to a particular lessor becomes divided into several obligations. The gist of the last paragraph is that the lessor, the transferee, and the lessee may, in the case of a partial transfer, determine what proportion of the premium or rent reserved by the lease shall be payable in respect of the parts so transferred to the lessor and the transferee respectively. It, however, also provides that in case they disagree, such determination can be made by the court having jurisdiction to entertain a suit for the possesson of the property.

94.5. *Partition–Recommendation*—It has been held[1-2] that partition is a transfer within the meaning of section 109.[3] We are of the view that this interpretation should be specifically incorporated into section 109, by means of an express Explanation to be inserted for the purpose, which we recommend.

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1 *Banarasi Lal* v. *Shri Bhagwan*, A.I.R. 1955 Raj 167, 171, para 23 (Dave, J.).
2 *Skattar Singh* v. *Rawela*, A.I.R. 1952 J. & K. 18.
3 For a contrary view, see *Indoji*, A.I.R. 1920 Mad. 20. (case under section 53).

CHAPTER 95

COMMENCEMENT OF LEASES

SECTION 110

95.1. *Introductory*—Section 110 reads—

> "110. Where the time limited by a lease of immovable 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.
>
> "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.[2]
>
> "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."

95.2. *Scope*—It has been held that where the lease is to commence from the date of putting the lessee in possession, then section 110 does not apply.[1]

According to the Assam High Court, section 110 applies only to written leases.[2] We agree with this view, with respect. There are, however, observation in an earlier Calcutta case[3] raising a query on the subject. We think that oral leases should be excluded from section 110, since the terms of an oral lease cannot always be precisely proved.

We recommend accordingly.

95.3. *Section 110—Context to the contrary*—The first paragraph of section 110 deals with the date of commencement of a lease. The word "from" (as a general rule) excludes the day from which the time is to be reckoned, except where the context requires a contrary rule to be adopted. This general rule is applicable whenever time is to be computed "from" a day specified, whether such time is fixed for the performance of a contract or is prescribed by law for the doing of an act or for the institution of proceedings in a Court of Law. This principle is

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1 *Rajan* v. *Gopal*, (1975) 2 S.C.J. 1, 5.

2 *Dudmere* v. *Haribhakti*, A.I.R. 1970 Assam 115.

3 *Calcutta L.&S. Co. v. Victor Oil Co.*, A.I.R. 1944 Cal. 84, 85 (Rau J—obiter).

found embodied in section 9(1) of the General Clauses Act which runs as follows :

> "In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word from and, for the purpose of including the last in a series of days or any other period of time, to use the word to."

Section 12, sub-section (1) of the Limitation Act, 1963, runs as follows :

> "In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded."

Rau, J. has observed :[1]

"The rule laid down in section 110 is not inflexible and the section must be read as qualified by some such phrase as 'unless the content otherwise requires' ".

We recommend that the section should be amended accordingly.

95.4. *Section* 110—*periodical tenancy*—It has been held that section 110 is not applicable to a periodical tenancy.[2-5]—such as a tenancy from year to year or from month to month as, in such a tenancy, time is limited by the notice to quit and not by the lease.

95.5 *Recommendation*—Having regard to the position discussed above, we are of the view that the scope of section 110 should be more precisely defined by providing that —

(i) it does not apply to periodic tenancies[6] (section 106);

(ii) it does not apply to oral leases;[7] and

(iii) it does not apply where the context indicates to be contrary.[8]

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1 *Calcutta L. & S. Co. v. Victor Oil Co.;* A.I.R. 1944 Cal. 84, 86 (Rau, J.) (obiter).

2 *Durga Prasad* v. *Bhagwan,* A.I.R. 1967 Punj. 404, 405.

3 A.I.R. 1959 Assam 174, 175, para 3—*Ram Dhari* v. *Jagendra Kumar.*

4 *Carraba M & T Co.* v. *Chari,* A.I.R. 1957 Cal. 357, 360.

5 *Chand Mohamad* v. *Murtza Khan,* A.I.R. 1950 Nag. 233, 234.

6 Para 95.4.

7 Para 95.2.

8 Para 95.3.

The following is a rough re-draft of section 110 which we recommend to carry out the above changes.

Revised section 110

"110. (1) Where the time limited by a lease *in writing* of immovable property is expressed as commencing from a particular day, in computing that time such day shall be excluded.

(2) Where no day of commencement is named, the time so limited begins from the making of the lease.

(3) Where the time so limited is a eyar 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.

(4) 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.

Explanation.—Nothing in this section applies to leases governed by section 106 *or where the context indicates to the contrary.*

CHAPTER 96

DETERMINATION OF LEASE

SECTION 111

96.1. *Determination of lease*—Section 111 provides that a lease of immovable property determines :

"(a) by afflux of the time limited thereby;

(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 becomes 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 (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; or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of 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."

The illustration to clause (f) provides as follows :—

"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."

96.2. *Section* 111(*a*)—Clause (a) of the section is limited to a lease which is determined by efflux of the time "limited thereby". In such a case, no notice to quit is necessary. It has to be noted that in the scheme of the Act, there is a dichotomy between leases for a fixed period—described in section 110 and 111 with reference to the expression "time limited" or "time limited thereby"—and leases from year to year or month to month falling within section 106. In the former case, clause (a) supplies, while in the latter case, clause (h) applies. Where a lease expires by efflux of the time limited thereby, no notice is necessary.[1] On the other hand, where the lease is governed by section 106, notice is necessary, because the lease is not for a "time limited thereby". This position is clear enough. It is therefore surprising that occasionally in situations where section 106, read with section 111(h) applies, arguments are addressed contesting the requirement of notice.[2-3] Conversely, it is often overlooked by litigants that where there is a tenancy for a fixed term, eviction cannot be claimed by a mere notice before expiry of the term.[4]

96.3. *Section* 111(b)—Clause (b) contemplates the case where the time limited by the lease is limited conditionally on the happening of some event. In clause (a), the question was merely of "efflux" of time, while in clause (b), on the happening of the specified *event* the lease determines.[5] Then, there is clause (g) relating to forfeiture for certain defaults.

There seems to be some obscurity as to the precise line of demarcation between clause (b) and clause (g). The line becomes obscure when the "event" mentioned in this regard in the lease is, in some manner or another, connected with some wrongful act or default on the part of the leasee. For example, in a Calcutta case,[6] there was a lease for 99 years and there was a condition in the lease that on liquidation of the lessee company, the lease shall cease to be operative and the company shall forthwith make over possession to the proprietor. This was held to be a provision for forfeiture, falling within clause (g), since there was a duty cast on the lessee to make over possession on liquidation which was construed as a clause for re-entry.

In an Orissa case,[7] the lease was for a fixed period of 40 years, but there was a condition of defeasance that if the lessees carried on any other business than the manufacture or sale of its byproducts, then the lease shall stand cancelled automatically. It was held that the lease was not governed by clause (b), but fell within clause (g). Both the Calcutta and the Orissa judgments show that the matter was strenuously argued.

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1 *Dellanpant* v. *Vithalrao*, A.I.R. 1975 S.C. 1111, 1114, para 14.
2 *Bose* v. *Syed Nayyar*, A.I.R. 1967 All. 209.
3 *Ramasami* v. *Venkataramanjulu*, A.I.R. 1914 Mad. 301.
4 (1969) B.L.J.R. 850, cited in the Yearly Digest.

5 As to tenancy at will, see para 96.18 *infra*.
6 *In re Srinath*, A.I.R. 1952 Cal. 207; 209, 210. paragraphs 20—31 (Sambhu Nath Banerjee, J.).

7 *Krishna Chandra* v. *N. C. etc. Works*, A.I.R. 1957 Orissa 35.

96.4. *Recommendation as to clause* (b)—It appears to us that while the principle is clear enough, the somewhat cryptic language of clause (b) has been, or is likely to be, the cause of unnecessary controversy. The best course would be to make it clear in clause (b) that the "event" mentioned therein must be some event unconnected with any wrongful act or default on the part of the lessee. We recommend that clause (b) should be suitable amended. It is sufficient to add, after the words "limited conditionally on the happening of some event", the words *"not connected with any wrongful act or default on the part of the lessee"* in clause (b). The termination of a lease for wrongful act or default of the lessee would be possible under clause (g) by way of forfeiture, if its conditions are satisfied.

96.5. *Section* 111(c)—Under clause (c), simply paraphrased, a lease terminates if the interest of the lessor terminates. The general rule is that a person cannot confer a better title than he himself has. A lease is essentially a transfer, though of a subordinate interest and it cannot, speaking in general, travel beyond the duration for which the lessor's title endures. If his interest terminates, then any subordinate interest accorded by him must terminate. This general rule seems to be the basis of clause (c).[1]

This clause applies, in particular, to mortgagees who grant leases. In the absence of a statutory provision to the contrary, the lessee under a lease granted by a mortgagee cannot claim any rights beyond the term of his original lessor's (mortgagee's) interest.[2] Another illustration of clause (c) is to be found in the situation of a sub-lease. Where the head-lease terminates, the sub-lessor stands in a dual capacity; with reference to his own sub-lessee, he is the lessor and clause (c) applies fully to the sub-lease, so that within the meaning of that clause "the interest of the lessor in the property terminates" on the happening of the event—the event in this case being the determination of head-lease.

96.6. *Section* 111(d)—*Recommendation*—The principle on which section 111, clause (d) is based is that where the greater estate and the lesser interest coincide in the same person without any intermediate estate,[3] there is a merger. Clause (d) incorporates the maxim *Nemo potest esse tenens et dominus,* that is, nobody can be both landlord and tenant at the same time in respect of the same property. For the purposes of this clause, it should be immaterial whether the vesting of the two interests in the same person is by act of parties or by operation of law.[4] However, to avoid doubts, we recommend that at the end of clause (d), the words *"whether by act of parties or otherwise"* should be added.

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1 (a) *Ravji* v. *Gopalji,* A.I.R. 1963 Guj. 328;

(b) *Kamlakar* v. *Ghulam Haji,* A.I.R. 1963 Bom. 42.

2 *Sachalmal Parasram* v. *Ratnabai,* A.I.R. 1972 S.C. 637.

3 *Suraj Chandra* v. *Behari Lal,* A.I.R. 1939 Cal. 692, 695.

4 *Promothonath* v. *Kali Prosonno.* I.L.R. 28 Cal. 744.

96.7. *Limitations of clause* (d)—Two important limitations of the provision as to merger ought to be noted. In the first place, the intention of the law is that there is no merger where the separate existence of the two interests is not incompatible. On this principle, where the lessee takes a usufructuary mortgage, the lease should not be regarded as merged in the mortgage, since the two interests are co-ordinate and not inconsistent.[1] The correct position would seem to be that in such a case tenant's rights would only be in abeyance and not totally abrogated.[2]

96.8 It is also necessary that the entire interest—speaking quantitatively —of the lessee and the entire interest of the lessor must vest in the same person.[3] Hence, if a lessee of a portion of the property acquires fragmentary share of the proprietary interest in the property, there is no merger.[4]

96.9. *Section* 111(e)—Clause (c) relates to 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. Mutual agreement implies that there is an acceptance on the part of the lessor; a unilateral notice by the lessee surrendering the premises, if not accepted by the lessor, does not determine the lease, and the lessee still remains liable for the rent.[5]

Surrender implies that possession is delivered and accepted. Therefore, it is not enough that the lessee gives a notice, if the notice is not accompanied or followed by delivery of possession. These propositions, one would have thought, are fairly implicit in the language of the section, as also in the concept of surrender. However, occasionally these requirements are lost sight of[6-7] resulting in avoidable controversy. Of course, we do not regard them as matters capable of improvement by amendment.

96.10. *Section* 111(f)—As to clause (f), the most usual illustration of an implied surrender is that given in the illustration to the section—acceptance of a fresh lease during the continuance of the old lease. The principle here is that of incompatibility between enjoyment under the prior lease and enjoyment under the later lease. The position would be the same where the new lease is granted to a third person with the consent of the lessee.[8] Of course, the new lease must be a valid and effective lease.

It may, on the facts of a particular case, be difficult to determine whether there was an intention to surrender or an acceptance thereof. Such controversies could hardly be avoided by an amendment of the wording of the section and we recommend none.

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1 *Lachman Das v. Hira Lal,* A.I.R. 1966 All. 323.
2. *Kallu v. Diwan.* I.L.R. 24 All 487.
3 *Manmotha* v. *Mahendra,* A.I.R. 1922 Cal. 284, 385.
4 *Faqir Baksh* v. *Murli Dhar,* A.I.R. 1931 P.C. 63.
5 A.I.R. 1962 Mad. 439.
6 *Amar Nath* v. *Har Prasad,* A.I.R. 1932 Oudh 79.
7 *Dargahi Lal v. Manna,* A.I.R. 1948 Oudh 254.
8 *Venkayya* v. *Subbarao,* A.I.R. 1957 A.P. 619, 625.

96.11. *Section* 111 (g)—Clause (g) deals with forfeiture of a lease in three situations, namely,—

(i) on breach of an express condition where a right of re-entry is provided for; or

(ii) on denial of the lessor's title by the lessee;

(iii) on the insolvency of the lessee where the lease provides for a right of re-entry on such contingency.

Under the law, as it now stands, in all these cases it is also necessary that the lessor must give a written notice to the lessee of his intention to determine the lease.

If the other requirements of section 111(g) are satisfied, it is immaterial that the lease is by way of permanent tenancy[1]. Even a permanent lease can be forfeited on breach of a condition expressly providing for re-entry.[2]

96.12. *Section* 111(*g*) *and the word "condition"*—In clause (g), the word "condition" is not used in the same sense as in English law, and overlaps what is called a covenant in English law. A condition puts a bridle or restraint on the estate granted.[3] Thus, in a lease which stipulated and conditioned that the lessee would not assign except to his wife and children,[4] these words indicated that the lease could be determined for breach of the condition. But a covenant only imports an agreement. Thus, in a lease where the lessee "hereby agrees that he will not underlet the premises without the consent in writing of the landlord".[5] these words are a covenant the breach of which gives the lessor only the right to recover damages or obtain an injunction.

Under the section as it stands after the amendment of 1929, a provision in the lease that on the breach of a particular condition the lease shall be "void", or a provision using a similar phraseology, does not entail forfeiture. The amendment of 1929 thus requires a strict adherence to the letter of the law, in so far as it is now necessary that there must be an express provision for re-entry in the lease.

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1 *Mohammad Amir* v. *Municipal Board,* Sitapur, A.I.R. 1965 S.C. 1923, 1928 para 11.

2 *Gopal Krishna* v. *Narayya,* A.I.R. 1964 A.P. 528, 530.

3 Mulla (1973), page 747.

4 *Deo D. Henniker* v. *Watt.* (1828) 8 B & C 208.

5 *Shaw* v. *Coffin,* (1963) 14 C.B. (N.S.) 372.

This was not the position before the Act of 1929. In old clause (g), it was stated that forfeiture could take place upon the breach of an express condition which provided that on breach thereof the lessor may re-enter or the lease shall become void. Hence, a covenant in a lease that on a failure to pay rent, the lease shall become null and void, entailed forfeiture. Of course, against such forfeiture, relief was not granted by section 114.[1] Whether this amendment restricting the scope of forfeiture for breach of a condition was or was not necessary, need not be discussed at this stage, since its practical effect, broadly stated, is merely that the draftsman of a lease should now be more careful and use the precise formula "the lessor shall be entitled to re-enter," instead of any other less stringent wording.

It may incidentally be stated that conditions making a lease void on their breach are also construed in English[2] as well as in pre-1929 Indian cases[3] as making the lease voidable at the option of the lessor.

96.13. *Effect on Assignment*—The question of evicting the lessee on violation of a condition against assignment or sub-letting of rights of the lessee has been discussed by us earlier.[4] In regard to section 12, our recommendation was that in such a case the assignment should be void. This amendment of section 12 does not, of course, necessarily involve a change in section 111(g), which, as at present, will apply only where there is an express provision for re-entry in case of breach.

96.14. *Denial of title*—As to the situation of denial of title, it is a well established principle that if a tenant denies the title of the landlord, he can be evicted without notice to quit. As was observed by Best, J.—[5]

> "There can be no necessity for a notice to end that which he (the lessee) says has no existence."

96.15. *Section 111(g) (New)—Termination at the option of the lessee-Recommendation*—We have dealt with clause (g). At this stage, we may refer to an important matter pertaining to the termination of a lease. Section 111 contains no clause providing for the termination of the lease *at the option of the lessee* on account of a breach of a contract by the lessor, even where the term broken by the lessor is, from the lessee's point of view, an important condition. Thus, in a Madras case,[6] the lease

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1 *Hiranandan* v. *Ramdhar,* A.I.R. 1922 Pat. 528.

2 *Davenport* v. *The Queen,* (1877) 3 App. Cas. 115;
Reid v. *Parsons,* (1817) 2 Chit. 247 (the term shall cease);
Deo D. Bryan v. *Banks,* (1821) 4 B. & Ald. 401;
Deo D. Nash v. *Birch,* (1830) 1 M. & W. 402;
Quesnel Forks Gold Mining Co. v. *Ward,* (1920) A.C. 222.

3 *Hiranandan* v. *Ramdhar,* A.I.R. 1922 Pat. 528.

4 See discussion as to section 12, *supra.*

5 *Deo* v. *Frowd,* (1828) 130 Eng. Rep. 883, 884.

6 *Govindaswami* v. *Palaniappa,* A.I.R. 1925 Mad. 833, (Ramesam, J.)

was for 5 years and one of the terms of the lease was that within six months from the date of the lease, the lessor shall have a latrine constructed, a well sunk and a room built upstairs. The lessee occupied the house from November, 1916 to February, 1919 and thereafter after giving intimation in March 1919, vacated the house, as the well was not sunk and other necessary repairs were not effected. The landlord brought a suit for rent for the remaining period and was ultimately successful. It was held that the lessee had no right to terminate the lease, since the lease was for a fixed period.

96.16. *Recommendation to add clause (gg)*—We are of the view that the law should recognise such a right by allowing termination by the lessee for breach of an express condition providing for such termination after reasonable notice to the lessor. We, therefore, recommend that a new clause should be inserted—say, as section 111(gg)—for the purpose, in these terms :—

"*(gg) by repudiation, that is to say, in case the lessor breaks an express condition which provides that on breach thereof the lessee may repudiate the lease, and the lessee gives notice in writing to the lessor of his intention to determine the lease.*"

96.16A. *Section 111(h)*—Section 111(h) needs no change.

96.17. *Section 111-Lessor's death*—Before concluding our consideration of section 111, we may refer to a few matters not dealt within so many words in the section. The death of the lessor does not determine the lease, except in cases where his own interest ceases on his death or it is provided in the lease that the lease shall terminate on his death.[1-2]

As to the lessee's death, a lease, being a transfer of an interest in immovable property, is a heritable right,[3-5] except where the lease provides to the contrary expressly or by implication. A contractual tenancy is subject to devolution on succession.

96.18. *Section 111 and tenancy at will*—As regards a tenancy at will, it is to be noted that a formal notice is not necessary to terminate such a tenancy. By its very nature, such a tenancy contemplates that it survives only until a certain event happens. On the part of the lessor, a demand of possession is enough to terminate it and he need not give any time to the lessee for evicting where the tenancy is one at will. Of course, the notice itself can operate as a demand for possession. But, as a matter of principle, a tenancy at will can be determined by a mere demand for possession, express or implied.[6] Since the lease can be put to an end at any time, the case does not fall within the "notice to quit" contemplated by section 106 read with section 111(h). It should be regarded as falling within section 111, clause (b).

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1 A.I.R. 1957 Cal. 173, 176.
2 A.I.R. 1929 Nag. 23, 26.
3 *Nihal Chand* v. *Shiv Narain*, A.I.R. 1958 Punj. 263, 265.
4 *Ram Barai* v. *Tirtha Pada*, A.I.R. 1957 Cal. 173, 176.
5 *Ansar Ali* v. *Babulal Jamini*, A.I.R. 1940 Cal. 89. 91.
6 *Jhalku Singh* v. *Chandrika Singh*, A.I.R. 1961 Pat. 350. 353.

96.19. *Section* 111 *and Rent Control legislation*—Finally, it is proper to take notice of an important development affecting the termination of tenancies regulated by local Rent Control legislation. Such legislation, as is well-known, is intended to confer, *Inter alia,* special protection against eviction on tenants of the premises to which the particular legislation applies. In such cases, the fact that the tenancy is terminated in the manner laid down in the Transfer of Property Act is not sufficient to entitle the landlord to sue for eviction and certain statutory requirements must be satisfied. The tenant is entitled to remain in possession *by statute* which is the origin of the expression "statutory tenancy".

The converse question, namely, whether where the requirements of the Rent Control legislation justifying eviction have been fulfilled, it is also necessary that the tenancy should have been determined in the manner prescribed by the Transfer of Property Act is a difficult one. Judicial decisions on the subject, on a cursory study, show that the position is not very clear.[1] The matter is, however, really suitable for being dealt with in the local Rent Control legislation, by providing either that the Rent Control legislation does not entitle the landlord to sue for eviction without a formal termination of the tenancy, or by providing that where the Rent Control legislation applies, formal termination of the tenancy is not required.

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1 See discussion in *Duttopant,* A.I.R. 1975 S.C. 1111, 1113, 1114, paragraphs 12 to 14.

CHAPTER 97

WAIVER OF FORFEITURE

SECTION 112

97.1. *Introductory*—The Act has two sections dealing with waiver relevant to action resulting in termination of a lease. These sections are based on the principle that action resulting in such termination essentially depends on the will of the party who took such action and can therefore be withdrawn. Section 112 deals with waiver of forfeiture. It reads—

> "112. A forfeiture under section 111, 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."

97.8. *Section* 112, *first proviso—Recommendation*—Criticising the language of the first paragraph of section 112, Mulla[1] has pointed out that the first proviso to section 112 makes it clear that the word "forfeiture" as used in section 112 does not mean the same thing as "forfeiture" as defined in section 111(g). He states that under section 111(g), two things are necessary for forfeiture, namely, (i) the happening of any of the three specified events, and (ii) the giving of notice by the lessor. There is no forfeiture under section 111(g) until there is a notice given by the lessor. Now, if the landlord has already given a notice after knowing of the breach, the first proviso to section 112, which requires that the lessor must be "aware that the forfeiture has been incurred" is, according to Mulla, meaningless, because there cannot be forfeiture under section 111(g) without the knowledge of the lessor.

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1 Mulla (1973), page 756.

Mulla further states[1] that it will be more accurate to say that in the case dealt with in section 112, there is a waiver *of the breach, disclaimer or the insolvency,* rather than to state that there is a *waiver of forfeiture.* He also adds that in the leading English case,[2] Baron Bramwell observed that the expression "waiver of forfeiture" is not strictly accurate. We agree with the criticism made by Mulla for the reasons given by him. Even though the point is of a verbal nature, we are of the view that in order to preserve the symmetry of legislative language, it is desirable that section 112 shoud be cured of this defect by a suitable re-draft.[3]

97.3. *Section* 112—*second proviso*—The first provision to section 112 raises no further problems. Under the second proviso to section 112, 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. Mulla has explained[4] that this proviso results from the principle that an election once made in favour of forfeiture is irrevocable. The lessor when he has knowledge of the breach may take time to make his election, but once he has made the election either by express words or by an unequivocal act, the election is irrevocable. By giving notice and filing a suit on the ground of forfeiture the lessor has determined the lease and no subsequent act of the lessor may amount to a waiver. This proviso needs no change of substance.

97.4. *Revised Section* 112—In the light of what we have said earlier,[5] our recommendation is to revise section 112 as under :—

"112. (1) *Where the lessor becomes entitled under section* 111(*g*) *to terminate the lease by forfeiture on the ground of a breach or renunciation of character by the lessee or adjudication of the lessee as an insolvent, and the lessor is aware that such breach, renunciation or adjudication has taken place, the right of the less or so to terminate the lessee is waived* —

(a) by acceptance by the lessor of rent which has become due *since such breach, renunciation or adjudication; or*

(b) by distress *by the lessor for such rent;* or
[*Section* 112, *Main paragraph in part re-modelled*]

(c) by any other act on the part of the lessor showing an intention to treat the lease as subsisting.

[*Section* 112, *first proviso*]

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1 Mulla (1973), page 756.
2 *Croft* v. *Lumley,* (1858) 6 House of Lords Cases 672, 705.
3 See revised draft in para 97.4 *infra.*
4 Mulla (1973), Page 759
5 Para 97.2, *supra.*

[*Section* 112 *Main paragraph in part*]

(2) *Where the lessor has already terminated the lease by forfeiture on such ground, the forfeiture is waived by the acceptance of rent, distress or other act mentioned in sub-section* (1) *after such termination and the lessee shall hold the property leased as if the forfeiture had not occurred.*[1]

[*Section* 112 2*nd proviso*]

(3) *Notwithstanding anything contained in sub-sections* (1) *and* (2), where rent is accepted *by the lessor* after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver for the purposes of those sub-sections".

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1 *Cf.* section 114.

CHAPTER 98

WAIVER OF NOTICE

SECTION 113

98.1. *Section* 113–*Waiver of notice to quit*—The next case of waiver is dealt with in section 113. Notice to quit may be waived under the section which reads—

> "113. A notice given under section 111, 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 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.

98.2. *Recommendation as to statutory tenancies under Rent Acts.*—In connection with this section, it is to be noted that where Rent Acts are in force, the acceptance of the "rent" may be attributable to the statutory tenancies created by such Acts,[1] and not to an intention to waive the notice. It is desirable that section 113 should be modified to leave scope for excluding such cases, by adding an Explanation worded suitably.

98.3. *Recommendation.*—In order to avoid misunderstanding and unnecessary continuance of the controversy in future, we recommend that the following Explanation should be added to section 113—

> *"Explanation.—The acceptance by the lessor of rent which has become due in respect of the property since the expiration of the notice does not amount to waiver of the notice, where such acceptance can be attributed to the fact that the lessee has, under any law relating to the control of rents and protection of tenants against eviction, a right to continue in possession notwithstanding the giving of the notice"*

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1 *Panchanan Ghose* v. *Haridas,* (1954) 58 C.W.N. 438;
Mahadeo Prasad v. *Sulekha,* A.I.R. 1954 Cal. 404;
Pulin Behary v. *Lila Dey,* A.I.R. 1957 Cal. 627;
Narayana Iyengar v. *Subba Rao,* A.I.R. 1958 Mys. 113;
Jagannath v. *Sayed Abdul,* A.I.R. 1962 Ass. 148.
Bhagwatisinghji v. *Keshulal* A.I.R. 1963 Raj. 113;
Bhagat Ram v. *Keshab Deo,* A.I.R. 1965 Ass. 55.
And see *Ganga Dutt Murarka* v. *Kartik Chandra Das,* (1961) 3 S.C.R. 813: A.I.R. 1961 S.C. 1067.

CHAPTER 99

COMPENSATION FOR HARASSMENT OF LESSEE

SECTION 113A (NEW)

991.1. *Need for provision as to harassment.*—Before proceeding to the next section, we would like to refer to the need for a provision in the Act as to the harassment of tenants by landlords. At the time when the Act was passed,—and for a long time thereafter—economic conditions did not create any such situation as would induce the lessor or the lessee to take the law into his own hands. The Act therefore proceeds on the assumption that whatever be the nature of the dispute as to the rights of the parties, such disputes will be settled before courts properly constituted and that no extra judicial means will be resorted to unilaterally by the parties to precipitate the matter. Conditions have, in certain respects, changed. Occasionally, circumstances arise where one of the parties, disregarding the scheme of the Act and the implicit assumptions of the legal system, attempts to take private means to force the other party to surrender his rights or to compromise them.

99.2. *Reasons for amendment.*—We have, at the moment, in mind the harassment sometimes resorted to by landlords in order to force the tenants to increase the rent or to vacate the premises. Some provisions on the subject, of course, are found in Rent Control legislation, but it seems to deal with important matter on an all India basis. While it would be inappropriate to include, in the Transfer of property Act, any penal provision on the subject, it would be proper to allow compensation for nuisances or other illegal acts calculatde to interfere with the peace or comwort of the lessee or members of his household, or for withdrawing or withholding services reasonably required for the occupation of the lease premises.

99.3. *New Section 113A.*—In the light of the above discussion, we recommend a new section to be inserted as section 113A, as follows :

"113A. *If the lessor, with intent to cause the lessee of any premises—*

(a) *to give up the occupation of the premises or any part thereof; or*

(b) *to refrain from exercising any right or pursuing any remedy in respect of the precises or any part thereof;*

commits any nuisance or does any other illegal act calculated to interfere with the peace or comfort of the lessee or members of his household in the enjoyment of the premises or withdraws or withholds services reasonably required for the occupation of the premises for the purposes of the lease, the lessee shall be entitled to compensation from the lessor for the loss caused by such act."

Explanation.—In this section, "lessee" in relation to any premises, includes a person continuing in the premises after the termination of the lease by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession of the premises.

CHAPTER 100

FORFEITURE FOR NON PAYMENT OF RENT

100.1. *Introduction.*—We referred in the introductory discussion in this Report to the influence of equity on the development of the law of property and on the evolution of a few of its important doctrines. The section which we now propose to deal with furnishes an illustration of one such important doctrine of equity. The development of the jurisdiction to grant relief against penalities and forfeitures is well known. The common law had treated these as technical and draconian rules. Equity, however, readily gave relief where monetary compensation was an adequate remedy in lieu of the penalty or forfeiture provided under a contract. A distinction was drawn, as in the modern law, between penalties *in terrorem* and a pre-estimation of damages. When it came to forfeiture under conditions annexed to common law estates, the same criterion of compensation still applied, though technical distinctions between conditions and limitations, and conditions precedent and subsequent, sometimes complicated the basis on which relief was granted.

It is a general principle of equity that wherever a penalty is provided to secure the performance of an act, the latter is considered as the principal intent of the instrument, and the penalty is deemed to be intended only to secure such performance. On this principle, relief was granted against forfeiture of leases. The principle is that where the forfeiture of a lease and re-entry for the forfeiture is stipulated for in a lease, in case of non-payment of rent, the right of re-entry is deemed merely as a security for the payment of the rent.[1-2]

100.2. *Section* 114.—Section 114 deals with relief against forfeiture for non-payment of rent, in these terms :

"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 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 asking such payment within fifteen days, the court may, in lieu of making 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.'

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1 Story, Equity Jurisprudence (1920 Edition), paragraphs 1314, 1315, 1316 A.I.R. 1924 Lah. 49.

2 Story, Equity Jurisprudence (1920 Edition), paragraph 1315.

100.3. *Prior law.*—The principle on which this section is based was applied even before the passing of this Act.[1] For example, the Bengal Rent Act[2] provided for relief against forefeiture in these terms :

> "In all cases of suits for the ejectment of a raiyat or the cancelment of lease, the decree shall specify the amount of the arrear, and if such amount together with interest and costs of suit be paid into court within fifteen days from the date of the decree, execution shall be stayed."

100.4. *No change.*—No change is needed in the section.

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1 *Mohamed Ameer* v. *Peryag Singh* (1881) I.L.R. 7 Cal. 566, 570 (D.B.).
2 Section 78, second paragraph, Bengal Rent Act (10 of 1859).

CHAPTER 101

FORFEITURE FOR BREACH OF OTHER COVENANTS

SECTION 114A.

101.1. *Introductory.*—Forfeiture of a lease on ground of breach of a covenant other than one for payment of rent is subject to certain restrictions. The relevant section 114A was introduced in 1929, and because of its somewhat[1] incomplete content, the section has been the cause of considerable obscurity and practical difficulties. These difficulties are, in part, due to the fact that worded negatively, the section fails to tell us what happens when the restrictions imposed thereby are complied with. It is framed in terms of a bar against *a suit* (a suit for ejectment), but it is totally silent about the status of the lessee in the meantime. In the order of section, it follows section 114 and, is to some extent, coloured by the concepts which form the basis of that section, but even in that regard it fails to adhere fully to the scheme of section 114. For example, unlike section 114, it does not enact that if the notice given by the lessor under the section is complied with, the lease continues. On a literal reading, section 114A would give the impression that all that it is concerned with is the fate of *a suit* for ejectment. It is non-committal about the fate of the lease, read literally. This position is juristically unsatisfactory, since the parties' substantive rights ought to be as much the concern of the law of forfeiture as their judicial remedies. This is how the section reads :—

> "114A. Where a lease of immovable property has determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy,
>
> requiring the lessee to remedy the breach; and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.
>
> Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing, of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

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1 See para 101.3 and 101.4, *infra*.

101.2. *Notice.*—If one goes by the questions that appear on the surface, one may note that considerable difficulty has been caused by the provisions relating to notice under section 111(g) and notice under section 114A. That the object of the two notices is different, is well-established. The notice under section 111(g) is intended to communicate the intention of the lessor to terminate the lease on the specified ground, while the notice under section 114A is intended to give an opportunity to the lessee to avoid forfeiture in cases where a breach of condition is committed and such a breach is capable of being remedied. In this sense, a notice under section 111(g) is a different notice from that under section 114A.[1] There has arisen some controversy on the question whether two notices are required for these two purposes, or whether one notice should do. After stating that the law was not beyond doubt, two eminent judges—Rajamannar, C.J. and Venkatarama Aiyar, J.—in aMadras case,[2] observed that they were inclined to agree with a Calcutta decision[3] that two notices were not necessary. Actually, however, in the Madras case, there were two notices—one of the 7th July, 1948 and the other of the 27th August, 1948—and the High Court read the two notices together and held them to have satisfied the requirements of both the sections.

There is, however, an Assam case specifically holding that one notice is enough.[4]

101.3. *Relationship.*—We are not so much concerned with the question whether two notices are required or whether one notice is enough—although it may be not always be easy for a layman to draft the notice in such a way that one single notice would combine the requirements of section 111(g) and those of section 114A. Our intention is to deal with a more fundamental question, namely, what ought to be the exact relationship, in point of time between the action taken under section 111(g) and the action required under section 114A? To frame our query in still more fundamental terms, what exactly is the time when the termination of lease ought to take place where the case falls under section 114A. Should the lease come to end by the notice given under section 111(g), so that the notice given under section 114A and the proceedings contemplated by that section should merely deal with matters of procedure, such as *enforcing the remedy of ejectment*? Or, do considerations of fairness require that the lease should not come to an end until the requirements of section 114A and the formalities therein have been gone through? This query is not merely academic, because on the view which one takes depends how the section ought to be redrafted. Apparently these matters were not fully thought of when the amendment of 1929 was initiated. The observations in the Report of the Special Committee merely refer to the English statutory provision—section 146, Law of Property Act 1925—without going into the juristic questions which have now been put forth above. We describe these ques-

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1 *Chandra Nath* v. *Chulai Pashi*, A.I.R. 1960 Cal. 40 (S. K. Sen, J.).

2 *Mrs. Margaret* v. *G. A. R. Stain*, A.I.R. 1953 Mad. 313, 315, paragraph 7.

3 *Pravat Chandra* v. *Bengal Central Bank Ltd.*, A.I.R. 1938 Cal. 589.

4 *Kshiroda Sundari* v. *Bhupendra*, A.I.R. 1961 Assam 70 (Deka, C.J. & Mehrotra, J.).

tions as juristic, because on them depends the fundamental issue, namely, when does the lease come to an end and what is the proper terminology to be adopted in the two sections—111(g) and 114A from the juristic point of view.

101.4. *Under-leases.*—The difficulty caused by the present unsatisfactory position becomes more acute when one comes to consider the effect of forfeiture on under-leases. The general rule which find specific recognition in section 115, is that if the lease is terminated by forfeiture, then the under-lease is also annulled, except in certain specific cases.

Now take forfeiture governed by section 114A. If the lease is taken as determined as soon as the requisite notices are given, then the date of consequential annument of the under-leases is the date of such notices. The savings in section 114A, which protects the lessee to a limited extent a suit for ejectment, does not, *by its terms,* give any protection to the under-lessee. What, then, is to happen if the lessee complies with the notice and remedies the breach ? Are the under-leases which are to be taken as terminated (under section 115) to be taken as revived ? If so, where is the express provision in that regard ? We are raising this query to show how it is very necessary for the purposes of section 114A (leases) as well as for the purposes of section 115 (under-leases) to take a definite stand as regards the date of effectiveness of the forfeiture to which section 114A applies. The existing provisions, it cannot be disputed, are incomplete, since they leave the position ambiguous.

101.5. *Possible alternatives*—How can a definite stand, then, be evolved? One possible approach on the subject could be that the lessor must first give a notice of his intention to determine the lease under section 111(g), and that, after such determination, he must give, before a suit for ejectment, a notice containing the ingredients required by section 114A. On this approach, termination of the lease would come first, and the object of the notice under section 114A would be to give the lessee an opportunity, *even after the termination of the lease, to remedy the breach.* If this approach is to be adopted, section 114A would need change. The provision in section 114A, unlike section 114, says nothing about the lessee holding the property as if the forfeiture had not occurred (if the breach is remediable). Some such provision would have to be inserted to make the law self-contained. It will also be necessary to deal with under-leases[1] specifically. The demerit of this approach is that it is cumbersome, inasmuch as the lease is first terminated, then the termination is cancelled and then the lease is revived. The fortunes of the lessee fluctuate.

101.6. *Another alternative*—Another possible approach is that not withstanding the present working which has a flavour of *procedural* law, the true juristic position is that the lease should not come to an end until notice is given under section 114A, (allowing time to the lessee to remedy the breach) and until the lessee fails to comply with notice to remedy the breach if it is capable of being remedied. (to avoid confusion, we are, for the moment, leaving out of discussion, the situation of "irremediable breach").[2]

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1 Para 101.4, *supra.*

2 See para 101.9, *infra.*

On this approach, it is the notice under section 114A that assumes primary importance. If the breach is capable of remedy, the termination does not take place until reasonable time has elapsed. This approach takes notice of the fact that section 114A is not a mere procedural provision. It give the lessee an opportunity to remedy the breach.[1] If the lessee complies with the notice and remedies the breach, the lease is not determined at all. If he does not comply with it, the lease determines *at the end of the notice period.* The true juristic position is that termination of the lease, at least in the case of a breach which is remediable, does not become effective until the period of the notice expires. The lessee knows his position definitely.

We have, after careful consideration, come to the conclusion that this would be a far better and simpler approach. It would make the law neat. One, and only one, contingency rules at a time and the contingencies are not numerous, nor cumbersome. Apart from that, it would be faithful to the spirit underlying the equitable doctrine of relief against forfeiture.

101.7. *Re-drafting required*—If this course is adopted, then it is necessary to redraft section 114A so as to the frame it in terms of the postponement of forfeiture, instead of the present working which assumes that the lease *has been determined* and purports to deal with ejectment. The major defect in the present drafting of section 114A is that while it deals, in a negative manner, with the case where the lessee fails to comply with it, it does not deal in a positive manner with what is to happen if the lessee complies with the condition given in the notice under section 114A. In our view, the proper approach should be that if the lessee complies with the notice, the lease does not terminate. If so, it is obvious that the section requires re-drafting. Even if the intention is that the lease comes to an end but is capable of being revived retrospectively if the notice is complied with, the section should be more expressive than at present.[2] In our opinion, however, as already stated,[3] it would be simpler and better to adopt the approach that termination is not effective until the expiry of the notice period. Such an approach gives full effect to the benevolent object of the provision in section 114A, in contrast with the other approach that the lease already comes to an end, which is a narrow and unnecessarily technical approach.

101.8. *Calcutta Case*—We are basing our approach on considerations wider than mere judicial precedents, but we are happy to find that certain observations in a Calcutta case[4] strongly support it.[5] Ramendra Mohan Datta, J. observed as follows in that case as to the status of the lease :—

> "The scope of section 114A contemplates that to be a valid notice it must signify the lessor's intention to determine the lease; it must specify the breach which is capable of remedy; and reasonable

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1 *Sakuntalammal* v. *Chandrasekar* A.I.R. 1968 Mad. 195. 198. 199.

2 See para 101.5 *supra.*

3 Para 101.6 *supra.*

4 *Dooni Lal* v. *Giniya Devi,* A.I.R. 1970 Cal. 452. 458. paragraph 36 (Ramendra Mohan Datta, J.).

5 For draft amendment, see para 101.15, *infra.*

time must be given to the lessee to remedy the breach by the said notice. Otherwise the notice would be bad. The cause of action to file a suit would not *arise and the lease would continue as before.*"[1]

Dealing with the question whether the amount to be due during the period of the notice under section 114A could be properly described as "rent", he observed :—

> "In my opinion, until the expiry of the reasonable period as provided in the notice, the *lessee would remain liable to pay rent*[2] and in receiving such rent there would be no question of the forfeiture being waived, and that is the reason why there is no express provision for waiver of forfeiture under section 114A as is provided by section 112 of the Transfer of property Act in respect of forfeiture under section 111, clause (g), of the said Act."

He also dealt with the expression "where a lease of immovable property has determined by forfeiture" in section 114A, and explained that "it conveys the meaning that so far as the lessor is concerned he is doing all that he is required to do under section 111, clause (g), but whether the *lease will stand determined by forfeiture or not will depend upon whether the lessee will comply with the notice or not.*"[3]

The marginal note to section 114A has also been criticised in the same Calcutta judgment.

101.9. *Irremediable breach*—So far, we have assumed that the breach is capable of remedy. As regards the special situation where the breach is not capable of being remedied, all that is required, on a combined reading of section 111(g) and section 114A, is that the lessor must give to the lessee notice in writing specifying the particular breach. If it is his case that the breach is not capable of remedy, naturally he is not bound to allow the lessee any further time. In such a case, the law does not compel postponement of termination for any further period. Of course, there must be compliance with the relevant part of section 114A, but this involves no postponement.

101.10 *Irremediable breach in England*—In England, it has been held[4] that certain breaches are, by their very nature, irremediable—for example, user of the premises for immoral purposes. That was a case of user by the tenant and *that too, knowingly.* In a later case,[5] an innocent tenant granted a sub-lease and the sub-lessee used the premises for immoral purposes, and the breach was regarded as capable of remedy.

101.11. *Immoral purposes*—Incidentally, as to user for immoral purposes, section 3 (2) (a) of the Suppression of Immoral Traffic Act[6] in India provides that any person who, being the tenant, lessee, occupier or

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1 Emphasis added.
2 Emphasis added
3 Emphasis added.
4 *Rugby School* v. *Tannahill*, (1934) All. E.R. (Reprint) 187.
5 *Glass* v. *Kencakes Ltd.*, (1964) 3 All. E.R. 807.
6 The Suppression of Immoral Traffic in Women and Girls Act, 1956.

person incharge of any premises, uses, or knowingly allows any other person to use, such premises or any part thereof as a brothel, shall be punishable on first conviction with imprisonment for a term which may extend to two years and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and also with fine.

Sub-section (3) of this section further provides that notwithstanding anything contained in any other law for the time being in force, on conviction of any such person for the said offences in respect of any premises or any part thereof, any lease or agreement under which such premises have been leased out or are held or occupied at the time of the commission of the offence, shall become void and inoperative with effect from the date of the said conviction.

Under section 18(1) of the Act, a competent Magistrate may, on receipt of an information that any house, room or place within a distance of two hundred yards of any "public place" mentioned in sub-section (1) of section 7, is being used as a brothel or for carrying on prostitution, pass orders directing eviction of the occupier within 7 days of the passing of the order from the house, room, place or any portion thereof.

Sub-section (4) of section 18 further provides that notwithstanding anything contained in any other law for the time being in force, when a magistrate passes such an order, any lease or agreement under which the house, room, place or portion is occupied at the time shall become void and inoperative.

Section 18(1), proviso provides that if the Magistrate finds that the owner, lessor or landlord was innocent of the improper user of the house, room, place or portion, he may cause the same to be restored in the owner, lessor or landlord with a direction that the house, room, place or portion shall not be leased out, or otherwise given possession of, to or for the benefit of the person who was allowing the improper use therein.

We are referring to these provisions only because leases for immoral purposes have figured in English cases relating to forfeiture.[1] It is needless to say that the provisions in the Suppression of Immoral Traffic Act apply whether or not the lease contains a covenant on the subject.

101.12. *Indian law as to irremediable breach*—In our Act, section 114A, clause (b), limits the operation of the section to a breach which is capable of remedy. *Prima facie,* therefore, the question will, as in England, be a question of fact. Substantial interference with the property leading to its partial destruction may, for example, be irremediable. Breach of a covenant to insure or a covenant to repair would, speaking generally, be remediable. In fact, it is the breach of a covenant to repair against which relief is principally given by the section, since, before the amendment of 1929, such relief could not be granted.[2]

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1 Para 101.10, *supra.*

2 *Debendra Lal* v. *Cohen,* A.I.R. 1926 Cal. 908.

101.13. *Two notices*—It is now proper to discuss the technical question whether two notices are required under section 111(g) and section 114A, or whether one notice should do. Although it would lead to avoidance of confusion in practice if the first notice calls upon the lessee to remedy the breach and the second notice, on failure to remedy the breach, determines the lease, that, of course, is not mandatory in law. One and the same notice can comply with section 114A and section 111(g), provided it is borne in mind that forfeiture of the lease is not effective until the requirements of section 114A are satisfied. The lessor may, if he so chooses, state in one and the same notice that the lessee has committed a breach of covenant and therefore he determines the lease, but he must allow the lessee a reasonable time to remedy the breach. Further, in order to ascertain whether the forfeiture is effective or not, he must wait until the time allowed under section 114A has expired. In this sense, it is not the lessor who lays down the effective date of termination, but the law. The lessor must, of course, comply with both the sections, and it is immaterial whether the same notice combines the two formalities, or whether two different notices are given. But the termination of the lease will not depend merely on the notice under section 111(g), but also on compliance with section 114A.

101.14. *Obscurity*—The following extract from a Calcutta judgment[1] illustrates the obscurity that is felt to prevail at present :—

> "*In Pravat Chandra Syam's* case ante, R. C. Mitter and Biswas, JJ., held that one written notice is required, reading sections 111(g), and 114A together—not one under the former and another under the latter; the reason being that section 114A 'added to the statute by the amendment of 1929' only defines the form in which the notice has to be given under section 111(g). Some fourteen years later Rajamannar, C.J. and Venkatrama Aiyar, J. in *Wood* v. *Spain* ante 'are inclined to agree' with this view 'though there is room for doubt'. The Judgment is the judgment of the learned chief justice whose doubt I share, if I may say so with the greatest respect. Do these sections say in any manner that what is provided for is only a form of notice? I am afraid not. Both confer substantive rights : one, section 111(g), in a positive from on the lessor, and another, section 114A, in the negative form, or the lessee. A negative form, as section 114A confers a right on the lessee to the extent that it imposes a bar on the lessor. In any event, I do not read this to mean that two notices are bad. I read this to mean that two notices are not essential and that one combined notice satisfying the requirements of section 111(g) and 114A is too good. Mr. Ghosh sees an insuperable difficulty in drafting such a combined notice Mr. Gouri Mitter does not. Nor do I. Here am I, a lessor, telling my lessee—You have broken an express condition X which provides that on breach thereof I may re-enter. I therefore, determine the lease and notify you so in writing of my intention. Section 111(g) receives effect. In the same notice, I tell him further X, the particular breach I complain of, is capable of remedy. And I require you to remedy it. Section 114A receives effect too. So where is the drafting difficulty? If I, no draftsman, can draft it, counsel and solicitors—draftsmen all—can do it for better."

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1 *Godabari Devi* v. *Nand Kishore*, (1969-70) 74 C.W.N. 531, 571, para 102 (Bijavest Mukherjee, J.).

If the correct position is stated by us above is borne in mind, such controversies could be avoided.

101.15. *Recommendation*—In the light of what we have stated above, we recommend that section 114A should be revised as under :—

"114A. *Postponement of forfeiture in certain other cases*— Where a lease of immovable property is under clause (g) of section 111 sought to be forfeited for a breach of an express condition which provides that on breach thereof the lessor may re-enter, *such forfeiture shall not be effective and the lease shall not determine,* unless and until the lessor has served on the lessee a notice in writing—

CHAPTER 102

EFFECT OF SURRENDER AND FORFEITURE

102.1. *Section* 115.—115 reads—

> "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 enforceably by the lessor.
>
> The forfeiture of such a leaseannuls 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 114."

102.2. *Effect of surrender.*—Surrender being a voluntary act, the principle applies that the lessee cannot derogate from his own grant, he cannot, by surrender to the lessor, destroy the rights that he has created in the sub-lease.[1] The surrender, therefore operates as a grant subject to the rights of the sub-lease.

102.3. *Persons in adverse possession.*—The effect of a surrender on persons in adverse possession against the lessee has raised a controversy in England *Walter* v. *Yalden*[2] held that a surrender operates as an assignment, and the lessee can give a title to his lessor by surrender only to the same extent as he could to a stranger by an assignment. This was, however, upset in 1963 by a judgment of the House of Lords.[3]

The decision in *Walter* v. *Yalden* was rendered in a case where the question arose whether surrender affected a person who had acquired a title by adverse possession against the lessee. It was held that he could not be affected until the lease determined in the ordinary course, for the lessee could not, by surrender, give to the lessor what he (the lessee) had not got himself. *St. Marylebone Property Co.* v. *Fairweather,*[4] the House of Lords has overruled *Walter* v. *Yalden* (*Lord Morris dissenting*).

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1 *Suleman Haji* v. *Dareb Shaw*, A.I.R. 1939 Bom. 98; Bom. L.R. 125; *Premier National Bank* v. *Bhairodin Sethia*, (1950) I.L.R. 1 Cal. 226; *Mohammed Ibrahim* v. *Dani Madhav*, A.I.R. 1951 Cal. 126.

2 *Walter* v. *Yalden*, (1902) 2 K.B. 304.

3 *St. Marylebone Property Co.* v. *Fairweather*, (1963) A.C. 510, 546; (1962) 2 All. K. B. 288 (H.L.).

4 *St. Marylebone Property Co.* v. *Fairweather*, supra.

Mulla has stated[1] that the view taken in *Walter* v. *Yalden* was correct, and that the decision of the House of Lords ignores the maxim that *nemo dot quod non babet and* enables a lessee to collude with the lessor so as to prejudice third parties.[2] He agrees with the minority view of Lord Morris.

102.4. We also think that the minority view is correct. The logic of the minority opinion is that the landlord has no claim to immediate possession except by virtue of the surrender; and that the tenant has no power to surrender what he has not got, namely, an immediate title as against the squatter. The tenant's title against the squatter has been extinguished by statute. How then, consistently with the principles of property law within which the statute must operate, can the tenant confer upon the landlord a good title against the squatter? After the adverse possessor has possessed the land for twelve years he has, by Act of Parliament, a good title as against the person dispossessed.

H.W.R. Wade's comment is instructive.[3] How can it be denied that the landlord claims through the tenant, as the tenant's successor in title, *during the residue of the surrendered term*? *Without the surrender,* the landlord had no immediate title to possession at all; for, as Lord Redcliffe explained so clearly, the Squatter can plead the lease against him (the lessor). After the surrender the landlord has a new element in his title, but that new element is unquestionably derived from the tenant, *vis* the surrender. It is only on this new element that the Landlord's claim to possession can be founded. It, therefore, seems very difficult to dispute that the landlord claims through the tenant and so is subject to the squatter's estate to the same extent as the tenant, i.e., until the need of the term of the lease.

102.5 In this context, there is a difference between forfeiture and surrender. A forfeiture, of course, operates by fulfilling a *condition* and so making exercisable *a paramount right of re-entry* gested in the landlord from the beginning, which is a conditional legal interest binding on all comers, squatters included. A surrender is, however, something quite different, for it can only operate in favour of the landlords as a successor in title to the tenant.

We would, therefore, agree respectfully with the dissenting judgment of Lord Morris and find ourselves in substantial agreement with the view of H.W.R. Wade and Mulla.

102.6. *No change.*—We have discussed this point as one of some interest, theoretical as well as practical. No changes, of course, are needed in the section.

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1 Mulla (1973), Comment on section 115.

2 See the dissenting judgment of Lord Morris; and Wade. "Landlord, Tenant and Squatter" (1962), 78 L.Q.R. 541; also (1962) 78 L.Q.R. at pp. 33, 38.

3 H. W. R. Wade in 78 L.Q.R. 541, 550, 551.

CHAPTER 103

HOLDING OVER

SECTION 116

103.1. *Introductory.*—After the termination of a lease by any of the modes laid down in section III,—some of which are more particularly dealt with in sections 112 to 115—the lessee may still continue in possession of the premises. If such continuance is without the consent of acquiescence of the lessor, the person so continuing has no legal status. Occassionally; such a person is described as a "tenant by sufferance", but the expression "tenant is strictly speaking a misnomer, because no tenancy in the sense of a *right of enjoyment* arises either by contract or by statute in such a situation The lessor can immediately institute legal proceedings for his eviction. This could only be on the basis that he is a trespasser.[1]

The position is, however different where there is consent or acquiescence on the part of the lessor. If the consent is express, further statutory authority for the tenant's continuance is not required, but it is still necessary to define the terms on which the tenant is to continue—in so far as such terms are not the subject matter of a fresh contract. The more frequent situation, however, is of acquiscence by the lessor. It is then essential to define the terms on which the lessee is to continue in possession.

103.2. *Holding over.*—The matter is dealt with in section 116. It seeks to define the terms on which a lessee who is allowed by the lessor to continue in possession after the termination of the lease, will hold the premises. The legal name devised is "holding over", but it must be understood that it is an essential ingredient fo rthe application of that doctrine that the lessor must have given his assent, express or implied, to the continuance in possession of the lessee.

103.3. *Renewal and its terms.*—Holding over is a bilateral transaction. The effect, stated in broad terms, is that the lease is "renewed". This, in general, implies that the terms of the prior lease continue to apply—but there is an important refinement and an important qualification in this regard. The refinement is as regards the duration of the renewed lease. The qualification is as regards the notice required for the termination of the renewed lease. We shall deal with these two aspects later[2-3] both furnishing an interesting illustration of the much maligned labour saving device of "referential legislation."

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1 (a) *Deputy Commissioner* v. *Vishan Dayal*, A.I.R. 1919 Oudh 278.
(b) *Maganlal* v. *Bhudar*, A.I.R. 1927 Bom. 192.
(c) *Punjab National Bank* v. *Chaudhry*, A.I.R. 1945 Oudh 392, 395.

2 Para 103.5 to 103.9, *infra.*

103.4. *Section* 116.—The section reads—

> "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 represntative accepts rent from the lessee or "under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement of 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 106.

Illustrations

(a) A lets a house to B for five years. B under-lets 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."

103.5. *Period.*—We begin with the points that most frequently arise on the section. Questions have arisen often as to period of the renewed lease. In the absence of an agreement to the contrary, the period of the renewed lease is to be governed by section 106 the scheme of which, it may be recalled, is based on the purpose of the lease. This refinement is based on the purpose of the lease. This refinement is to be expressly found in section 116. As to the period of notice, the reference in section 116 to section 106 is not so explicit, but the better view[1] is that the provision in the old lease (as to period of notice) is not operative, and the matter is governed by section 106. These matters of detail require some discussion.

103.6. *Obscurity as to period of notice.*—First, we may note that there seems to be a fair amount of obscurity related to the meaning of two expressions of vital importance used in section 116, namely, "in the absence of an agreement to the contrary" and "as specified in section 106". When the tenant holds over and the lease is considered as renewed under section 116, what is the position where the original lease made certain specific provisions as to its termination—say, by providing for three months' notice contemplated by section 106? Obscurity arises in this regard because it is not clear whether the words "in the absence of an agreement to the contrary" in section 116 are to be projected back as to cover also the contrary provision in the *original lease*. The obscurity also arises from the fact that the reference in section 116 to section 106 is, on one possible construction, to be taken as confined to the *period of the tenancy*,—year to year or month to month—and nothing definitely is stated about the *period of notice* to be given for termination of the lease.

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1 See para 103.6, *infra*.

103.7. *Conflict of decisions.*—Judicial decisions on the subject are not uniform. In an Allahabad case,[1] a lease for manufacturing purposes provided for three months' notice instead of the usual six months' notice. The lessee held over. It was held that the provision for three months continued to apply, the reason being that the words "in the absence of an agreement to the contrary" refer not only to the existence of an agreement as to the terms of holding over, but also as to the period of notice. It may be noted that in the Allahabad case, Ghulam Hasan and Kaul, JJ. dissented from an earlier Calcutta case[2-3] taking a contrary view.

In contrast, there are decisions [4-6] which take the view that the provision in the original lease waiving or reducing the period of notice is not carried over to the reviewed lease under section 116, Transfer of Property Act.

103.8. *True position—recommendation.*—On a careful consideration of the matter, it seems to us that it is not the intention of the legislature that the provision as to the duration of lease contained in the original lease should also be attracted where section 116 governs the matter. While provisions like a convenant to pay rent in advance or a convenant for repair or a provision for re-entry on non-payment or rent can be taken as incorporated in the renewed lease, the time by which the lease shall expire, should not be held to be a term of the tenancy arising by holding over under this section.

In order to avoid further controversy in the matter, we recommend that a suitable sub-section should be inserted[7] in section 116, after renumbering the present section as sub-section (1).

103.9. *Special law.*—At this stage, we may refer to a suggestion relevant to the section. It has been stated that in view of the special provisions of the Bombay Rent Act, 1947, the landlord is not entitled to claim possession of the premises except under the provisions of the Rent

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1 *Suiti Devi* v. *Banarsi Das*, A.I.R. 1949 All. 703 (Ghulam Hasan and Kaul, JJ.).

2 *Dasarathi Kumar* v. *Sarat Chandra*, A.I.R. 1934 Cal. 135.

3 Other cases are :

(a) *Manmohan Nath* v. *Peary Mohan*, A.I.R. 1919 Cal. 54 (Fletcher & Walmsley, JJ.).

(b) *Badal* v. *Ram Bharose*, A.I.R. 1938 All. 649.

(c) *Lalman* v. *Mt. Mullo*, A.I.R. 1925 Oudh 173, following *Khuda Baksh* v. *Abid Hussain*, 12 Oudth Cases 279. (Pandit Sundar Lal, J.C.).

4 *Ram Lachan Baid* v. *Kumar Kamakhya Narain Singh*, A.I.R. 1923 Pat. 201.

5 *Kodali Bapayya* v. *Yadavalli Venkata*, A.I.R. 1953 Mad. 884, 887.

6 *Smt. Saila Bala Dassee* v. *H. A. Tappassier*, A.I.R. 1952 Cal. 455.

Venkataramaiah, Judge High Court of Karnataka).

Act. In other words, the Rent Act superimposes a disability on the landlord as to claiming possession, except on the grounds mentioned in the Rent Act, and the Rent Act does not create any new rights as such. It is further stated that it often happens that even after the notice to quit, the landlord accepts the rent and the Bombay High Court has taken the view that mere acceptance of rent after the operation of the Bombay Rent Act, would not lead to the result that there is a fresh tenancy. There is no special provision in the Rent Act, as such on the subject. In view of the Bombay ruling, mere acceptance of rent after the determination of the lease is no ground for holding that the tenancy is renovated. In the absence of any special provision under the Rent Act, however, section 116 of the Transfer of Property Act has got to be considered; and the section *makes no exception in favour of any special law.* The suggestion is that for the sake of clarification,[1] a proviso should be inserted in section 116 to the effect that the first part of the section *would not apply to a case where the relations of the landlord and tenant* are governed by any special Act. We appreciate the desirability of a specific provision on the subject.[2] We would provide that mere acceptance of rent attributable to rent control legislation should not be construed as holding over.

By way of example of the correct position, we may refer to a recent case[3] holding that unless the tenant prove that the landlord consented to his continuance in *possession as a tenant,* mere acceptance of rent after termination of the original tenancy would not suffice to create a new tenancy, where the tenancy is governed by rent control legislation.

103.10. *Recommendation to add the words "in writing"*—It has been stated[4] that the words "otherwise assents to his continuing in possession" have been responsible for the assertion of untenable please and delay in the disposal of cases. This, it has been suggested, can be remedied by adding the words "in writing" after the words "assents" and before the words "to his".

We have, after careful consideration, decided to accept the suggestion in substance and we recommend that it should be adopted in a modified form—we would put it as a matter of written evidence. Although it would, in one sense, narrow down the scope of the section, it would introduce a test which will lead to greater certainty in practice, and we think that *so far as acts other than the acceptance of rent are concerned,* certainty is desirable to avoid disputes and that they should be evidenced in writing.

103.11. *Recommended redraft*—The following redraft of section 116 is recommended in the light of the above discussion :—

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1 File No. F. 3(3)/55 L.C. Part I, S. No. 76(iv)—Suggestion by Shri R. K. Ranade, District Judge, Kolhapur.

2 See discussion in 49 C.W.N. (Journal) 52, commenting on the case in 49 C.W.N. 430, 433.

3 *Hari Prasad* v. *Mathmal Chunilal,* (1974) Mah. L.J. 637 (cited in the Yearly Digest) following A.I.R. 1961 S.C. 1067.

4 File No. 3(3)/55-L.C. Part I (S. No. 93) (Suggestion by Mr. Justice E. S. Venkataramaiah, Judge High Court of Karnataka).

"116. (1) 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 *by an act evidenced in writing* assents to his continuing 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 are property is leased, as specified in section 106.

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 *evidenced in writing.* B's lease is renewed from year to year.

Exception.—Where, by virtue of legislation relating to the control of rents and protection of tenants against eviction, the lessee or under-lessee is entitled to continue in possession after determination of the lease, nothing in sub-section (1) *shall apply to such lessee or under-lessee, where the acceptance of the rent is attributable to such legislation.*

(2) *Subject to the provisions of sub-section* (1)—

(a) *the provisions of section* 106 *shall apply as to the termination of the lease governed by that sub-section, and*

(b) *the terms of the lease that has determined shall not apply for the purpose of termination of the lease governed by that sub-section.*"

CHAPTER 104

AGRICULTURAL LEASES
SECTION 117

104.1. *Section* 117.—Section 117 reads

"117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the State Government may, by notification published in the Official Gazette, declare all or any of such provisions to be so applicable in the case of all or any of such leases, 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."

104.2. *Reasons.*—The reasons for this special provision were thus explained in their Report of 1879 by the Law Commissioners[1] :

"Local legislation as to the relations of zamindar and raiyat being so copious and elaborate, we think that the provisions of this Chapter should not apply to leases for agricultural purposes, except in so far as the local Government may declare all or any of such provisions to be so applicable, together with, or subject to, those of any local law for the time being in force."

104.3. *Test.*—In determining the question whether the lease is for "agricultural" purposes, the test is not the actual use of the land, but the original purpose of the lease.[2] Every lease relating to agricultural land is not necessarily for an agricultural purpose. Regard must be had to the purpose for which it is let out.[3]

104.4. *Meaning of 'agriculture' according to the Dictionaries.*—Several definitions of agriculture are met with in the dictionaries and in the case law. According to Bouvier's Law Dictionary, "agriculture is the cultivation of soil for good products or for any other useful or valuable growths of the field or garden."

This is a fairly wide definition.

Wharton's Law Lexicon adopts the definition of agriculture in B Edw. VII C. 36 as including "horticulture, forestry and the use of land for any purpose of husbandry etc." In 10 Edward VII C. B.S. 41, it was defined so as to include the use of land as meadow or pasture land, orchard, or osier

1 See Report of the Second Law Commission, 1879.
2 *Bhikari* v. *Kashinath,* I.L.R. (1964) Cut. 289, 294; (Misra J.).
3 *Batakrushna* v. *Kunja Behari,* A.I.R. 1954 Orissa 132, 134.

or wood land, or for market gardens, nursery grounds or allotments, etc. In 57 and 58 Vic. C. 30, section 22, the term "agricultural property" was defined so as to include agricultural land, pasture and woodland, etc.[1]

Agriculture, according to the Oxford English Dictionary,[2] is the science and art of cultivating the soil, including the allied pursuits of gathering in the crops and reading live-stock : tillage; husbandry; framing (in the widest sense). According to Webster's Dictionary, agriculture means "the act or science of cultivating the ground including harvesting of crops and rearing and management of live-stock; tillage; husbandry; farming; in a broader sense, the science and art of the production of plants and animals useful to man including to a variable extent the preparation of these products for man's use. In this broad use it includes farming, horticulture and forestry together with such subjects as butter and cheese-making, sugar-making, etc."[3]

104.5. *Case law.—In Murugesa Chetti* v. *Chinnathambiza,*[4] in the course of the judgment, it was observed by Bhashyam Iyengar, J., that the term "agriculture" was used in its more general sense (in section 117) as comprehending the raising of vegetables, fruits and other garden products, as good for man and beast. His observations were intended to bring the betel garden under the term "agriculture", and not to *exclude* something which was not food for man or beast.

In *Jagdish Chandra Sanyal* v. *Lal Mohan Poddar,*[5] the definition of Webster was approved and two American cases were also mentioned as having followed that definition, though it is not clear for what purpose.

In a Madras case[6] Spencer J. observed :

"Agriculture connotes the raising of useful or valuable products which derive nutriments from the soil with the aid of human skill and labour, and thus it will include horticulture, arboriculture and sylviculture in all cases where the growth of trees is effected by the expenditure of human care and attention in such operations as those of ploughing, sowing, planting, manuring, watering, protecting etc."

104.6. The Judicial decisions to which we have made a reference above[7] adopt a wide meaning of the word agriculture. According to its wide meaning, the term will include horticulture, forestry, and even the use of land for pasture.[8] The Madras case of 1922 also supports the wider view.

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1 Material taken from judgment of Ramesam, J. in *Avvadi Pathan* v. *Ramaswami Chetti,* A.I.R. 1922 Mad. 351, 353.

2 Murray, Oxford English Dictionary, cited in (1902) I.L.R. 25 Mad. 627, 629.

3 Webster.

4 a. *Murugesa Chetti* v. *Chinnathambi Gounden,* I.L.R. 24 Mad. 421, 525.

5 *Jagdish Chandra Sanyal* v. *Lal Mohan Poddar,* (1910) 13 C.L.J. 319; 7, C. 364.

6 *Avvadi Pathan* v. *Ramaswami Chetti,* A.I.R. 1922 Mad. 351, 352.

7 Para 104.4, and 104.5, *supra.*

8 *Imam Ali* v. *Ram Priyawati Devi,* A.I.R. 1937 Nag. 289, 290.

According to its limited meaning, it is confined to the raising of grain or other fields crops. In the Act, there is nothing to indicate that it is intended to limit the denotation of the term in any way,[1] in general the decisions have interpreted the term as including horticulture.[2-3].

But there is not much case law to show whether it includes forestry or dairy farming.

104.7. *No change.*—Since the concept of "agricultural purposes" is a crucial one in the scheme of the Chapter on leases, we would have liked to insert a definition, if possible. A precise definition would have been a "gem of high price"—to quote Lord Denning's description of an ideal definition in another context. But, with the exception of Bouvier,[4] the available materials do not suggest a basis for a precise definition. We, therefore, leave the matter as it is.

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1 *Burugesa Çhetti* v. *Chinnathambi Goundan,* (1901) I.L.R. 24 Mad. 421, 426 (per Shephard J.).

2 A.I.R. 1937 Nag. 289, 290.

3 *Auvadi Pathan* v. *Ramaswami,* A.I.R. 1922 Mad. 351.

4 Para 104.4, *supra.*

CHAPTER 105

EXCHANGE

SECTIONS 118 TO 121

105.1. *Section* 118.—Three specific types of transfer have been dealt with so far. The next to be dealt with is exchange. Section 118, which is not confined to immovable property, reads—

> "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 the transfer of such property by sale."

Exchange is generally kept distinct from sale. The distinction between sale and exchange has its genesis in, and significance for the purpose of, economics. Historically, barter precedes sale.

Speaking from the point of view of economics, the intrinsic value of the property given in exchange, as distinguished from its market value, would vary according to the purpose for which, or the necessity in view of which the exchange was effected.[1] Property other than money, in other words, carries an economic value which is not precisely defined as in the case of money. Moreover, a particular goods or house may mean much more to X than to another person Y. In this sense, the market value and value to the transferee may differ from each other.

105.2. *Criticism of section* 118.—In section 118, the phrase "neither thing is money only" does not seem to be very expressive. What the draftsman meant was that of the two things, none should be money, or both should be money only. This idea is obscured because the expression "only" has to be read *in both the parts*. The present language creates problems where money is a part, but only a part,[2] of the consideration for the transfer of a "thing" and the rest of the consideration is in kind. Literally, the transaction becomes an exchange,—e.g., a house exchanged for a house *plus* a substantial amount of money. In this case, niether thing is "money only" and the test of section 118 is satisfied if taken literally. But that has not been the Judicial construction and would be unrealistic.

The expression "only", while appropriate where *both the things are money*, ceases to be so when read in connection with "neither things". The definition as given in the Act turns out to be too wide in this sense.

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1 *Sumer Bahadur* v. *Jeet Lal*, A.I.R. 1924 All. 390, 391 (Lindsay and Kanahiya Lal, JJ.).

2 See para 105.6, *infra*.

105.3. *Expression "Price".*—The draftsman could have employed the expression "price". It may be noted that section 54 (so far as is material), defines a sale as a transfer *for a price*. In relation to goods, "price" is defined in section 2(10) of the Sale of Goods Act, 1930, as money consideration for the sale of goods. Incidentally, in this connection, it is to be noted that the definition in section 118 is not confined to immovable property.[1] The expression "price" could thus have been made use of. While the Contract Act—now, the Sale of Goods Act[2]—and the Chapter on sale in the Transfer of Property Act, follow a certain drafting style, the definition of exchange in section 118 is founded on a different legislative source—The New York Civil Code.[3]

105.4. As the Supreme Court observed in a case[4] arising under the Income-tax Act—the observations of the Supreme Court take note of section 118 also—

> "It is clear therefore that both under the Sale of Goods Act and the Transfer of Property Act, sale is a transfer of property in the goods or of the ownership in immovable property for a money consideration. But, in exchange, there is a reciprocal transfer of interest in the immovable property, the corresponding transfer of interest in the movable property being denoted by the word 'barter'. The difference between a sale and an exchange is this, that the former *the price is paid in money*, whilst in the latter, it is paid in goods by way of barter (Chitty on Contracts, 22nd Edn., Vol. II. page 582)."

105.5. *Main situations.*—The position will be clearer if the main situations are borne in mind—

(a) neither thing is money;

(b) both are money only;

(c) one is money, but the other is not money;

(d) one is money, but the other is not *money only*.

The intention, of course, is that (a) and (b) are exchanges, but (c) is not. As regards (d)—consideration partly in money and partly in kind—difficulty arises, as set out above.

105.6. *Consideration partly in money.*—The question whether a transaction is a sale or exchange, may be important not only under the Act, sections 55 and 119—but also in regard to the right of pre-emption, and, often in regard to assessment of income-tax. Where the consideration for a

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1 *C.I.T.* v. *Motor & General Stores*, A.I.R. 1968 S.C. 200, 203.

2 See para 105.4, *infra*.

3 Statement of Objects and Reasons, dated 10th May, 1877.

4 *Income-tax Commissioner* v. *Motor and General Stores Ltd.*, A.I.R. 1968 S.C. 200, 203, paragraph 3 (on appeal from A.I.R. 1965 A.P. 342).

transfer of property is partly money and partly other property and the consideration is entire and indivisible, it may be necessary to decide whether the transaction is to be treated as a sale or as an exchange. There is, generally, a right of pre-emption[1] only where the transaction is a sale—though, if there is a custom to that effect, pre-emption is allowed even in cases of exchange. Let us examine in brief the case law on the subject.

105.7. *Case law as to part consideration in money.*—In an Allahabad case,[2] it has been held that the transaction would be an exchange and not a sale (for the purpose of pre-emption), even if the purpose of adding the non-pecuniary portion of the consideration is to defeat the right of pre-emption. A similar view has been taken in later cases of the same High Court.[3-4]

Thus, A sells property to B for Rs. 2,000 and on the same date, B sells his property to A for Rs. 4,000—the amount being made up of (i) Rs. 2,000 for A's property, (ii) Rs. 1,400 by way of satisfaction of a prior decree against B in favour of A's mother, and (iii) Rs. 600 in cash. In the event of defect of title, A was to receive from B Rs. 2,000, and not his property. It was held that this was an exchange, with a potentiality of sale only in some circumstances.[5]

105.8. *Test of substantial part.*—The Lahore cases, on the other hand,[6-8] show that if the value of the non-pecuniary consideration forms only a negligible portion of the total consideration, the transcation would be a sale.

According to the Lahore view, if the parties, in substance, intended to make an exchange of properties, the mere fact that a small sum of money was paid by one to the other by way of adjusting the values, would not alter the nature of the transaction as an exchange. For example, where a house worth really Rs. 1,500 was transferred for land worth Rs. 500 and cash Rs. 500, the transaction was held to be an exchange.[9]

105.9. *Recommendation.*—We agree, with respect with the view that the fact that part of the consideration was in kind does not necessarily make the transaction an exchange, if the monetary consideration is substantial. To make the section reflect more accurately the true position, our recommendation is that "Exchange" should be defined as follows :—

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1 *Cf. Agra pre-emption Act* (11 of 1922).
2 (1947) All, L.J. 592, cited in the Digest.
3 *Ram Badan Lal* v. *Kunwar Singh,* A.I.R. 1938 All. 229, 231. (Bennet, Ag. C.J. & Ganga Nath, J.).
4 *Randhir Singh* v. *Randhir Singh,* A.I.R. 1937 All. 665. (Sulaiman, C.J. & Bennet, J.).
5 (1947) All. L.J. 592.
6 *Nihalu* v.*Bhagwana,* A.I.R. 1936 Lah. 234.
7 *Allah Dita* v. *Kaji,* A.I.R. 1934 Lah. 823.
8 *Gul Mohammad* v. *Tota Ram,* A.I.R. 1915 Lah. 218.
9 *Ismail Shah* v. *Saleh Mohammad,* A.I.R. 1925 Lah. 236, 237.

"118. When two persons mutually transfer the ownership of one thing for the ownership of another and neither thing *is money*. . . . . or both the things are money only, the transaction is called an exchange.[1]

(Second paragraph as at present)

Explanation.—Where ownership of a thing other than money is transferred for a consideration which consists only in part of money, the transaction is an exchange if that part is not substantial in proportion to the rest of the consideraion."

Section 119—*Rights arising on defect in title.*

105.10. Section 119 deals with one of the rights arising on exchange. It provides as follows :—

> "119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration."

In terms, the section contemplates a case of one of the parties to the exchange being, by reason of any defective title of the other party, deprived of the thing received by him in exchange. The principle underlying the section applies also to the case where instead of a subsequent *deprivation* of the property transferred, there is no transfer at all. It has been held[2] that it would impliedly follow from section 119 that when a party to an exchange has failed to obtain possession of the property which he was entitled at his option for the return of the property transferred by him, if this property is still in possession of the other party or his legal representative or a transferee from him without consideration the principle applies.

We do not, of course, suggest any change in this regard.

105.11. *Section* 120—*Recommendation for verbal change.*—Section 120 equates exchange to sale in other respects, as regards rights and liabilities. It needs no change of substance, but a minor verbal lacuna should be rectified. The section should read—"Save as otherwise provided in this Chapter, each party *to an exchange* has the rights....."

We recommend accordingly.

105.12. *Section* 121.—Section 121 reads—

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

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1 Second paragraph as at present.

2 *Ch. Seetaramaswamy* v. *Narasingha Panda*, (1974) (1) C.W.R. 234 (B. K. Patra and K. B. Panda, JJ.) (cited in the Yearly Digest).

It will be recalled that where *both the things are money,* the transaction is an exchange, as defined in section 118. Since the transfer of money for money is not a sale,[1] the provisions of the law relating to the sale of goods do not apply, so that conditions and warranties implied by that law have no relevance to an "exchange' of money. There was, therefore, need for a specific provision on the subject. This need arises from the nature of money that is legal tender. Legal tender money is that which the creditor must accept—also he has to forgo his claim to payment. This renders it all the more necessary[2] that the recipient must have a legal protection in regard to genuineness of the money.

105.13. *Title.*—As to title to money, the clearest exception to the rule *nemo dat* is to be found in current coin of the realm and negotiable instruments, which are, for this purpose, treated as the same. *Currency* or the circulation of money concerns the idea that directly any individual coins pass into circulation, the very act of circulation destroys the title of the former owner and creates a title *de novo* in the person acquiring the coins in discharge of a monetary obligation. Circulations is the "stream of Lethe", and it is the fact of circulation which gives us the exception to the rule, and not that "money had no earmark" as is commonly said.[3] This statement of the law is true as to the position in India also.[4]

But this exception applies only if the transferee of the coin or negotiable instrument takes it in good faith for value and without notice of a defect in the title of the transferor.

105.14. *No change.*—We have no further comments on this section—except that because of its being in an obscure corner in the Transfer of Property Act, many laymen, —and even lawyers—are unaware of this important provision.

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1 *Emperor* v. *Jogessur,* (1878) I.L.R. 3 Cal. 379, 382.

2 *Cf. Jones* v. *Ryde,* (1814) 15 R.R. 561, 564, 566.

3 Vaines, Personal Property (1973), page 161.

4 (a) (1878) Punj. Rec. No. 73, page 235, 237;

(b) (1890) Punj. Rec. No. 83, page 259, 261.

CHAPTER 106

GIFTS : GENERAL OBSERVATIONS

SECTION 122

106.1. *Introductory*—The next Chapter in the Act, which deals with gifts, is a short one, but has raised serveral interesting problems. Many of these problems could, with respect, have been avoided if courts, and counsel arguing before courts, had paid more attention to basic principles[1] underlying the Act and to some of the important express provisions of the Act. Some of the problems are due to defective or incomplete drafting, or to failure to bring upto date some of the sections in the light of the amendment made in 1929 in regard to the transfer of actionable claims.

106.2. *Basic principles-Idol*—To take an example of a controversy which is due to an inadvertent disregard of a basic principle, let us refer to the debate that went for a long time as to the precise status of a gift to a Hindu idol. It is a basic principle that the Act deals with transfer to a "living person".[2] If this principle is kept in the forefront not much effort is required to come to the conclusion that the definition in section 122 cannot apply to a dedication to an idol as such.[3]

106.3. *Drafting*—As regards incomplete expression in drafting, we may note that while the definition of 'gift' in section 122, is, in terms, wide enough to cover gift of *all types of property*, it is the next chapter—beginning with section 130—that is really applicable to gifts (as well as other kinds of transfer) of *actionable claims*. Section 130, after its amendment in 1929, is explicit on this point. However, when in 1929, section 130 was widened on the point, there was no consequential amendment in section 123 so as to exclude gifts of actionable claims from the scope of section 123 (formalities of gifts). We are pointing out this omission not in any over-critical spirit, but in order to indicate how some High Courts, with respect, have failed to notice that any question relating to the formalities for effectuating a gift of an actionable claim (e.g. money with a bank), should be decided with reference to section 130, and not with reference to section 123. We shall revert to this aspect again[4], when we consider section 123.

106.4. *Savings in section* 129—Some questions of difficulty have arisen out of the savings contained in section 129, to the effect that nothing in this chapter shall be deemed to affect any rules of Mohammedan Law. This part of section 129 has remained unchanged ever since the Act was passed—we are not concerned with the amendment relating to Hindus that was made in 1929. Since the Act was passed, two important developments have taken place : one is the passing of the Muslim Personal Law (Shariat) Act in 1937, and the other is the constitutional provision in article 14. We need not, at this stage, go into the details of the relative controversies. But we are mentioning this point in order to indicate the scope of the discussion that will ensue[5] and the nature of the controversy that it will embrace.

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1 Para 106.2, *infra*.

2 Section 5.

3 See, further, discussion as to section 122, *infra*.

4 See discussion as to section 123, *infra*.

5 See discussion as to section 129, *infra*.

106.5. *Section* 122—So much by way of introduction. The definition of gift is contained in section 122 which reads as follows :—

> "122. 'Gift' is the transfer of certain existing movable or immovable 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."
>
> "Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.
>
> If the donee dies before acceptance, the gift is void."

106.6. *Section* 123, *first paragraph—idols*—The first paragraph of the section incorporates the principle that a gift is *gratuitous* transfer of property from one person to another.[1] First and foremost, it must be a transfer. And the transfer must be to a living person—section 5. This itself is enough to exclude "dedication" to an idol from the scope of the definition of gift in the section.

106.7. *Theory of Hindu law as to dedication*—There is also another aspect to be considered in connection with dedication. The theory of ancient Hindu law is that a dedication is intended to benefit the public in whom the spirit of God is said to reside. It is to the universal soul which pervades all beings. The idol is not, in theory, the donee, though it is so regarded for the sake of convenience. This is the reason why[2] it has been held that the deity is immortal and a Hindu debutter will not fail even if the image be broken, stolen or lost. The dedication, as was held by Venkatarama Ayyar J.[3] confers a spiritual benefit on the worshippers.

106.8. *Chhandogya Upnishad*—In the Chhandogya Upnishad,[4] this is what is stated regarding the persons who benefit by a religious offering :

"अथ युक्तदेव विद्वान् अग्निहोत्र जुह्वोति नस्थ सर्वेणु लोकेषु भूलेषु आत्मसु हुंत भवति यथेइ क्षुधिता बाला मातंर सयीमि पर्यूपासते स्वांगि भूताध्या ग्निहौत्रभुपासत इत्याग्नि होत्रभुपासन इति ।"

The following is a free rendering of the above :

> "He who persents an oblation, has made an offering in all world in all beings, in all souls . . . . . As in the world hungry infants press round their mother, so do all beings await the holy oblations. They await the holy oblations.[5]

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1 Gifts are always gratuitous; Grants are upon some consideration or equivalent, 2 Blackstone's Commentaries 440.

2 *Mahant Ram Saroop Das Ji* v. *S. P. Sahi*, A.I.R. 1959 S.C. 951.

3 *Deokinandan* v. *Murlidhar*, A.I.R. 1957 S.C. 133.

4 Chhandogya Upanishad, quoted in *Ramalinga* v. *Sivachidambara*, (1919) I.L.R. 42 Mad. 440, 442.

5 *Ramalinga* v. *Sivachidambara*, I.L.R. 42 Mad. 440, 442.

The usual religious formula pronounced by every Hindu male or female, on the occasion of any offering or feeding, is that it is made to God :

"सर्वान्तर्यामी भगवान् श्रीहरिः जनार्दनः प्रीयताम्"

"He is watching within all beings"

106.9. *Meaning of "voluntarily"*—The word "voluntarily" in the section bears its ordinary popular meaning, denoting the exercise of an unfettered free will.[1] Perhaps, the idea is derived from Roman Law. Gift in Roman Law is an alienation "which is made without the law compelling you to do it,"—*quod nullo jure cogente conceditur.*[2] "They are completed when the giver has openly declared his intention whether in writing or not..... if no delivery took place, they should be fully and completely valid; the necessity of delivery should rest upon the giver."[3]

Some obscurity has been created as regards the exact scope of the expression "voluntarily". Of course, the expression is not used in the sense in which it was used in the Court of Chancery as a transaction without consideration.[4] It would seem to indicate free will.

In a Privy Council case,[5] however, it was observed that though the transaction was induced by undue influence, it does not necessarily follow that it was not made voluntarily. The Privy Council observed that a transaction of gift, which is the result of undue influence, would not be void, but would only be voidable. In that case, on the facts, no undue influence was found.

We do not, however, with great respect to the Privy Council, agree with the view that a transaction induced by undue influence is still to be taken as "voluntary". Undue influence may require proof of ingredients different from those of coercion or fraud, but the principle is the same—the quality of consent is impaired, and it is difficult to agree with the approach that where undue influence is present, and the quality of will is thereby impaired, the donor still acts "voluntarily".

A gift is, of course, "voluntary" in the sense that no donor can be forced to take any steps towards the completion of the gift. A person declaring that he will make a gift in future, may or may not carry out his declaration. There is no legal obligation. But this does not, in our view, exclude the other implications of "voluntarily".

106.10. *Undue influence*—We may add that as to the specific question of undue influence, the Supreme Court has held[6] that the law relating to undue influence in the case of a gift, *inter vivos*, in the same as that in the case of a contract.

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1 A.I.R. 1939 Rang. 76, 80.
2 Digest 50.17, 82.
3 Justin II. vii. 2.
Tyabji, Muslim Law (1968), page 304 (footnote).
4 *U Thita* v. *U Arasena*, A.I.R. 1938 Rang. 76.
5 *Ram Chandra* v. *Lakshman*, A.I.R. 1945 P.C. 54, 56.
(Judgment by Madhavan Nair, J.).
6 *Subhash Chander* v. *Ganga Dass*, A.I.R. 1967 S.C. 878.

106.11. *Second and third paragraphs—Acceptance during lifetime and death before acceptance—Recommendation*—Under the second paragraph of section 122, it is necessary that the acceptance must be during the "lifetime" of the donor. Similarly, under the third paragraph, if the donee "dies" before acceptance, the gift is void. The expressions "lifetime" and "dies" are obviously not appropriate for artificial legal persons. Although the legislature has, by suitable amendment in section 5 extended the concept of "living person", the extension has not found a corresponding reflection in section 122. It should, we think, be so reflected. We, therefore, recommend that the two paragraphs should be suitably amended to meet the point discussed above.

106.12. *Revised draft of section* 122—The following is our revised draft of the section in the light of what is stated above :—

"122. (1) 'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another *person,* called the donee, and accepted by or on behalf of the donee.

(2) such acceptance must be made during the life *or existence* of the donor and while *the donor* is still capable of giving.

(3) If the donee dies *or ceases to exist* before acceptance, the gift is void."

CHAPTER 107

FORM, VALIDITY AND EFFECT OF GIFTS

SECTION 123 TO 128

107.1. *Section* 123—After the definition of gift in section 128, follow a few sections, concerned with the form, validity and effect of gifts. First, as to form, section 123 provides as follows :

> "123. For the purpose of making a gift of immovable 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.
>
> For the purpose of making a gift of movable 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."

107.2. *Exclusion of actionable claims*—Our first recommendation as to section 123 is to exclude actionable claims from the scope of this section.[1] In support of this recommendation[2] it is enough to state that gifts of actionable claims are, at least as regards their formalities, governed by section 130.

107.3. *Second paragraph—movable property*—Secondly, the second paragraph of the section requires that where movable property is not transferred by delivery of possession, then it is necessary that there must be a registered instrument for the purpose. In our opinion, the requirement of registration is unnecessary; an instrument in writing should be enough for making a gift of movable property. Parties may procure registration if they so choose. But it should not be an obligatory formality in the case of movable property, and writing should suffice. It may be that registration ensures publicity, but in the case of movable property we do not think that this can be a conclusive consideration. Against any advantage that may be obtained by way of publicity must be counter-balanced the inconvenience resulting from a mandatory requirement of registration.

No doubt, there is an alternative mode, namely, delivery. But if the gift is in writing, registration should not be insisted on. It can perhaps be argued that the requirement of registration is intended to prevent coercion, but it can be stated, in reply, that a person who wants to overpower the will of the donor or to practise deception can compel or induce the donor to make a gift *by delivery*. It appears to us that the requirement of registration is unnecessary in the case of movable property. A written instrument should do.

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1 See section 130.

2 For draft, see paragraph 107.9, *infra*.

In order to keep a safeguard for solemnity, attestation may be provided for by way of abundant caution. We recommend accordingly.[1] Our recommendation to abolish the requirement of registration in case of gift of movable property is subject to reservation by Shri Sen-Varma.

107.4. *Postponement of registration*—Thirdly, postponement of registration is immaterial to the validity of a gift. Where a gift has been effected by a registered instrument duly attested and the gift has been acted upon by the donee, the title legally passes to the donee and cannot be defeated by any intention of the donor to the contrary.[2] Thus, in a case where the gift deed was deposited with the Registrar, but was taken away by attacking the Registrar, it was held that the gift was completed, and could not be superseded by a subsequent registered deed.[3]

We shall deal with this aspect under section 126, where we discuss the question of revocation after acceptance.

107.5. *Expression relating to signature*—Next, as to the expression "signed by or on behalf of the donor", some comments are required. The Act has used different expressions in different sections to indicate signature. Thus, in section 130, the words used are—"signed by the transferor or his duly authorised agent". In section 59, the expression used is "signed by the mortgagor". In sections 54 and 107, there is no reference to the signature of *the transferor*. It has been observed by the Allahabad High Court[4] that the words "on behalf of" have been loosely used in section 123, and must be construed on meaning only a signature by a person duly authorised by the donor. We agree, with respect, with this construction. We do not, however, recommend a change in the section on this point, because in our view the position is clear.

107.6. *Joint account of husband and wife*—Finally, we may now refer to an interesting subject which involves several branches of law—family law, trusts, transfer and banking. Controversies often arise as to whether there is a gift where the husband deposits money in bank under a joint account with his wife which is payable to either or survivor. No doubt there cannot be a gift unless there is an intention to make a gift. In that sense, it is legitimate to enquire whether the person who deposited the money intended really to make a gift, or whether he still wanted to retain control over the money. For this purpose, it is even permissible to consider the applicability of various doctrine, such as the English doctrine of advancement,[5] the provisions of the Indian Trusts Act relating to resulting trusts, the Indian practice

1 This is subject to reservation by Shri Sen-Varma.

2 *Bhagatrai v. Ghanshyamdas,* A.I.R. 1948 Nag. 328.

3 *Sobhanath* v. *Prithipal,* A.I.R. 1948 Oudh 223, 224; *Narayanaswami,* A.I.R. 1954 Mad. 215.

4 (1902) I.L.R. 24 All. 319, 325, 327 (Stanley, C.J.).

5 As to advancement, see—

(a) *Shambhoonath* v. *Pushkarnath,* A.I.R. 1945 P.C. 10;

(b) *Buram Ditta* v. *Ram Ditta,* A.I.R. 1928 P.C. 172;

(c) *Mujitabi Begum* v. *Mehbub Rehman,* A.I.R. 1959 M.P. 359, 364, paragraphs 29 & 30.

of Benami transactions, and the like. Such enquiry, however, can only be for the purpose of ascertaining the intention of the alleged donor to vest the alleged donee with a beneficial interest in the money. It does not conclude the matter when one comes to consider the validity of the gift from the formal point of view.[1]

107.7. *Formal aspect*—In the undermentioned case,[2] a deposit was made in a bank by the husband in the joint names of himself and his wife in the following terms—"Mr. and Mrs. Hope, payable to either or survivor". It was held that there was no gift of the money by the husband to the wife as *there was no delivery* of the money by the husband to the wife within the meaning of section 123.[3] It was held that the English law, which presumed a gift by the husband to the wife in such a case defeasible on the death of the wife in the lifetime of the husband, was not applicable in India.

In a Bombay case,[4] there was a deposit of money in joint names of husband and wife. Deposit was payable to wife only after the husband's death. It was held that the deposit did not operate as a gift to the wife,[5] as there was no such delivery as was required to make a valid gift, and as the doctrine of advancement was not applicable in India.

107.8. *Nature of bank deposit*—It should, however, be noted that fixed deposit in a bank is not a property *in possession.* It is a "debt" and, as such, an actionable claim. Hence a gift of such deposit is not a gift of movable property in possession, but a gift of an actionable claim. The handing over of a fixed deposit receipt, therefore, is not enough to pass title to the deposit in terms of section 130. The gift must comply with the requirements of section 130 which deals with the transfer of actionable claims.[6] We have already recommended[7] that actionable claims should be expressly excluded from section 123.

107.9. *Recommendation to revise section* 123, *second paragraph*—In the light of what we have stated above, we recommend that section 123, second paragraph, should be revised as follows :—

> "for the purpose of making a gift of movable property, the transfer may be effected either by an instrument *in writing* signed as aforesaid and *attested by at least two witnesses* or by delivery."[8]

Besides this, the following Exception should be inserted below section 123 :—

> *"Exception.—Nothing in this section applies to the transfer of an actionable claim."*

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1 See para 107.7, *infra.*

2 *Mrs. Paul* v. *Nathaniel,* A.I.R. 1931 All. 596, 597.

3 *Mrs. Cowdry* v. *Imp. Bank of India,* A.I.R. 1956 Mad. 56, 58.

4 *Keshavlal* v. *Bai Dahi,* A.I.R. 1943 Bom. 7, 9.

5 *Cf. Krushandas* v. *Bhagwandas,* A.I.R. 1976 *Bom.* 153.

6 *Rajeshwari v. Mohan Bikram,* A.I.R. 1945 All. 409, 411.

7 Para 107.2, *supra.*

8 This is subject to reservation by Shri Sen Varma.

107.10. *Section* 123(*A*) *(New)*—***Unregistered donee***—Before proceeding to the next section, it is necessary to refer to the need for inserting a new section on the subject of incomplete gifts. While discussing section 53A (part performance), we have also discussed the desirability of introducing[1] a provision for the protection of donees who are in possession under an unregistered deed as gift. The relevant provision on the subject, as already recommended in that discussion, could be inserted in the Chapter on Gifts. The section could be suitably numbered as section 123A and worded thus—(This is subject to reservation by Shri Dhavan and Shri Sen-Varma) :[2]

"123A. *Notwithstanding anything contained in section* 123, ***where*** *any person agrees without consideration to transfer any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty:*

and the transferee has, in part performance of the agreement, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession under the agreement;

then, notwithstanding that the agreement though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by section 123 *or by any other law for the time being in force, the transferor or any person claiming under him, shall be debarred from enforcing or maintaining against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continues in possession other than a right expressly provided by the terms of the agreement;*

Provided that nothing in this section shall affect the right of a transferee for consideration who has no notice of the agreement or of the part performance thereof.

Explanation 1.—*For the purposes of this section, it is immaterial whether the transferee or a person claiming under him is a plaintiff or a defendant.*

"Explanation 2.—*A person who obtains or continues in possession, but is dispossessed otherwise than in due course of law, is entitled to the benefit of this section.*

Explanation 3.— *Where property is sold by auction in execution of a decree of a Court, an auction purchaser is a person who claims under the decree holder for the purposes of this section."*

107.11. *Registration Act, section* 49—Section 49 of the Registration Act should also be considered. It reads—

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1 See discussion as to section 53A, Chapter 49, *supra.*

2 Section 125A is subject to reservation by Shri Dhavan and Shri Sen-Varma.

"49. No document required by section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered.

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered, may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

This will require consequential amendment by adding in the proviso a saving for the newly added section as to unregistered deeds of gift.[1]

107.12. *Section* 124—Section 124 provides that a gift comprising both existing and future property is void as to the latter. Even apart from the section, future property cannot be transferred. Thus, future income cannot be transferred before its accrual.[2] These points do not, of course, require any change in the section.

107.13. *Section* 125—According to section 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. We have no comments on this section.

107.14. *Section* 126—*When the gift may be suspended or revoked*—According to section 126, first paragraph, the donor and the 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.

It further provides in the second paragraph—

"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".

The third paragraph provides —

"Save as aforesaid, a gift cannot be revoked."

Finally the section provides —

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

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1 To be carried out under section 49, Registration Act.

2 *Bindraban Behari* v. *Oudh Behari*, A.I.R. 1947 All. 179, 180.

There are two illustrations to the section, which we are not quoting. The essence of the first paragraph is the *agreement* to revoke. The essence of the second paragraph, on the other hand, is the defect vitiating the agreement that was reflected in the gift.

The first paragraph is illustrated by conditional assignments of insurance policies—condition on the donee surviving the donor[1]—a matter now governed by section 38(7), Insurance Act, 1938.

The second paragraph is illustrated by cases in which there are allegations that the donor was subjected to undue influence or that other circumstances leading to a flaw in consent existed.

107.15. *Section 126—third paragraph—Recommendation as to non-registration*—The first two paragraphs of section need no change.

As to the third paragraph, it has now been judicially established[2] that a gift cannot, after acceptance, be revoked, except on the grounds specified in the section, and that this bar against revocation applies even if the deed of gift has not yet been registered.[3]

In other words, the fact that the deed has not yet been registered, does not entitle the donor to revoke it,[4-5] where there are no valid grounds for revocation. The crucial moment seems to be the moment of acceptance of the gift,[6] in the sense that a gift can always be revoked before acceptance, but cannot be revoked thereafter, except in the specified situation.

In Roman law, it was established that a donation is never perfect until it has been accepted.[7] A gift between living persons—*donation inter vivos*—was described as a transaction by which transfer takes place by the mutual consent of the giver, who divests himself of the thing given in order to transfer title to the donee and the donee who accepts and acquires the legal title to it. Acceptance is necessary, because there must be the mutual consent and concurrent will of both parties.

To put the matter in the form of propositions —

(a) A gift can be revoked before acceptance. In fact, before acceptance, there is no effective gift[8] The word "revoked" has to be used here only for convenience.

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1 *In se Khyrunnissa,* A.I.R. 1955 Mad. 450, 460.

2 *Kalyanasundaram* v. *Karuppa,* A.I.R. 1927 P.C. 42.

3 For earlier views, see case law discussed in *Atmaram* v. *Vaman,* A.I.R. 1925 Bom. 210 (F.B.).

4 *Union Bank* v. *Ram Rati,* A.I.R. 1954 All. 594 (Randhir Singh J.).

5 *Atma Ram* v. *Waman,* A.I.R. 1925 Bom. 210 (F.B.) (Majority view).

6 *Venkatasubbamma* v. *Narayan Swami,* A.I.R. 1954 Mad. 215, 217, para 7 (Satyanarayan Rao J.).

7 Bouvier, Law Dictionary (1914) Vol. I, page 924.

8 Section 122.

(b) A gift cannot be revoked after acceptance,[1] except in the specified circumstances, mentioned in the first two paragraphs of section 126.

(c) The fact that the deed of gift has been registered does not, in itself, affect the operation[2] of proposition (a).

(d) The fact that the deed of gift has not been registered does not[3] in itself, affect the operation of proposition (b).

In order to incorporate the true position, as stated in propositions (b) and (d) above, we recommend that section 126, third paragraph, should, in the interests of accuracy and clarify, be revised as follows.

> "Save as aforesaid, as gift cannot be revoked *after its acceptance by or on behalf of the donee, whether or not the instrument affecting the transfer for making the gift has been registered.*"

We should add that Shri Sen-Verma has a reservation as to this recommendation.

107.16. *Section* 127—*Onerous gifts.*—Onerous gifts are dealt with in section 127, which reads—

> "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.

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 obligations, he retains the property given, he becomes so bound."

There are two illustrations to the section—

> "(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 or his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

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1 Section 126, third paragraph.

2 Section 126, first two paragraphs, as interpreted judicially—see *Venkatasubbamma* v. *Narayanaswami,* A.I.R. 1954 Mad. 215, 217 para 7.

3 See case law, *supra, and Papathi* v. *Doraiswami,* A.I.R. 1939 Mad. 290.

(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."

The section needs no change.

107.17. *Section* 128—*Universal Donee.*—Section 128 deals with a universal donee, in these terms :

"128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by, and liabilities of, the donor at the time of the gift, to the extent of the property comprised therein."

107.18. *Principle*—The principal object of this section is to do justice to the creditors of the donor. The section is based on the principle that a man ought to be just before he is generous. If he is only generous, forgetting this maxim, the law will see to it that no injustice is caused to the creditors.

The ordinary principle is that (i) liabilities are not transferable unless the person in whose favour the liabilities exist, agrees, and that (ii) they are not transferable unless the transferee of the liability agrees. Section 128 modifies the second proposition in the case of a universal donee. In a sense, the section follows the maxim of equity, *qui sentit commodum sen tire debet et onus* (he who derives the advantage ought to sustain the burden).

147.19. *Roman law.*—The section reminds us of the doctrines of Roman law. The Roman law recognised many forms of universal succession under which the whole of a man's property, whether consisting of rights *in rem* or rights in *personam* or of both combined, passed to another; and with the property or assets (*bona activa*) passed also the liabilities (*bona passiva*)[1]. In Civil Law, a "universal legacy" was a testamentary disposition by which the testator gives to one or several persons the whole of the property which he leaves at his decease.[2]

Then, there was the concept of "universal succession" "A succession to a universities juris. It occurs when one man is vested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights."[3]

107.20. *No change.*—These points do not, of course, require any change in the section.

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1 Holland, Jurisprudence (6th Edition), page 142.

2 Louisiana Civil Code, article 1606;
Bouvier, Law Dictionary (1914), Vol. 2, page 3375.

3 Maine, Ancient Law, page 179.

CHAPTER 108

DONATIO MORTIS CAUSA AND MUSLIM LAW

SECTION 129

108.1. *Section* 129—Section 129 can be divided into two parts. The first part provides—"Nothing in this Chapter relates to gifts of movable property made in contemplation of death." The second part provides—"Nothing in this Chapter *shall be deemed to affect any rule of Muhammadan Law.*"

The first half of the section which relates to gift made in contemplation of death has raised no problems. The second half, which saves rules of Muslim law, has led to an interesting controversy as to whether it violates the equality clause of the Constitution. The question has been raised whether it is permissible to exclude from the operation of the Chapter gifts otherwise governed by the Muslim law—is not such exclusion a denial of equality before the law? We have to consider three reported judgments of the Patna, Andhra Pradesh and Kerala High Courts. The first two High Courts have expressly or impliedly upheld the validity of section 129 as it stands. The Kerala High Court has held that section 129 can be upheld only if it is "read down" by confining it to Muslim non-secular gifts and it has held that section 129 is to be so read.

The fundamental question is whether the special provision in section 129 saving the rules of Muslim law introduces such discrimination as is impermissible under article 14. The Constitution does not, of course, prohibit discrimination in toto. It permits classification, provided there is a rational nexus between the basis of the classification and the object sought to be achieved thereby. However, on the very question whether classification made by section 129 is a reasonable one, a conflict has arisen, as already stated.

108.2. *Case law.*—First, we take up the Patna judgment,—*Mt. Bibi Maniran* v. *Mohammad Ishaque*,[1] In that case, a division bench of the Patna High Court rejected the argument that section 129 violated article 14 of the Constitution; the High Court held that the classification between Muslims and others was reasonable, having regard to the well-known fundamental differences between the religion and customs of Muslims on the one hand and the religion and customs of others.

In so formulating its reasoning, the High Court relied on a decision of the Supreme Court in *Moti Dass* v. *S. B. Sahi*,[2] which—so far as is material for the present purpose—recognises that the State may make a discrimination based on the above mentioned difference.

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1 *Mt. Bibi Maniran* v. *Mohammad Ishaque*, A.I.R. 1963 Pat. 229 (D.B.).
2 *Moti Das* v. *S. P. Sahi*, A.I.R. 1959 S.C. 942.

108.3. *Andhra view.*—A similar view has been taken by the Andhra Pradesh High Court which has impliedly upheld the validity of section 129. The reasoning in the judgment is quoted below :[1]

> "According to the Muhammadan Law, there can be a valid gift, if three essentials of the gift are satisfied—
>
> (1) a declaration of the gift by the donor,
>
> (2) the acceptance of the gift expressed or implied, by or on behalf of the donee, and
>
> (3) delivery of the possession of the subject of gift by the donor to the donee, if these conditions are complied with, the gift is complete.
>
> According to Muslim law, it is not necessary that there should be a deed of gift in order to make it a valid gift, but of course, if there is a deed it should be registered. But if the deed is merely a memoranda of an already effected gift, then it stands on a separate footing."

Referring to the Kerala Judgment, the Andhra Pradesh High Court observed :

> "In view of this specific provision of Muslim law, which is saved by section 129, it cannot be held that the gifts amongst Muslims also should satisfy the provisions of Chapter VII. There is also no justification for making any distinction between *secular and non-secular gifts*[2] as has been done by the learned Judge in the above decision. Moreover, after the Shariat Act 1937 (Central Act 25 of 1937) the Muslim personal law alone applies in the matter of gifts. In view of this Act, the prior decision in *Ma Asha* v. *B. K. Haldar*[4] cannot be deemed to be correct view. Moreover, it has been held in *Ghulam Ahmed* v. *Mohd. Sidiq*[5] by a full bench of Jammu & Kashmir High Court that after the amendment in 1929 in section 129, the operation of the *provisions of Chapter VII have been excluded in regard to gifts* made[6] by persons professing Muslim faith and made under that law. Hence, if all the formalities as prescribed by Muslim law, regarding the making of gifts are satisfied, the gift is valid notwithstanding the fact that it is oral and without any instrument. If there is a contemporaneous document it should be registered. But if the gift is antecedent and the deed is subsequent merely evidencing the past transactions, it does not require registration, because it does not by itself make or complete the gift. This has already been the view expressed by my

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1 *Chola Uddandu* v. *Masthai B.*, A.I.R. 1975 A.P. 271 273, para 10 (Venkata Rama Sastri J.).

2 Emphasis added.

3 See *Bibi Maniran* v. *Ishaque, A.I.R.* 1963 Pat. 229.

4 *Ma Asha* v. *B. K. Haldar,* A.I.R. 1936 Rang. 430 (F.B.).

5 *Ghulam Ahmed* v. *Mohd. Sidiq,* A.I.R. 1974 J & K 59 (F.B.).

6 Emphasis added.

learned brother Sambasiva Rao, J. in *A. Srisailam* v. *A. Lingamma*[1] I do not find any precedent to support the view expressed by the learned Judge of the Kerala High Court (in A.I.R. 1972 Ker. 27) to make any distinction between gifts which are secular and non-secular in this respect. Hence with great respect to the learned Judge, I am unable to contribute to that view. I have, therefore, to reject the argument of the learned counsel for the appellant, based on the above decision."

108.4. Although the Andhra Pradesh judgment does not discuss the constitutional issue, its express dissent from the Kerala judgement would seem to show that it did not share the Kerala High Court's view as to the constitutional position with reference to section 129.

108.5. *Kerala view.*—As against the Patna and Andhra Pradesh views, we should now refer to the Kerala view. In the Kerala case,[2] the matter was discussed at length by Krishna Iyer J. (as he then was).

It was held that the essentials of a valid gift in Muslim law are (1) declaration of gift by the donor, (2) express or implied acceptance by or on behalf of the donee, and (2) delivery of possession of the subject of gift to the extent it is susceptible of. The declaration of gift need not be by a formal statement, but may be made out by conduct. It was also held that a deed of gift executed by a Muslim *recording a gift* made according to the three conditions laid down by Muslim law is merely *evidence of a completed gift,* and, as such, is not compulsorily registerable and is admissible in evidence, notwithstanding sections 17 and 49 of the Registraton Act.

108.6. *Constitutional question as discussed in Kerala judgment*—On the constitutional question which was argued at great length particularly (but not exclusively) with reference to article 14, it was held that section 129 is valid as read in the light of Part III of the Constitution, *if the ambit of the word 'gift' in section* 129 *is confined to religious and charitable gifts under Muslim law,* because the dual element of classification under Article 14 will then be fulfilled. It was laid down in a considered judgment that unless the section is so "ready down", it would violate article 14, as the High Court saw no reasonable basis for excluding gifts by Muslims from the requirement of registration—section 123.

108.7. *Secular Gifts.*—Thus, according to the Kerala judgment, only such gifts as are non-secular will be exempt from the operation of Chapter 7 of the Transfer of Property Act, including section 123. A Muslim secular gift must, therefore, comply with the requirements of registration, attestation, etc. under section 123. Whatever might have been the content of the word 'gift' in section 129 when it was originally enacted, its meaning has to be gathered today in the constitutional perspective of Articles, 14, 15, 25 and 44, according to this judgment. The Muslim Perso-

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1 *A. Srisailam* v. *A. Lingamma,* (1972) 2 And. W.R. (S.N.) 5. (Sambasiva Rao J.).

2 *M. Rawther* v. *M. Charavil,* A.I.R. 1972 Ker. 27, paras 3, 8, 9, 16, 21, 31 (Krishna Iyer J.).

nal Law (Shariat) Act, 1937[1] was duly noticed, but it was held that the application of Muslim Personal law (applied by the Act of 1937) to gifts does not preclude the application of other laws which do not run counter to the rules of Muslim law. The need for a document, its attestation and registration arose under section 123, Transfer of Property Act and did not run counter to the rules of Muslim law.

It was made clear that the Transfer of Property Act is a pre-Constitution statute and the expression 'gift' in section 129 may, perhaps, save all manner of gifts made prior to the Constitution, the truncated meaning for the word 'gift', being assigned only because of Articles 14 and 15(1).

108.8. *Act of* 1937.—The case law discussed above shows a conflict of decisions. In the ordinary course we would have dealt with the matter and expressed our preference for one or the other of the views. We may, however, not that after the passing of the Transfer of Property Act, there was passed the (Shariat) Act, 1937. Section 2 of that Act has applied Muslim law, *inter alia*, to matters pertaining to gifts by Muslims. Thus, the law on the subject of application of Muslim law is now contained in the Act of 1937. Section 129, latter half, is a *negative* provision *saving* the rules of Muslim law, but the Act of 1937 is a *positive* provision, applying the Shariat to the matters mentioned therein. If due regard is had to the wording of the Act of 1937, this conclusion is inescapable.

Section 2 of the Muslim Personal Law Act, 1937 reads—

> "2. *APPLICATION OF PERSONAL LAW TO MUSLIMS* :
>
> Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land), regarding intestate succession, special property of females, including personal property inherited or obtained under contract of gift or any other provision of personal law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula* and *mubaraat;* maintenance, dower, guardanship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

108.9. *No change in section* 129.—If this is the position, then the question whether section 129, latter half, takes out gifts by Muslims from section 123, and if so, whether such taking out is constitutionally permissible, is only of academic interest. The governing law is to be found in the 1937 Act. Since the Act of 1937 is not under review, we do not express any views as to the validity of section 129, which would only be of academic interest—academic because any textual modification of section 129 would be ineffective without also amending the Act of 1937.

For the same reason, we do not discuss the question whether "law" in which is discussed at length in a Bombay case,[2] and also by other High Courts,[3,4] and which was elaborately dealt with in the Kerala judgment.

In the result, no change is recommended in section 129.

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1 Para 108.8. *infra.*

2 *State of Bombay* v. *Narsu Appa Mali*, A.I.R. 1952 Bom. 85.

3 *Gurdial Kaur* v. *Mangal Singh*, A.I.R. 1968 Punj. 396.

4 *Ram Pershad* v. *State of U.P.*, A.I.R. 1957 All. 411.

CHAPTER 109

ACTIONABLE CLAIMS

SECTIONS 130—137

109.1. *Section* 130—An ordinary transaction of transfer does not involve more than two parties. But there is a species of property which, when it is proposed to be transferred, must involve a third person. That third person is a debtor or other person under liability. Where the debt, i.e. the benefit thereof, is to be transferred a mere bilateral transaction is not enough. The debtor must also be brought into the picture—though he may not be a party to the "transfer". In the terminology of the Act, debts and other choses in action are called "actionable claims". For the transfer of actionable claims, section 130 provides in these terms :

> "130.(1) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor whether such notice of the transfer as is hereinafter provided be given or not :
>
> Provided that every dealing with the debt or other actionable claims by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or had received express notice thereof as hereinafter provided) be valid as against such transfer.
>
> (2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without making the transferor a party thereto.
>
> *Exception.*—Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938.
>
> *Illustrations*
>
> (1) A owes money to B, who transfers the debt to C, B then demands the debt from A, who, not having received the notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.
>
> (2) A effects a policy on his own life with an insurance company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor subject to the proviso in sub-section (1) of section 130 and to the provisions of section 132".

109.2. *Propositions*—The section appears to be simple in its provisions, but it has raised a number of interesting problems, since it provides an exclusive procedure for transferring actionable claims—vide the word "only". Its rigour is, to some extent, modified by section 137, which saves the modes of transfer authorised by the law relating to negotiable instruments and documents of title to goods. That section, however, has created its own problems. The law relating to the transfer of actionable claims has consequently acquired a richness and complexity of which the sparse chapter in the Act does not give an adequate picture.

In a judgment of Ramesam, J.[1], are to be found almost all the propositions of importance on the subject of assignment :

> "To effectuate an assignment of a debt there must be words of transfer in the instrument. A notice to the debtor not containing words of transfer nor referring to a transfer is not an instrument of transfer. An instrument of transfer in general, must be an instrument executed in favour of the assignee. But a transfer can be effected by an endorsement on the bond or other paper evidencing the debt sought to be transferred. Apart from such cases, an instrument of transfer would be addressed to the assignee. But assuming that the instrument may be addressed to the debtor, there must be words operating as a transfer. The fund out of which the payment is to be made should be specified and if no fund is specified, the order does not operate as assignment. The assignment of a debt must be of the whole debt. But the assignment may be absolute or by way of security."

Not all of these propositions have remained non-controversial. But the extract shows pithily the salient features which may require consideration —the necessity of transfer, the mode of transfer, what can be transferred, and the nature of the assignment. In order to appreciate the significance and importance of the present law, it is desirable to have a look at the historical development of the law relating to the transfer of actionable claims.

109.3. *History*.—Three distinct branches of the law have contributed to the evolution of the principles on the subject—

> (a) It was a well-known rule of the common law[2] that no possibility, right, title or thing in action could be granted to third persons, because it was thought that a different rule would be the occasion of multiplying contentions and suits. At common law, a debt was looked upon as a strictly personal obligation. An assignment of a right to bring an action at law against the debtor was looked upon as open to the objection of maintenance.[3]

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1 *Doraiswami Mudaliar* v. *Doraiswami Iyengar*, A.I.R. 1925 Mad. 753 (Ramesam J.).

2 *Kishan Gopal*, A.I.R. 1927 Cal. 447, 448 (C. C. Ghose, J.).

3 Hawkins, Pleas of the Crown, Vol. 1, page 458, cited in Kishan Gopal, A.I.R. 1927 Cal. 447.

(b) After a time, the Common Law Courts recognised the right of any one who had a pecuniary interest in the debt to *sue in the name of the creditor.* This was the limit of their departure from the old strict rule.

(c) But the Courts of Equity took a different view.[1] Courts of equity admitted the title of an assignee of a debt, regarding it as a piece of property, an asset capable of being dealt with like any asset, and treating the necessity of an action at law to get in as a mere incident.[2] Every such assignment was considered in equity as, in its nature, amounting to *a declaration of trust,* as amounting to an agreement to permit the assignee to make use of the name of the assignor in order to recover the debt or to reduce the property into possession.

109.4. *Civil law.*—The doctrine of the Courts of equity is so nearly coincident with the rules obtaining in the civil law and in the jurisprudence of the modern commercial nations of continental Europe that perhaps one may be allowed to quote the following passage from Pothier on Sales[3] (Ed. Cushing) : "A credit being a personal right of the creditor, a right inherent in his person, it cannot, be considered according to the subtlety of the law, be transferred to another person nor consequently be sold. It may well pass to the heir of the creditor because the heir is the person and of all the personal rights of the deceased. But in strictness of law it cannot pass to a third person; for the debtor being obliged towards a certain person cannot, by a transfer of credit, which is not an act of his, become obliged towards another. The jurisconsults have nevertheless invented a mode of transferring credits, without either the consent or the intervention of the debtor as creditor may exercise against his debtor by a mandatory as well as by himself the action which results from his credit. When he wishes to transfer his credit to a third person he makes such person his mandatory to exercise his right of action against the debtor. It is agreed between them that the action shall be exercised by the "mandatory" in the name indeed of the mandator, but at the risk and on the account of the mandatory who shall retain for himself all that be exacted of the debtor in consequence of the mandate without rendering any account thereof to the mandator. Such a mandatory is called by the jurisconsults *procurator in rem suam.* From this it was established in practice that credits might be transferred, given, sold or disposed of by any other title, and it was not even necessary that the act which contains the transfer should express the mandate in which, as has been explained, the transfer consisted".

109.5. *Statute*—The last step was taken by statute law by recognising the transfer of actionable claims, subject to certain formalities. Side by side, there developed the law merchant the rules whereof governed negotiable instruments and mercantile documents of title.

109.6. *Position elsewhere.*—We may now revert to section 130, which requires a writing for effecting the assignment of an actionable claim. In England, there is a broadly similar provision.[4] In some of the States in the United States, to constitute an assignment of a chose in action, no writ-

1 *Row* v. *Dawson*
2 *Prosser* v. *Edmonds.* ....
3 Pothier on Sales (Edited by Cushing) cited in *Kishan Gopal,* A.I.R. 1927 Cal. 447, 448.
4 Section 136, Law of Property Act, 1925.

ing or particular form is necessary, if the consideration be proved and the meaning of the parties be apparent. Therefore, the mere delivery of the written evidence of the debt is enough to constitute an assignment[1] in some States of the U.S.A.

In France, an assignment of a debt must be in writing, the registration duty must be paid thereon and the formal notice in writing must be served (after registration) by an officer of the court called a "huisser". Such notice can be replaced by the debtor's formal acknowledgement in a notarial Frency deed. This passes the legal title to the debt.[2]

109.7. *Requirement of writing.*—It is an essential requirement of section 130 that the transfer—conveniently described in practice as an "assignment"—should be in writing. No particular formula, however, is required. The section does not even provide that a separate document is needed.[3] So long as the intention to transfer is established and finds expression in writing, there is a valid assignment as between the creditor and the alleged assignee. Thus, what is material is (i) an intention to transfer and (ii) its expression in writing. If these requirements are satisfied, the form is immaterial.

109.8. *Instances where separate instruments not required.*—A separate instrument is not required for a valid assignment of actionable claims. Thus, an endorsement on an instrument which represents the debt,[4] can constitute an assignment. An endorsement on a promissory note may operate to assign the debt as well, when the endorsement is so worded, and the requirements of the law with regard to stamping are complied with.

An endorsement on a money bond to the effect 'I have sold the document',[5] or to the effect 'the balance due should be paid into the hands of my son'[6] is enough to constitute an assignment, since the intention to assign exists and is expressed in writing.

This does not, of course, mean that it is always easy to determine the question whether there was an intention to transfer. That question must be answered on the facts of each case.

109.9. *Partition.*—The section does not apply where there is no "transfer". It is well settled that a partition of joint property is not a "transfer" within the meaning of the Transfer of Property Act.[7] It is for this reason that when a promissory note is allotted to the share of one of the coparceners without endorsement or written instrument (section 130), the allotment is still valid. Partition itself can be effected orally, because of section 2(b).[8]

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1 Bouvier, Law Dictionary (1914), Vol. 1, page 484, right-hand column.

2 (1900) 1, 602.

3 See para 109.8 *infra.*

4 *Mohamed Shareef* v. *Abdul Rahiman,* A.I.R. 1966 Mad. 50, para 3.

5 *Firm Nanak Chand* v. *Firm Ram Sarup,* A.I.R. 1924 Lah. 684, 685.

6 (1909) 1 Ind. Cas. 212, 213 (Mad.).

7 *Muthu Veeran* v. *Govindan,* A.I.R. 1961 Mad. 518 (F.B.).

8 *Ganu Santu* v. *Shankar Tukaram,* 71 Bombay Law Reporter 165, 167 (reviews cases).

109.10. *Part of a debt.*—We shall deal later with certain points concerning what is an assignment. In the meantime, let us consider the question—what can be assigned? An important question that requires to be considered relates to assignment of a part of a debt. In England, there is some uncertainty on the question whether, at law, a part of a debt can be validly assigned.[1]

There is nothing in section 130 which prohibits the transfer of a part of debt. Nevertheless, there has arisen a conflict of opinion on the point. In an earlier Calcutta case[2] and in a Patna case;[3] it was held that a part of the debt cannot be validly assigned, for the reason that such a splitting up might cause harassment to the debtor.

According to the Madras view, on the other hand, assignment of a part of a debt is valid.[4]

The High Court of Patna has, in a later case,[5] held that where A transfers a part of debt to B who enforces the same in a suit against the debtor, the assignment would be valid, but 0.2, R. 2, of the Civil Procedure Code will prevent A from suing the debtor for the remaining portion of the debt. A similar view on the validity of the assignment, namely, that an assignment of even a part of the debt is valid, has been taken by the Gujarat High Court.[6]

109.11. *Recommendation as to part of debt.*—In our opinion, the latter view is to be preferred on the language of the section, which does not seem to bar transfer of a part of the claim. In order to clarify the position, we recommend adoption of the latter view by suitable amendment. No serious hardship is, in practice, likely to be caused by such a provision. Whether or not O. 2, R. 2, Code of Civil Procedure, 1908 applies, we do not think that many cases will necessitate the institution of legal proceeding for recovery of the actionable claim. In any case, if an actionable claim is "property", then juristically there should be no objection to transfer of a part thereof, subject, of course to compliance with the formalities prescribed by law. We may add that we do not, with respect, agree with the view that Order 2, Rule 2, applies where an assignee of a part of a debt sues the debtor. He will not be splitting up *his own claim*. So far as he is concerned, the entire cause of action will be included in his suit, so that there will be no breach of Order 2, rule 2.

109.12. *Section* 130—*Pay orders distinguished from assignments.*—That the "transfer" of a debt not bind the debtor unless notice is given, is one aspect of the law. The converse question—how far a communication *addressed to the debtor* is a valid assignment as between the parties—

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1 ***Durga Singh*** v. *Kesho Ram*, A.I.R. 1940 Pat. 170, 173.

2 ***Ghisulal*** v. *Gambhirmal*, A.I.R. 1938 Cal. 377, 378, 381 (Lord Williams and Jack JJ.).

3 ***Bibi*** *Haliman* v. *Bibi Umadahinnissa*, A.I.R. Pat. 506, 508 (Wort J.) (obiter).

4 ***Raja*** *of Ramanad* v. *Subramaniam Chettiar*, A.I.R. 1928 Mad. 1201.

5 ***Durga*** *Singh* v. *Kesho Lal*, A.I.R. 1940 Pat. 170, 174 (Harries C. J. and Fazal Ali J.).

6 I.L.R. (1964) Guj. 453, 471, 472; (1964) 5 Guj. L.R. 621 (F.B.).

represents another aspect. There seems to be some obscurity on the question whether a *direction to the debtor* is valid as an assignment of an actionable claim. It will be noted that so far as the text of section 130 goes, it does not, in express terms provide that the assignment should be addressed to the proposed assignee. There is, nevertheless, a distinction between a mere pay order and an assignment—though the distinction may not be easy of application. Thus, a mere direction by A to his debtor B that B should pay C, does not amount to a transfer of the debt to C, in the absence of an express words of transfer or—to add a necessary refinement—unless there is prior agreement with the alleged assignee, or a direction to pay out of specific funds.

The latter would be a mere pay order, which is revocable and in which the liability of the debtor (A) remains. Such a pay order may fail on the death of the person giving the order. It may even be defeated by the adjudication of the giver of the order as an insolvent.[1] Therefore, in practice, it becomes important to determine whether a letter is mere pay order or whether it operates as an assignment.

109.13. *Pay order—Indian caselaw.*—Mulla[2] has commented that the Indian cases as to pay orders are not very consistent. The matter bears examination.

In a Madras case,[3] *the delivery of a bond* with a letter to the debtor directing him to pay was held to be an assignment.

It was held in a Bombay case[4] that the delivery of a banker's deposit receipt with a letter to that bank directing payment, *if acted upon,* is valid as a delivery of the money. The Bombay case furnishes an interestng illustration of the difficulty of the subject matter. The letter in issue in that case was in these terms :

Bombay, 8th August, 1912.

"The Agent,

Hongkong and Shanghai Banking Corporation.

"Sir,

I hereby state that I have found my Bank Receipt. Herewith I am forwarding the same for the interest now due. I wish it to be handed over to my nephew.

I also wish you to hand over the amount of Rs. 105,000/- which is in fixed deposit to my nephew Wilmost Charles Harrison to his account.

Yours truly,
Sd/-
(C. A. Wakeford)

1 *B. N. Rly. Employees Urban Bank* v. *Seager,* A.I.R. 1942 Pat. 307, 308 (Harries C.J. and Manohar Lall J.).

2 Mulla (1973), pages 813, 814.

3 *Konjeti Veerswamy* v. *Varada.* (1913) 13 Mad. L.J. 77.

4 *Sethna* v. *Hemingway,* (1914) I.L.R. 38 Bom. 618, 629 (Scott C.J. and Batchelor J.).

This is my nephew's signature :—
Sd/- W.C. Harrison
Sd/- C.A. Wakeford."

In the trial court, Maleod J. held that this writing was merely *a notice* to the person from whom the debt to the defendant, but this was not sufficient to *transfer the ownership in the debt.* According to him, an obvious test is to see whether, after this document has been executed, the defendant could have sued the bank. When a writing under section 130 has been executed, all the rights and remedies of the transferor vest in the transferee. But the mere direction by the owner of a debt to the debtor to transfer in his books the debt in the name of another party cannot give that other party any right to sue for the debt. Macleod J. treated the letter as merely a "notice" of transfer. There was no transfer of the debt due from the bank and therefore the debt remained up to the time of the death of Mr. Wakeford (the writer of the letter) an asset belonging to him.

In the court of appeal, Scott C.J. and Batchelor J. held that while a deposit receipt is not a negotiable instrument, yet where the money mentioned in the receipt is immediately payable and the receipt was duly endorsed to give an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or upon the banker's promise to hold it at the disposal of the payee. For this proposition the court of appeal followed an English case.[1] The position was summed up by the court of appeal finally in these terms :—

> "An order on a Banker to pay money which he holds to the credit of the customer is not an assignment of a debt, but an authority to deliver property which, if acted upon, is equivalent to deliver by the customer."

109.14. In the Lahore case of *Thakar Das* v. *Malik Chand,*[1] a letter by a dairyman to the purchasers of his milk—cantonments—directing them to pay to his creditors the amounts of bills representing price of milk, was held to be an assignment, since the letter specifically recorded that the other creditors of the dairy man should have no claim, and thus indicated an intention to transfer.

109.15. In a Calcutta case,[2] a vendor's endorsement on a bill for goods sold, requesting the purchaser to pay the amount to a third person, who would *collect the amount on behalf of the vendor,* was correctly held to be a mere pay order, Ghose J. observed that the test is whether the right has been *transferred* to the third party so that the third party becomes entitled as of right. Sanderson C.J. pointed out that the endorsement meant that the named person was to collect the debt *as agent* of the creditor.

That decision was distinguished in a later Calcutta case,[3] where the direction was unconditonal and irrevocable.

The direction was "Please make the payment of bill to Messrs. It may please be treated as *irrevocable*". It was "accepted" by the debtor. The

1 *Thakar Das* v. *Malik Chand,* A.I.R. 1933 Lah. 102, 103 para 10.
2 *Kisen Gopal* v. *Bavin,* A.I.R. 1926 Cal. 447, 448.
3 *Prakash Chandra* v. *Kays Constructions Co.,* A.I.R. 1962 Cal. 604. 605, 606, para 4, 5 (Bachawat and D. N. Das Gupta JJ.).

direction was held to be an assignment. "Though the instrument is in the form of a pay order, the intention to assign appears plainly on its face". So observed the High Court.

109.16. *Power of attorney.*—A mere authority or power of attorney to recover debts does not constitute an assignment of the debts. The attorney is the agent of the creditor, but there is no assignment. There is a series of Assam cases[1] decided on that basis, and holding that the instrument in question did not constitute an assignment. This position must, however, be read as subject to qualification where there is a prior agreement.[2]

In a patna case,[3] a letter of authority written by a society authorising his employer to deduct, from the amount of his salary, sums due to the society, was held *not to constitute an assignment of an equitable charge.* It was regarded merely as an authority, and therefore it terminated on the adjudication of the alleged assignor as insolvent.

In a Madras case,[4] on the other hand, subscribers to a chit fund purchasing chits from the company deposited money with a bank for payment to the company of the instalments of the chits as and when they fell due. It was held that the money deposited by the subscribers with the bank operated as a valid assignment, in favour of the company.

109.17. *Agreement.*—There are cases holding that an agreement between the debtor and the creditor that the debt shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person who owes money belonging to the giver of the order, directing such person to pay such fund to the creditor, *out of a specific fund,* are valid assignments[5-7] of the part of the debt or fund to which the agreement or order relates.

In some cases, such a situation has been regarded as amounting to an equitable assignment.[8] But the only question to be considered in India is whether it falls within section 130.

109.18. *Supreme Court case—Irrevocable authority.*—In a Supreme Court case[9] a contractor to the military and other authorities entered into an arrangement with a Bank whereby the Bank agreed to finance the contractor and to advance monies to the contractor against his bill for supplies under the contracts. For the purposes of carrying out his

1 (a) *Bank of the East* (1927) *Ltd.* v. *State of Assam,* A.I.R. 1958 Assam 22;
(b) *Gauhati Bank* v. *Rajendra Nath,* A.I.R. 1959 Assam 167, 168, 169, paras 7-8.

2 Para 109.17, *infra.*

3 *B. N. Rly. Employees Bank* v. *Seagar,* A.I.R. 1942 Pat. 307 (Harries C.J. and Manohar Lall, J.).

4 *T. N. Subsidiary Co.* v. *T. N. & O. Bank,* A.I.R. 1940 Mad. 258.

5 *Venkata Rao* v. *Venkatapthy,* A.I.R. 1965 A.P. 410, 411.

6 *Thakar Das* v. *Malik Chand* A.I.R. 1935, Lah. 102, 103, para 10 (Tek Chand and Mosroe JJ.).

7 *T. N. Subsidiary Co.,* A.I.R. 1940 Mad. 258, 261. and Morroe, JJ.).

8 A.I.R. Mys. 196, 197.

9 *Bharat Nidh* v. *Takhat Mal* A.I.R. 1969 S.C. 313.

arrangement, the contractor executed *an irrevocable power of attorney* in favour of the Bank, authorising it to receive payments of the bills from the authorities. The contractor made out a bill on the military authorities for a sum and handed over the same to the Bank for collection, with an endorsement that it should be paid to the Bank. The Bank sent the bill for payment, but before it received the payment, the amount due under the bill was attached by a creditor of the Contractor in execution of a money decree obtained by him against the Contractor.

It was held that the attachment by the creditor was not valid. The power of attorney coupled with the endorsement on the bill was a clear engagement by the Contractor to pay the Bank out of the monies receivable under the bill and amounted to an equitable assignment of the fund by way of security.

The Supreme Court quoted with approval *Palmer* v. *Carey,* in which Lord Wrenbury observed:[1]

> "The law as to equitable assignment, as stated in *Roddick* v. *Gandell,* (1852) 1 De G.M. and G 763, 778 is this: The extent of the principle to be deduced is that an agreement between a debtor and the creditor that the debt owing shall be paid out of specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts of fund to which the order refers."

109.18A. *English law—Test of knowledge.*—In England, it has been held on the one hand that there must be document which purports to assign the chose in action and not merely a document directing the debtor to pay a *third person who knows nothing of the transaction.*[2] But, on the other hand,[3] merchants' letters to purchasers of their goods to pay the price to the Bank (who financed the merchants' business) on receipt of documents from the Bank was held to be a valid assignment, presumably because the *letter was sent through the Bank.*

It would appear that in England an assignment is said to have taken place—(i) when there is a prior agreement between the debtor and the creditor to whom the assignment is now to be made,[4] or (ii) where the creditor's letter addressed to the debtor is given to the assignee,[5] or (iii) otherwise the assignment is communicated to the assignee.[6]

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1 *Palmer* v. *Carey.* (1926) A.C. 703. 706.
2 *Curran* v. *Newpark Cinema Ltd.* (1951) 1 All. E.R. 285.
3 *Brandt & Sons* v. *Dunlop Rubber Co.,* (1905) A.C. 454; (1903) All. E.R. Rep. 345.
4 *Fisher* v. *Calvert,* (1879) 27 W.R. 301 (Eng.).
5 (a) *Brice* v. *Bannister,* (1878) 3 Q.B.D. 569, 571;
(b) *Buck* v. *Robson,* (1878) 3 Q.B.D. 686, 687.
6 Snell, Equity (1966), page 85.

In some of these cases, the assignment was held to be equitable and not statutory, but this was because of certain other defects in the assignment.

109.19. *Position as to direction to pay in England.*—In England, to constitute a legal assignment, there must be a document which purports to assign the chose, and not merely to direct the debtor to pay a third person who knows nothing of the transaction.[1] A cheque is no assignment of any money in the drawer's account, for it is "but an order to pay and not an absolute assignment of anything", and in any case there is no debt to be assigned for no debt arises until the customer demands payment from the bank.[2]

The position on this point is as follows as regards equitable assignment in England.

An assignment is not binding on the assignor and the assignee, unless it either is made by prior arrangement with the assignee or has been communicated to him;[3] otherwise it is revocable.[4] Thus, if D ows money to C, an assignment by C to A made between C and A *binds them forthwith,* even if D has no notice of it;[5] but if the assignment to A is made between C and D, C and D are not bound until A has notice of it.[6-7]

109.20. *Principles need to be stated.*—We have discussed at length the case law in India and the position in England as to direction to pay, in order to show the nature of the problems that have arisen. It seems to us that while each case may depend on its own facts, those facts must be dealt with in the light of certain principles, and that those principles should find mention in the Act in some form, so that at least a broad amount of certainty can be introduced into the statute law, and controversies may be reduced to the minimum. Disputes will still arise, but a citizen, or at least his legal adviser, will know what language to adopt if he desires that the instrument should be legally operative as an assignment, or if he does not desire that the instrument should be so operative, as the case may be.

The need for such a course will be readily appreciated when it is borne in mind that the problem under consideration comes up again and again before the courts, and the interests, not only of the parties to the alleged transfer and the debtor, but also of rival creditors of the debtor, are to issue. Very often, the problem arises in the context of insolvency, so that the Official Assignee is also interested.

109.21. Having considered all aspects of the subject, we think that in order to clarify the position, the following provision should be made[8] to regulate the position between the alleged assignor and assignee:-

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1 *Curran* v. *Newpark Cinemas Ltd.,* (1951) 1 All. E.R. 295.
2 *Schroeder* v. *Central Bank of London,* (1876) 24 W.R. 710 (per Brett J.) cited in Snell, Equity (1966), page 81.
3 *Re Hamilton, FitzGeorge* v. *FitzGeorge,* (1921) 124 L.T. 737, 739.
4 *Morrel* v. *Wooten,* (1852) 16 Beav. 197.
5 *Gorringe* v. *Irwell India Rubber and Gutta Percha Works,* (1886) 34 Ch. D. 128,
6 *Morrel* v. *Wooten.* (1852) 16 Beav. 197.
7 Snell, Equity (1966), page 85.
8 This is not a draft.

(a) a mere direction by a person to his debtor [1-2] to pay the debt to a third person is not an assignment to the third person;

(b) it is an assignment to the third person if—

(i) It is given in pursuance of an agreement with the third person to whom the debt is alleged to be transferred,[3] or

(ii) it is communicated by the creditor to the third person,[4] or

(iii) It directs payment to the third person out of a specified fund[5] or

(iv) it shows on the face of it an intention to assign the debt irrevocably to the third person.[6-7]

109.22. *Position in England,*—In England, once a contract of assignment of a chose in action between the assignor and the assignee has been made, notice should be given to the debtor. Where the assignment is at law, there is, under section 136 of the Law of Property Act, 1925, an express requirement of notice in writing to complete the assignment, i.e., to transfer full legal title in the chose to the assignee. At law, property only passes with notice, in England. But in equity,[8] title in a chose can be transferred without this notice to the debtor.

After *Ward* v. *Duncombe,*[9] it was settled that for four important reasons the equitable assignee should give notice to the debtor as soon as possible:

(i) to gain priority over subsequent assignees;

(ii) to ensure that the debtor paid the assignee and not the assignor;

(iii) to take the chose out of the "reputed ownership" of the assignor in case he eventually became bankrupt;

(iv) to avoid further "equities" which might arise between assignor and assignee.

109.23. *Notice.*—So much as regards the operation of the transfer as between the parties to the assignment. Besides the instrument of transfer, there must be notice given to the debtor. The notice of the assignment required by section 130(1), proviso, of our Act can be given either by the assignor or by the assignee. As to its character as a notice, it does not matter who gave it. But the fact that the notice was given by

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1 What we say of "debts" applies to other actionable claims also.

2 Clarification as to part of debt also to be made, see supra.

3 *T. N. Subsidiary Co.,* A.I.R. 1940 Mad. 258 and cases in para 109.9, *supra.*

4 *Rama Iyer* v. *Venkata Chellam,* (1908) I.L.R. 30 Mad. 75; 16 M.L.J. 554.

5 Para 107.17, *supra.*

6 (a) *Thakar Das* A.I.R. 1933 Lah. 102;

(b) *Prakash Chandra,* A.I.R. 1962 Cal. 604.

7 Para 109. 18. *supra.*

8 Diana M. Close, "Equitable Assignment" (1975), 39 Conv. 261.

9 *Ward* v. *Duncombe,* 1893) A.C. 368, 392.

the assignor (the original creditor) may, in certain situations, make a difference. It may re-inforce the assignment, or remove doubts as to whether an earlier letter from the creditor to the debtor was merely an authority (pay order) or a transfer (assignment).

109.24. *Section* 131.—This takes us to the next section which deals with the form and contents of the notice. Section 131 provides that every notice of transfer of actionable claim shall be in writing, signed by the transfer or his agent duly authorised in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

The notice under section 131 must contain the name and address of the transferee. The reason is thus stated by the Select Committee:

> " A notice in general terms not stating the name and address of the transferee would not be sufficient as a safeguard against fraud. A debtor is, we think, entitled to know the name and address of the person to whom he becomes liable on a transfer of the claim against him."

109.25. *Significance of notice.*—Though there be a valid transfer of a debt between the transferor and the transferee, the person bound to pay the debt is not bound by the transfer unless he receives an express notice in writing conforming to the provisions of section 131, from the transferor, or if he refuses to sign, from the transferee, stating the name and address of the transferee. Where the notice did not contain the address of the transferee, it was held to be insufficient.[1] So also, a notice which did not state the address of the assignee but his solicitor's address, was held to be defective.[2]

The notice must be given to the person concerned, or to his agent authorised to receive such notice.

109.26. *No change.*—No need for amendment of section 131 is disclosed by these points.

109.27. *Section* 132. Section 132 reads—

> "132. The transferee of an actionable claim shall take it subject to all liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.
>
> *Illustrations*
>
> (i) A transfers to C a debt to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.
>
> (ii) A executes a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. B cannot enforce the bond against A."

1 *Hansraj* v. *Nathoo*, 9 Bom. L.R. 838.
2 *Sadasook* v. *Hoare Miller & Co.*, A.I.R. 1923 Cal. 719, 720.

The section needs no change.

109.28. *Section* 133.—Section 133 reads—

> "133. 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"

109.29. *Meaning.*—Section 133 does not make it compulsory on the part of the assignor to give the assignee any warranty as to the solvency of the debtor, nor does it mean that in every assignment of an actionable claim there shall be implied a covenant by the assignor to warrant the solvency of the debtor. This section merely lays down a rule of construction to be applied only when the assignor actually gives such warranty to the assignee. If a warranty is given, it means that the debtor is solvent at the date of the transfer. The insolvency of the debtor after the date of the transfer does not entail any liability on the transferor.

Section 133 may be left as it is.

109.30. *Section* 134.—The subject of mortgaged debts is dealt with in section 134 in these terms:

> "134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the 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 or other person entitled to receive the same."

It should be noted thtat section 134 does not allow the transferor to recover the debt. Accordingly, after the transfer, no decree can be passed in favour of the transferor in a suit by him, even if the transferee is impleaded as a defendant.[1]

109.31. *Conflict with section* 130—*Recommendation.*—It has been pointed out in a Calcutta case[2] that section 130 and section 134 do not harmonise with each other. While under section 130 "all the rights and remedies" of the transferor vest in the transferee," the words in section 134 are—"the residue, if any, belong to the transfer". The wording in section 134 ought to be "the residue, if any, shall be re-transferred by the original transferee to the original transferor", *or other person entitled to receive the same.* We recommend that section 134 should be suitably amended on this point.

109.31A. *Section* 135.—Section 135 provides that every assignee by endorsement or other writing of a policy of insurance against fire, in whom

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1 *Santuram* v. *Trust of India Assurance Co.*, A.I.R. 1945 Bom. 11, 12, 13 (Chagla J.).

2 *Ranjit Roy* v. *D. A. Davis,* (1935) I.L.R. 62 Cal. 1, 10 (Costello J.).

the property in the subject insured shall be absolutely vested on the date of assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself. This provision was considered necessary because the Exception to section 130 excludes, *inter alia,* fire policies. The significance of section 135 seems to lie in this, that if the property is transferred, the right of suit of the original insured shall be transferred and vested in the assignee of the policy "as if the contract contained in the policy had been made with himself". Indirectly, the effect of the section is to provide negatively that the assignee of the policy can sue only if the property in the subject insured is absolutely vested in the assignee at the date of the assignment.

109.32. *Subrogation and assignment—Supreme Court judgment.*— The section as such raises no problems, but one question not directly arising out of the section, but concerning insurances, may be dealt with at this stage. On payment of the loss, the insurer is subrogated to the right of the insured. This is a general principle of insurance law.

The doctrine of subrogation is a doctrine of equity jurisprudence and is one of the legacies which the Roman law has handed down to posterity. And, like all doctrines of equity, it embodies a rule of natural justice. It is a doctrine which operates independently of contractual relations. For, though there is no real contract *in esse,* the law will infer such a contract under particular circumstances. It is also a doctrine which, if not entirely is at least very closely, connected with the doctrine of salvage lien. Subrogation does not, however, dispense with the necessity of an assignment of the policy to the insurer, so that it may still become necessary to determine whether there is an assignment and if so, whether it is valid. As to the effect of an assignment, however, there seems to have arisen a difference of opinion in one case in the Supreme Court.[1] In that case—to state only the material facts—the plaintiff company Shri Sharada Mills Ltd. sued the Union of India as representing the Central and Southern Railways for damage to certain bales of cotton sent by the plaintiff by railway. The cause of action was in negligence. One of the defences put forth by the railways was that the plaintiff company could not institute the suit, as it had insured the goods with the Indian Globe Insurance Co. and had already received the total loss from the insurance company. In proof of the assignment, a letter was put on record. Ray J. (as he then was) thus formulated the question[2]—

> "The question which falls for determination in this appeal is whether the respondent mill on recovering Rs. 32,254-6-9 from the Indian Globe Insurance Co. Ltd. and *assigning all rights against the Railway Administration in favour* of the insurance company as a subrogee was competent to institute and maintain the suit against the Railway Administration."

The majority—Ray J. (as he then was) and Dua J.—Without deciding the question whether the letter that has put on record amounted to an

1 *Union of India* v. *Shri Sharada Mills Ltd.,* A.I.R. 1973 S.C. 281 (on appeal from A.I.R. 1966 Mad. 381) (Majority judgment of Ray & Dua JJ. with Mathew J. dissenting).
2 Para 2 in the A.I.R. (Emphasis added).

assignment, held that since the insurance company had chosen to allow the Mills (plaintiff company) to sue, the suit was properly constituted. The cause of action of the Mills against the railway had not perished on giving this letter. Mathew J. (who was in the minority), on the other hand, held that there was an assignment by the assured of all the rights to sue the railway administration, by virtue of which the India Globe Insurance Co. could file a suit against the railway, and that precluded the assignor from suing the railway administration.

109.33. Dealing with one contention that had succeeded in the High Court, namely, that the assignment was of a mere right to sue and therefore void under section 6(e), Mathew J. held that the assignment was of something which the letter of insurance recognised as assignable. He discussed at length the authorities and the views of text-book writers and English and Indian cases on the subject. It was, of course, the unanimous view of all the judges that mere subrogation does not operate as an assignment. But, in this case, there was a letter which, according to Mathew J., operated as an assignment and therefore precluded the assignor from suing. The principal basis of the High Court's decision upheld by the majority in the Supreme Court,[1] was that even after the assignment the assignor is not debarred from instituting the suit, though the assignee could also well have been added as a plaintiff. Mathew J. did not agree with this view.

109.34. *Comment on the Supreme Court's judgment.*—We have considered this judgment of the Supreme Court very carefully and with great respect, but we regret to say that it seems to us that the majority view would introduce a certain amount of anomalous element in the law. If, even after the assignment, the original assignor can sue the debtor so long as the assignee permits him (the assignor to sue, then, we apprehend, there is introduced into the law of assignment and into the law of procedure a set of propositions which, with great respect, do not reflect the common understanding of the position. In the first place, it would, in effect, mean that both the assignor and the assignee have a cause of action; this would put an end to the effectiveness of the "transfer". The rights under the policy are either transferred, or not transferred. They cannot reside in two persons at the same time. If they cannot reside in two persons, they must be in one person only and that person must be the assignee, provided there has been a vaild assignment.

Since, in the case before the Supreme Court, the Mills did not dispute the fact that the letter had been addressed by them to the Insurance Company, there was no conflict as to facts between the Mills and the insurers. The insurers had, by virtue of the letter, acquired the rights of the insured. This was also the case of the Railways. So it is difficult to understand how the Mills could sue, when the facts were undisputedly as stated above.

109.35 In the second place, the majority view would mean that where the cause of action is really in favour of Y (assignee), V (assignor) can still sue if Y permits him to sue. It is, with great respect, difficult to understand how this would be consistent with the law of procedure. In the general understanding that law, if a person sues on behalf of another there must be a proper authority in that regard.[2]

1 *Sharada Mills Ltd.* v. *Union of India*, A.I.R. 1966 Mad. 381, 384, paragraph 7.
2 Order 3, Code of Civil Procedure, 1908.

Though it is not possible to re-state the correct position by amendment, the matter is important enough to be dealt with here—which is the reason why we have considered it proper to express our view, since a fundamental question as to the effect of assignment is in issue. However, we venture to express a hope that the Supreme Court may like to reconsider the matter on a suitable occasion.

109.36. *Position in England.*—Reverting to the subject of insurance policies, in England it is not necessary for the assignee of the beneficial interest in the contract to possess or to acquire any interest *in the subject-matter of insurance*[1], though he may do so as a collateral part of the transaction.[2-3] This will be the case where the property insured is mortgaged and the proceeds of the policy are assigned as collateral security.

109.37. *Assignment in England before and after loss.*—In England, where a loss has already taken place, the right of the assured to recover the sum payable under his policy is an ordinary chose-in-action,[4] and it may, therefore,[5] like other closes-in action, be assigned by the assured before payment.[6-7]

Once the loss has occurred and the right to indemnity has therefore crystallised, the assured can assign his interest under the policy irrespective of whether or not he has parted with or lost his interest in the subject-mater insured between loss and assignment[8].

The assignment of the assured's right to receive the *proceeds of the policy* is the assignment, not of the contract of insurance, but of the debt arising under the contract, and is, therefore, the assignment of an ordinary chose-in-action.[9]

An assignment of the beneficial interest in a contract of fire insurance (before loss) also appears to be valid in England.[10] This seems to follow from the fact that the beneficial interest in a contract is, as a general rule, assignable in equity.

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1 *McPhillips* v. *London Mutual Fire Insurance Co.*, (1896) 23 A.R. 524 (fire insurance); Ivamy, General Principles of Insurance Law (1966), page 378.

2 *London Investment Co.* v. *Montefiore*, (1864) 9 L.T. 688 (fire insurance).

3 Ivamy, Principles of General Insurance Law (1968), page 378.

4 *Lloyd* v. *Fleming*, (1872) L.R. 7 Q.B. 299, 302, 303 (Marine Insurance).

5 Ivamy, General Principles of Insurance Law (1966), page 376.

6 *Hamilton* v. *Snowden*, (1880) W.N. 58, 175 (C.A.);
Randall v. *Lithgow*, (1884) 12 Q.B.D. 525;
Green v. *Brand*, (1884) Cab. & El. 410.

7 *English and Scottish Mercantile Investment Co.* v. *Brunton*, (1892) 2 Q.B. 700 (C.A.);
Bank of Toronto v. *St. Lawrence Fire Insurance Co.*, (1903) A.C. 59 (P.C.).

8 *Cf.* position as to marine insurance, Halsbury (3rd Ed.), Vol. 22 (Insurances), page 108, para 198.

9 See *Randall* v. *Lithgow*, (1884) 12 Q.B.D. 525;
Green v. *Brand*, (1884) Cab. & El. 410;
English and Scottish Mercantile Investment Co. v. *Brunton*, (1892) 2 Q.B. 700 (C.A.) (Assignment after loss).

10 *Tolhurst* v. *Associated Portland Cement Manufacturers*, (1903) A.C. 414, 420.

To constitute a valid assignment of a fire policy in England before *the loss*,[1] the consent of insurers to the assignment must be obtained. This is necessary because the assignment is, in effect, the substitution of a new assured, and the contract is purely a personal contract between the insurers and a particular assured.[2] The consent must be signified in the form prescribed by the policy. This is usually by memorandum signed by or an behalf of the insurers.

109.38. *Section* 136 *and its principle.*—We have disposed of section 135. Section 136 provides as follows:-

"136. No Judge, Legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim and no court of justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid."

It is generally assumed that section 136 is based on the principle that persons employed in or connected with the administration of justice should not place themselves in a situation where their interests may conflict with their duty. This principle is obviously sound, but it appears to us that the section is too widely worded, in so far as it prevents the person concerned from entering into even transactions which are not in the nature of trafficking or which do not involve an element of undue advantage.

109.39. *Section* 136—*Situations in reported cases.*—That the present widely worded section may cause hardship would be evident when one considers a few situations dealt with by the courts. Thus, the right of the subscriber to a provident fund[3] to get a definite sum out of the fund is an actionable claim. An employee having such a claim may be completed by circumstances to transfer his claim, say, when he is to leave the place which is the headquarters of the fund. If he transfers his claim to a relative who happens to be a legal practitioner, the transfer would be void under section 136. Take, next, the case where there is a contract for the sale of immovable property to a judge.[4] If the judge transfers the benefit of the contract to his nephew who happens to be a legal practitioner—there is no allegation of taking undue advantage—the nephew cannot purchase it. It may be a bona fide transaction, there being no question of either party being guilty of any misconduct, and yet the section will apply.

109.40. *Section before* 1950.—At this stage, we must note that the old section was much narrower than the present one. The old section read as follows (before 1900) :-

> "136. No Judge, Pleader, Mukhtar, Clerk, Bailiff or other officer connected with Courts of Justice can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his function."

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1 Halsbury (3rd Ed.) Vol. 22, page 316.

2 *Lynch* v. *Dalzell,* 1729) 4 Bro. Parl. (cas. 431, H.L.)
Sadler's Co. v. *Badcock.* (1743) 3 Atk. 554.

3 *Bhupati Mohan Das* v. *Phanindra Chandra,* A.I.R. 1935 Cal. 756.

4 Compare the facts in *Akhtar Beg* v. *Haq Nawaz,* A.I.R. 1924 Lah. 709.

The intention probably was not to place the persons concerned in a position in which they may be tempted to use the influence of the information which they may acquire by virtue of their possible connection with the transaction of business in the Court, to the prejudice of persons who might have to resort to it for the adjudication of actionable claims.

109.41. *Hardship.*—One may readily accept the principle that conflict between interest and duty ought to be avoided. But, unfortunately, after the amendment of 1900, the section has gone much further. It has often been felt that the section, as it now stands, causes hardship. It was noted in a Madras judgment[1] that in other countries, there is no such absolute provision. It was noted in that judgment that the New York Civil Procedure Code prohibits the purchase of actionable claims and negotiable instruments (by legal practitioners) only where it is made with the intention and for the purpose of bringing a suit therein. It was also noted in the same judgment[2] that in the French Civil Code, the prohibition is confined to claims falling within the jurisdiction of the court where the pleader is practising. This, in fact, was the substance[3] of section 136 before its amendment in 1900. The section was widened in 1900, apparently to meet cases where the person concerned is transferred Perhaps the legislature was anxious to provide that there should be no loophole permitting a person otherwise disqualified, to enter into a questionable transaction apparently dated after the transfer of that person but really conceived before it.

There was really no need for even this amendment, since the wording even at that time was elastic.

109.42. *Section wider than required.*—In any case, the section as it now stands appears to be much wider than is required as a matter of public policy. In a Patna case,[4] the High Court had to invalidate the transfer of a vakil of a right to recover arrears of rent of an immovable property even though the transfer was incidental to the transfer of that immovable property to the vakil. Dawson Miller, C.J. expressed a doubt whether the legislature had in view a case such as the present, but observed that he was bound to construe the section in its ordinary natural sense.

109.43. *Other illustrative cases.*—We have drawn upon these reported cases to show the hardship felt by the wide scope of the section. Let us also take a few hypothetical situations. The present section, if construed literally, would bar the acquisition by a legal practitioner of units in the Unit Trust of India by transfer, since a unit is an "actionable claim". A woman lawyer cannot, under the section, accept transfer of a gift cheque from her husband—unless she can rely on the provision in section 137 which excludes negotiable instruments from the provisions of the Chapter. In any case, she cannot "agree to receive" a gift cheque. A son who has recently started legal practice cannot "agree to receive" from his father

1 *Muni Reddi* v. *Venkata Rao,* A.I.R. 1914 Mad. 512, 519 (F.B.).
2 *Muni Reddi* v. *Venkata Rao,* A.I.R. 1914 Mad. 512, 519 (F.B.).
3 Para 109.40 *supra.*
4 *Sheo Govind Singh* v. *Gouri Prasad,* A.I.R. 1925 Pat. 310, 312.

the transfer of money represented by fixed deposit receipts in banks even where the transfer is *bona fide* intended to set him up in the profession, and no question of the son taking any undue advantage of his position as a lawyer is involved.

109.44. *Constitutional aspect.*—One could possibly consider the question how far the section can be treated as unconstitutional on the ground that the restriction thereby imposed on the right to acquire, hold and dispose of property is, by reason of its over-breadth, unreasonable and that it goes beyond what the public interest requires. That aspect, however, need not be discussed. Even if there is no constitutional impediment, the section appears to be defective on the merits and there is, in our opinion, need for narowing down its scope in view of what we have already stated.

109.45. *Provision in C.P.C.*—It may be of interest to point out that the provision in the Code of Civil Procedure prohibiting certain persons from bidding at auction sales in execution of a decree is much narrower than secton 136. The relevant rule[1] provides that no officer or other person having *any duty to perform* in connection with any sale shall, either directly or indirectly, bid for acquire or attempt to acquire any interest in the property sold. Whether a pleader engaged by a party to a suit falls within this rule is not a matter which needs to be considered for the present purpose.[2] But it is pertinent to point out that by virtue of his professional duty a pleader *engaged in the suit* who purchases the property for himself is open to censure if the purchase is likely to be detrimental to the interest of the client. This position, it would be noted, is much narrower than what is provided in section 136 of the Act.

The following is a suggested redraft of section 136 :—

> "136. (1) No Judge, legal practitioner, or officer connected with any Court of Justice shall buy, or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, *in respect of which a legal proceeding is pending, being a legal proceeding with which the Judge, legal practitioner or officer is concerned in his judicial, professional or official capacity.*
>
> (2) *No Court shall enforce, at the instance of a Judge, legal practitioner or officer connected with any Court of Justice, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.*"

109.47. *Section* 137.—In regard to the mode of transfer of certain special classes of actionable claims, there are special rules—statutory or non-statutory,—which, the legislature thought, should continue to apply. Accordingly, section 137 provides as follows:

> "137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods."

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1 O. 21, R. 73, Code of Civil Procedure, 1908.

2 See discussion in *Jamuna* v. *Motilal*, A.I.R. 1950 Cal. 63, and A.I.R. 1927 All. 76.

"*Explanation.*—The expression 'mecantile' document of title to goods' includes a bill of lading, dock-warrant, warehouse—keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, "or authorizing or purporting to authorize, either by delivery or endorsement, the possessor of the document to transfer or receive goods thereby represented."

109.48. *Other Negotiable instruments.*—Apart from instruments governed by the Negotiable Instruments Act, there are other instruments-e.g. hundis, debentures payable to bearer, or scrips or bonds, which have been regarded as negotiable instruments by the custom of trade. Indeed, with the growth of trade and wide expansion of commerce, new kinds of securities emerge and claim recognition from the courts of law as negotiable instruments. These instruments owe their validity to the Law Merchant, which is "neither more nor less than the usages of merchants and traders in different departments of trade, ratified by the decisions of Courts of Law, which upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and public convenience.[1]

109.49. *Shares.*—The section expressly excludes shares. In England, a share is regarded as a chose in action. Technically, "chose in action" is an expression large enough to include shares.[2] In India, the Sale of Goods Act defines 'goods" as including shares. However, shares still continue to be an actionable claims as defined in the Transfer of Property Act.

109.50 *Transfer of shares.*—As to the question of transfer of shares, it may be of interest to note that the law on the subject seems to be enriched with certain subtleties. A question that has caused the courts great difficulty is that of deciding what precisely is the legal effect of a transfer executed by the transferor and delivered to the transferee, but not yet registered by the company. Knowlegeable writers on the subject[3] emphasise that in considering this question, it is essential to keep in mind the dual nature of the transaction. On the one hand, it is a straightaway assignment of personal property (movable property in India), but, on the other hand, it is the release of one person from membership and the admission of another in his place. As between the transferor and the transferee, it is the first aspect that is important, while as between the parties and the company in regard to liability, it is the second. When, however, third parties other than the company are involved, even this distinction in itself may not solve the problem.

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1 Halsbury, Laws of England, 3rd Ed., Vol. 2, para 775.

2 *Torkington* v. *Magee,* (1902) 2 K. B. 427, 430, 431, Per Channell J. (reversed on facts; (1903) (K. B. 644); and see *Tolhurst* v. *Associated Portland Cement Manufacturers,* (1903) A.C. 415.

3 L.C.B. Gower, Principles of Modern Company Law (3rd Ed.), page 401, cited in *Pran Lal* v. *Vasudev,* (1973) 14 Gujarat Law Reporter 363, 369, para 24 (Divan & Shah JJ.).

So far as the transfer of the shares is concerned, the transaction is complete as between the transferor and the transferee, when he hands over the duly executed transfer certificate. The beneficial ownership then passes.[1] Of course, difficulties could arise where the directors have a power to refuse to register the transfer—a power sometimes given by the articles. But these difficulties are common to all modes of transfer of shares. In the meantime, that is to say, even while the transfer is not registered by the company, the seller, according to the better opinion, has no beneficial interest in the shares.[2]

109.50A. *Lahore case.*—In a Lahore case,[3] the plaintiff sold some shares of a Bank to the defendant, but did not take the purchase-money. A deed of transfer was duly executed and signed by the parties and was made over to the defendant to enable him to have his name registered in the books of the Bank in place of the transferor. Later on, the Bank failed and went into liquidation before the transferee had presented his deed of transfer to the Bank and thus the shares continued to stand in the name of the transferor, as before. It was held, that the contract was complete on the day that the deed of transfer was signed by both parties, and that by virtue of that the defendant stepped into the shoes of the transferor and became an owner of the shares in the company in his place, with all the advantages and disadvantages attached to that status.

In another Lahore case.[4] certain shares of a company were transferred and the necessary documents properly executed and presented to the Company as required by their articles, but they refused registration stating that they had been instructed by the transferor that he had been made to part with the shares by misrepresentation. It was held, that the directors were not purporting to act under the powers given to them by the Articles, powers to be exercised in the interest of the company but at the instance of the transferor who had actually signed a request for the transfer, and that the shares *should be registered in the name of the transferee.*

109.51. *Position in India as to transfer of shares.*—In India, to some extent, this position is reaffirmed by a Supreme Court judgement,[5] where it was held that even till the transfer is registered the transferee becomes the beneficial owner of the shares. Reliance was placed, *inter alia,* on section 94 of the Indian Trusts Act, 1882. The seller must transfer all the benefits to property rights annexed to the sold share of the beneficiary

109.52. *Section* 137—*last paragraph—Recommendation.*—It may be pointed out that section 137 does not mean that a negotiable instrument or document of title or share cannot be transferred in the manner provided in this chapter. Although the language of the section does not fully

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1 L.C.B. Gower, Principles of Modern Company Law (3rd Ed.) page 401, cited in *Pran Lal* v. *Vasudev,* (1973) 14 Gujarat Law Reporter 363, 369, para 24 (Divan & Shah JJ.).

2 See (a) *M. K. Sugar Mills* v. *J. K. Sugar Mills,* A.I.R. 1965 All. 535, 540.
(b) *Bank of Hyderabad* v. *S.,* A.I.R. 1957 Mad. 702, 703.

3 *Sawan Mal Gopi Chand* v. *Shiv Charan Das,* A.I.R. 1924 Lah. 173, 174 (D.B.).

4 A.I.R. 1935 Lah. 123.

5 *R. Mathalone* v. *Bombay Life Assurance Company,* A.I.R. 1953 S.C. 385.

bring out this position, it was not the intention to exclude[1] the mode of transfer provided in the chapter. Section 137 is only a provision qualifying the word 'only' in section 130. The mode of transfer provided in the chapter can, if the parties so desire, be adopted even in regard to actionable claims represented by such instruments or documents as are mentioned in Section 137.

109.53. *Negotiable instruments.*—The subject may be more particularly considered with regard to negotiable instruments. Negotiable instruments have been exempted from the operation of this chapter because their assignment is regulated mostly by the provisions of the Negotiable Instruments Act. The usual mode of transfer of negotiable instruments is endorsement or delivery.[2]

The debts represented by such instruments are, neverthless, actionable claims and, as such, may be transferred by assignment, i.e., by an assignment in writing under section 130. In fact, that has been the judicial construction, as will be apparent from a study of the reported cases, a few of which are mentioned in the footnotes.[3-9]

109.54. *Position regarding negotiable instruments.*—Negotiable instruments represent actionable claims, and as such, they can also be transferred by assignment under section 130. That is why, in a Madras case,[10] where an agreement in writing transferred all assets of the transferor, the transferee became entitled to pronotes of the transferor. It is true that section 137 saves negotiable instruments from the operation of section 130, but this does not mean that section 130 cannot be availed of for a transfer of a negotiable instrument, nor does section 130 create such a bar. The view that they could be transferred only by endorsement or by delivery is not correct.

Thus, in an Andhra case,[11] an endorsement was construed as an assignment. Endorsement on a promissory note by one of the two payees in favour of the other is invalid as an endorsement. Still, the creditor has a right to get a decree on the ground that the endorsement amounted *to an assignment* of an actionable claim.

109.55. Of course, there may be differences in the incidents of each mode of transfer. The assignee of a debt having an assignment in his favour, can sue the person liable for debt, while an endorsee who gets only the property in the instrument by the endorsement, and who is not an assignee of the debt, has merely the rights on the instrument and, therefore,

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See Mulla (1973), page 827.

2 See sections 27 and 48, Negotiable Instruments Act.
3 *Venkataswamy* v. *Noor Mahmed*, A.I.R. 1956 Andhra 9.
4 *Surath* v. *Kripanath* , A.I.R. 1934 Cal. 549.
5 A.I.R. 1921 Mad. 137.
6 *Gadadhar* v. *Damo Behara*, A.I.R. 1966 Orissa 230.
7 *Ghanshyam* v. *Ragho*, A.I.R. 1937 Pat. 100, 102.
8 *Mulji Deok*, A.I.R. 1957 Nag. 31.
9 A.I.R. 1935 Bom. 343, 346.
10 *Awshashalam* v. *Venkatachalam*, A.I.R. 1954 Mad. 820, 821, 822 (reviews cases).
11 *Srinivasulu* v. *Kondappa*, A.I.R. 1960 A.P. 174 175.

can sue only the person whose name appears thereon. But this does not affect the position that section 137 does not override section 130.

109.56. *Recommendation as to section* 137.—Thus, in regard to all the instruments mentioned in section 137, that section supplements, but does not override, section 130. Since this position is not brought out beyond doubt by the present section, we think that it should be suitably redrafted for the purpose and accordingly, we recommend the following redraft of section 137 :—

Revised section 137

"137. (1) An actionable claim represented by any of the following that is to say—

(a) instruments which are for the time being, by law or custom, negotiable; or

(b) any mercantile document of title to goods; or

(c) stocks, shares or debentures,

may be transferred either in the manner provided by the law or custom, as the case may be, for the time being in force, providing a special mode of transfer thereof, or in the manner provided in this Chapter.

(2) Where such actionable claim is transferred in the manner provided by the law or custom referred to in sub-section (1), nothing in the foregoing sections of this Chapter applies to such transfer.

Explanation.—The expression 'mercantile document of title to goods' includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as pool of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

CHAPTER 110

CONCLUSION

110.1. *Introduction.*—By way of concluding our discussion of the Act, we would like to say a few words in this Chapter as to certain matters of general interest.

In making our recommendations in this Report, we have followed the same practice as has been adopted in our other Reports. It has been our concern to reintroduce certainty where there is uncertainty;[1] to complete what is incomplete;[2] to refine what needs refinement;[3] to strive for neatness where there is obscurity;[4] and, in general, to re-shape the law so as to enable it to define and regulate in a better manner, the legal relations of citizens in their proprietary affairs.[5]

110.2. *Universal appeal.*—The law of property is often regarded as relating to matters purely of interest to lawyers, and in that sense, it is described as a technical branch of the law. But, as we have stated in the introductory Chapter, almost every one is, at some time or other, likely to be a holder of property. Also, it is a mistake to suppose that the Act is concerned only with immovable property. Not an inconsiderable portion of the Act is concerned with movable property. Not only do certain general principles contained in Chapter 2 apply to all property, but also certain specific chapters of the Act are very much concerned with movables. For example, the proposition that one can make a gift of the small things of life to one's nearest and dearest is an elementary postulate; but its legal validity is entirely derived from the chapter on gifts, particularly sections 122 and 123.

Similarly, the rule that one who gives legal tender money guarantees its genuineness, is expressly enacted in the Act, in section 121.

110.3. *Human aspect.*—Apart from this legal aspect, we may also point out that several branches of the law of property deal with questions affecting human values. The human element becomes relevant, for example, in a formulation of the rules of the law of perpetuity, gifts to unborn persons and the like. It is only because many proprietary transactions are ordinarily entered into in a business-like manner and in calm and cool surroundings after reflection, that the human element appears as secondary. Unlike the criminal law, there is hardly any drama in the factual situations on which the law of property operates. Also, it is true that the definite variety of human relationships that constitute the backdrop against which cases in the law of torts resent themselves is not to be

1 Section 5.
2 Section 10.
3 Section 18.
4 Section 114A.
5 Section 106.

met with in the law of property. Even then, it should not be overlooked that rules of the law of property—like the rules in any other branch of law—are intended to regulate human relationships.

It may also be mentioned that the level of culture of a civilisation may impose restrictions on the transfer of property. Concepts of property change with social concepts. Rules belonging to the domain of the law of property may appear to be overladen with the weight of law, because they speak the language of rights and liabilities; but, in reality, they derive their roots from current social notions.

Apart from this human aspect, there is the intellectual appeal of the law of property, in so far as it touches on the fields of economics and sociology—for example, where it seeks to define what property cannot be transferred.

Thus, the legal, moral and social importance of the law of property is much deeper than may appear at the first blush.

110.4. *Political aspect.*—We need not refer to the political aspect in *Arndt* v. *Grigg*,[1] a case dealing with the Nebraska "quiet-title" statute, the Supreme Court of the United States observed :

> "The sovereignty of the State ..... (gives it) control over property within its limits... and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding the transfer, liability to obligations, private or public, and modes of establishing title thereto."

110.4A.—*Antiquity.*—Codification of the law of property may not have a long history; but it may be pertinent to point out that some of the rules of law relating to property are of great antiquity. Noyes has observed :[2]

> "Property is not an idea nor an instinct. It is an elaborate social institution which present a continuous sequence of development from the first record of the customs and organisation of early society. If we were able to accept the extreme legalistic view that it is created by law and exists only in the contemplation of the law, an analysis of the institution for economic purposes would be a relatively simple matter. For, then we would only need to adopt such definitions as are provided ready to hand in legal doctrine and practice. However, the most cursory examination of the history of legal systems must convince us that such a view is untenable. The law finds the institution of property in existence, as well at the earliest as at all later stages of growth, and, far from creating its varieties, is occupied only in defining, maintaining and validating them."

110.5. *Influence of social organisation.*—Property thrives in a particular environment. That property rights are moulded within, and influenced by, the environment may be illustrated from early English law

1 *Arndt* v. *Griggs,* (1890) 134 U.S. 316, 320-21.

2 Noyes. **The Institution of Property.**

and by other examples. In Rome, for example, the peculiar cast given to the institution of property was due to its origin within that nearly self-sufficient social unit called the "familia". On the other hand, the principal contribution of pure English character arose from the dependent relation between families, called the "feod". The two social organisations were wholly different. The Roman consisted of independent groups, on a somewhat equal footing, each represented by the person of the head of the familia.

110.6. The early English society consisted of a hierarchy. In Rome, on the other hand, the social organisation was different, in some respects. The result was that in Rome the property relation, so far as it came within the purview of the law (i.e. was presented as disputes over property), was concerned primarily with a collateral relationship between independent and equal units, while, in England, it was concerned very largely with a lineal relationship between dependent and ranked units.[1]

A similar phenomenon was witnessed in India in regard to the joint family. Property rights in the context of the joint family have been changing from time to time, and we have variations even from region to region.

110.6. *A. Changing concepts*—If social notions do not remain static, no less can the law. Particularly in modern times, the law of property has undergone a great change. Formerly, the principal object of the law seemed to be to regulate "real" property in all its various artificial modifications, while little or no attention was bestowed upon the rules which govern personal property and rights. The mercantile law has since arisen, like a bright pyramid, and is now far more important in practice than the rules which refer to real estate. The law of immovable property, too, has change, New and unknown arrangements of sharing proprietary rights have come into being.

It follows that what is "property" and what is "transferable" property, are changing concepts. The reason for this will be clear when one examines the nature of a proprietary right. A "thing" is any "piece of property"—an interest.[2] Property law is not concerned with, and men are for the most part not dealing in, material objects. What is dealt with both in law and in economic life is one and the same. It is such "things" or interests which are bought and sold, treasured, protected, fought over.[3] It is these "things" which are measured against themselves in exchange and which give rise to the notion of economic value. The law hardly needs a term for material objects—the objects of rights. What it needs are terms for these immaterial "things", these bundles of rights, these interests.

110.7. *Different aspects*—That considerations not purely legal have an impact on proprietary rights could be illustrated in a different manner. Property in a thing may be recognised in one aspect, and not in another. For example, it has been held[4] in an English case[5] which concerned. "The Memoirs of Harriette Wilson", who was a notorious courtesan), that there can be no copyright in an immoral work.

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1 Noyes, Institute of Property, page 221.
2 Noyes, Institution of Property, page 456.
3 Noyes, Institution of Property, Page 456.
4 Note in Solicitor's Journal reproduced in 31 Bom. L.R. (Journal 26).
5 *Stockdale* v. *Orwhyn,* (1826) 2 C. & P. 163.

In *Walcot* v. *Walker*,[1] (also a case of copyright), Lord Eldon observed that the policy of the law did not permit a libellous publication to be considered "property". To the same effect is *Glyn* v. *Weston Feature Film Co.*[2] which involved consideration of a book called "Three weeks", then notorious.

110.8. Nevertheless, this does not seem that there can be no offence of *theft* in respect of such books or objects. The Court can order restitution of the book, or even sentence a thief who takes it without leave. In the United States, it was held before the war that[3] wine in "dry" states, such as Iowa, Massachusetts and Michigan, could, although forbidden to the public, be the subject of larceny, and there is a similar decision as to gaming implements in West Virginia (though in Ohio there is one to the contrary effect). It is well known[4] that indecent books or pictures, the regrettable works of great authors or artists, may be the subject matter of theft.

The possession of an indecent book or picture is not an offence, unless the book is kept for sale. The conclusion may, therefore, be reached that there is property in the physical book or picture within the meaning of the law relating to theft, though there is no copyright to be pirated.

The case of *Gorden* v. *Chief Commissioner*[5] in regard to street betting gains seized by the police may perhaps be quoted in support of the view that the court will assist an owner to recover property which a moral and law abiding person would not possess.

110.9. *Evolution according to social needs*—It is elementary t economic and social needs of the day give rise to various modes of with property. and the law, sooner or later, evolves rules for dealing them. For example, transactions by way of bailment assumed a variet forms in ancient India. Hindu jurisprudence recognised several specie bailments or deposits of movable property, of which five main divisions m be mentioned here. They are 'Nikshepa', 'Upanidhi', 'Nyasa', 'Anwadhi', and 'Yachita'.

110.10. *Varieties of bailment in Hindu law*—Nikshepa is a simple bailment of a man's goods to his friend or relation in whom he has confidence. If, however, a person encloses some movable belonging to him in a box or casket, and delivers the box or casket to another person, without mentioning its kind, form or quantity, it is called Upanidhi. In other words, a Nikshepa was a specified or open deposit; an Upanidhi was an unspecified one. But if a person who has fear of the king, or of robbers and the like, takes his movable property and places it in the house of another, after giving due notice to that other person, it was called Nyasa. One may presume that in this case there was an obligation to take reasonable care. In the case of Anwadhi, the person bails his property to another with directions to deliver it to a person specified by the bailor. The Mitakshara describes Anwadhi as a transaction in which the thing is bailed with the directions "deliver this to another other than myself and different from the owner". A Yachita. on the contrary, is a loan for use.[6]

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1 *Walcot* v. *Walker*, (1802) 7 Ves. 1.
2 *Glyn* v. *Weston Feature Film Co.*, (1916) 1 Ch. 261.
3 Note in Solicitor's Journal, reproduced in 31 Bom. L.R. (Journal 26).
4 Note in Solicitor's Journal, reproduced in 31 Bom. L.R. (Journal 26).
5 *Gorden* v. *Chief Commissioner*, (1910) 2 K.B. 1080.
6 Colebrooke Digest, Vol. I, pages 270—274.

It is significant that in all the above classes of bailments, a fiduciary relation is created as between the holder and the bailee, although it is only with regard to the movable property. The duties of the bailee in regard to the thing are more or less akin to those of a trustee so long as the thing bailed is in his custody or possession. The bailee is bound to restore the thing bailed in the same condition and manner in which it was bailed and to preserve the thing bailed in the same way as "a son is cherished". The simile sums up in a word the agregate duties of a bailee. He shall not without the consent of the owner, reap any profit out of the thing bailed, and shall not, without the consent of the owner, use a simple deposit.[1]

110.11. *Public opinion*—Reforms in the law succeed if they substantially reflect the current notions. The rationalisation that was introduced into Hindu law by Vijnaneshwara in regard to property rights is well-known. It may safely be inferred that what was chiefly instrumental in giving Vijnaneshwara a pre-eminent position must have been not this or that adventitious circumstance, but the substantial merit of the system that he propounded, its suitability to the needs of the time and its general agreement with the convictions of the people. Great master as he was in the art of balancing and explaining texts,—if the need be, even of distorting them—he constantly raised the discussion above the dull level of wordy warfare by appealing to higher reason and morality.

110.12. *Objectives*—If one bears all these aspects in mind, one would immediately perceive the objectives of the law of property and those of any reforms that may be introduced therein. The law defines, maintains and validates the varieties of property. The reform of the law should see that the content of the law keeps step with changes in society. A well designed law of property sets before itself certain objectives which it seeks to achieve in the regulation of the proprietory affairs of citizens. In regard to the aspect of transfer, the objective should be to ensure that transfer is not unduly hampered—thus avoiding one extreme,—and yet is not so unconfined as to harm society—thus avoiding another extreme. This approach should find reflection not only in the substantive rules regulating transfer, but also in the rules as to the machinery of transfer.

110.13. *Lines of Revision*—Having regard to the fact that these are the principal considerations that should underlie suggestions for reform, we have, in the preceding Chapters, gone through the Act section by section, and have, wherever necessary, recommended amendments in the light of the experience gained in the working of the Act during the long period of its existence and also in the light of the changed social conditions as well as conflict of judicial decisions and recent thinking on the subject. While doing so, we have borne in mind the fact that the Act was revised in 1929. These amendments do not detract from the quality of the content of the present Act as a legislative measure. But they take note of modifications inevitably rendered desirable by the passage of time—almost a century.

110.14. *Substance and form*—We are aware that there are limitations as to the extent to which one may go in recommending changes of substance in an Act of this nature. Radical amendments that make the substance or formalities of the law more stringent than at present, or cut down substantive

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1 Colebrooke's Digest, Vol. I, II. S. 1. 2; pages 270—300.

rights without adequate justification, might indirectly harm the interests of society, particularly by displacing settled practices. Amendments concerning the substance of the law have, therefore, been recommended by us only where they were found to be absolutely necessary in the interest of justice. An example of our recommendations falling in this category is the proposed amendment relating to forfeiture—section 114A,—wherein our approach has been to advance the spirit underlying the doctrine of relief against forfeiture.

110.15. *Other legislative developments*—We would like to mention that review of the law on a subject may sometimes be rendered desirable by legislative developments in another but allied subject. Rent control legislation furnishes one such instance for the present purpose. It has introduced several new concepts, of which only one need to be referred to, namely, the concept of statutory tenancy. In order that a landlord may recover possession, he must prove not merely that the contractual tenancy has been terminated, but also that the situation is free from impediments that might have been imposed in regard to eviction by the relevant rent control legislation. A point which is often overlooked is that a tenant of controlled premises, holding over after the termination of his tenancy, can still continue as statutory tenant and, therefore, normally he does not become a contractual tenant merely by paying rent. The reason is that the landlord has no right to possession without an order of the court, and the payment of rent and its acceptance are consistent with statutory tenancy and do not necessarily lead to an inference of a new contractual tenancy. This position was settled long ago in England,[1-2] and is recognised in India also. Since the Act was enacted at a time when such legislation was not in existence, its provisions—at the moment we have section 116 in mind—do not take notice of this special feature. Now that rent control legislation is no longer temporary in its character, it seemd to us desirable to deal with this situation in our recommendations.

110.16. *Simplification of the law*—Then, there is the objective of simplification of the law. Where there is a conflict of decisions, of course, an amendment by way of statement of the true legal position is almost always desirable. But, even apart from that, we have borne in mind the consideration that where, on a particular subject, the law purports to be condified, any important proposition that does not find mention in the statute law should, by amendment, be incorporated therein, if relevant to the subject matter. The ordinary citizen, once the law is codified, would expect that the most important matters would not be left to implication, and that at least the gist thereof would be found stated in the Code. Thus, we have recommended the incorporation[3] into section 126 of the judicially well-established principle that a gift cannot be revoked after acceptance.

110.17. *Notice to quit*—By way of example of simplification, we may mention our recommendation as to notice to quit. The normal method by which a landlord terminates a tenancy is by the service of a notice to quit. Such a document is no "new-fangled instrument"[4] but has been used since

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1 *Davies* v. *Bristow*, (1920) 3 K.B. 428.

2 Morrison v. Jacob, (1945) K.B. 577.

3 Section 126, third paragraph.

4 Note "The Conveyancer" (1947) 224 Law Times 296.

leaseholds became a recognised kind of property. The drafting of notices to quit, however, in many cases, presents difficulties, and not a few conveyancers have a sigh of relief when a notice to quit is accepted by the tenant as valid and no subtle questions of law are raised. The difficulty in framing such a notice lies in part in the fact that it must have been valid when it is served. Unlike a plaint, it cannot be amended from time to time. The fact that the tenant, on its receipt, does not immediately dispute its validity will not prevent him from doing so at any subsequent period in any dispute with the landlord as to delivering up of possession.

One of the difficulties in regard to a notice to quit arises from the position—now clearly established—that in all cases of periodic tenancies, wheather yearly, quarterly, monthly or weekly, a valid notice to quit must be expressed so as to terminate the tenancy at the end of a current period. This requirement has led to avoidable controversies, which we hope will be reduced after the amendment that we have recommended in section 106. We are referring to this amendment as an illustration of our attempt to simplify the law.

110.18. Fortunately, the Act is a short one and, in general, not complicated in its drafting. Shakespeare,[1] in one of his plays, thus described the confused situation in which the characters stood—

> "This is as strange a maze as ever man trod. And there is in this business more than Nature was ever conduct.....Some oracle must rectify our knowledge".

Oliver Cromwell has been quoted as having once said that the laws of England were "an ungodly jumble".[2]

We must hasten to add that a large part of the Act does not suffer from any such strange confusion. At some places, however, the Act is defective in the negative sense, as it is incomplete. We have tried to rectify such lacunae wherever they came to our notice.

110.19. *Conveyancing*—Digressing for a while from our main theme, we would like to stress the importance of a good system of conveyancing. Conveyancing is to the law of property what pleadings are to the law of civil procedure. Although land today is principally a mercantile commodity and saleability is a primary incident of its ownership, the modes of conveyancing remain essentially those that originated hundreds of years ago, for no compelling reasons. We have adverted to this aspect when we considered section 8, and would like to re-emphasise the need for a proper training in conveyancing. The matter is outside the scope of this Report; nevertheless, it is of importance, because a welldrafted deed of transfer avoids many avoidable problems, even if it cannot eliminate all of them.[3]

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1 The Tempest, Act 5, Scene 1.

2 Raymond Walton, Introduction to Law of Sales of Land (1950) (Introduction).

3 Lord Hailsham, Address to the National Book Trade Provident Society, noted in the Law Journal, reproduced in 36 Bom. L.R. (Journal) page 55.

110.20. This raises the question of style. Style was defined by Lord Hailsham[1] as consisting in the power of saying precisely and without waste of words what you mean. He declared that if business men and lawmakers had these gifts, there would be less work for lawyers in putting them right. These observations apply to conveyancing documents with great force.

The popular condemnation of the "Jargon" of the law may not be altogether just, since by reason of its subject matter, the law must aim at something quite drab. But if words are the raw material of the profession of the law, it behoves those who draft documents to select them with economy and care.

Perhaps one reason for the present state of affairs is the fact that there are no legal journals dealing with the theory and practice of conveyancing in India. There are, no doubt, a few books, but they are not enough to focus attention on developments in law and practice concerning conveyancing and do not deal with intricate examples of drafting of interest to those mythical and overburdened creatures—the average practitioner and the average landowner[2]—to borrow a phrase used by Megarry.

110.21. This is not to say that good conveyancing will avoid all problems. What Hudson wrote of treaties[3] applies to conveyancing also—

> "In litigation, the simple case is relatively rare in which the parties may be said to have foreseen and endeavoured to effect a solution of the precise problem presented. The parties seldom proclaim their intention in unmistakable terms; and even if an intention is proclaimed, it must be found to have been expressed in the text. More often, the problem raised before the Court was not foreseen when the instrument in question was being drafted, "neither the particular problem nor the general class to which it belongs; or if it was foreseen its solution was not definitely agreed upon. The compromises which are inevitable in framing an international instrument frequently result in the acceptance of a 'formula' which is possible only because it does not foreclose the contentions of any party. No great experience in international conferences is required to know that terms are sometimes employed in treaties of which no common understanding is reached in advance. In some situations, a lack of clarity may even be *desideratum;* the chief desire may be to continue uncertainty."

110.22. Two recent cases illustrate the different facets of the matter. In a Rajasthan case[4], the notice to quit was in the following terms :—

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1 Lord Hailsham, Address to the National Book Trade Provident Society, noted in the Law Journal, reproduced in 36 Bom. L.R. (Journal) page 55.

2 R. E. Megarry, Lectures on the Town and Country Planning Act, 1947 (Preface).

3 Hudson, Permanent Court of International Justice (1943), page 644.

4 *General Auto Agencies* v. *Hazari Singh,* A.I.R. 1976 Raj, 56, 61, para 22 (February).

"That the premises mentioned above let out to you on rent are required reasonably and bona fide for the personal necessity of residence and business for which my client has purchased and premises mentioned above. My client does not want to "keep you his tenant any longer and *hereby* terminates your tenancy by this notice and requests you to vacate the premises by the end of October, 1969 i.e., by the midnight of 31st October, 1959 or on such day on which you consider that your month of tenancy comes to an end".

It was contended that the expression "hereby terminates" meant that the tenancy was immediately terminated, that is to say, at the time of the service of the notice on the tenant, so that it was void with reference to section 106 Fortunately, this argument was rejected by the court, which regarded the notice as unambiguous. Such arguments cannot, of course, be avoided by any excellence in conveyancing.

On the other hand, there is an Allahabad case[1] where the notice was in the following terms :—

"You are required to deposit Rupees 195/- arrears of rent within one month of receipt of the notice, failing which you should vacate the portions of the premises which are in your tenancy *on expiry of* 30 *days of the receipt of* "the notice otherwise on expiry of the said period necessary legal proceedings will be taken against you".

It was held that there was no indication in the notice that the plaintiff was going to file a suit for ejectment or possession and that the demand for deposit of arrears of rent was the principal object of the notice. One may not, with respect, agree with the actual conclusion reached by the Allahabad High Court in this case, but the point which is being emphasised in the present discussion is that the draftsman of the notice could have avoided these complications by intimating in positive terms that he was *terminating* the tenancy.

110.23. As to the amendments recommended by us in the Act, it is not for us to say whether we have succeeded in effecting any substantial improvement. The task of the law-reformer is not an easy one. To recommend a change in the law without realising in full its likely implications is to render oneself open to the charge of undue tinkering with the law. To shrink from recommending a change where the existing law is believed to cause serious injustice, is to be guilty of a serious omission. Striving to steer clear of this Scylla and Charybdis, the law reformer must yet navigate his ship on an even keel. He must exercise a keen faculty of discrimination as well as exhibit a balanced approach. We would add that we have done our best to follow such a course.

Frankfurter described the complexity of the Judge's task in these terms :[2]

1 *Ram Bhushan* v. *K. R. Chakravarty,* (1971) Allahabad Law Journal 752.

2 Felix Frankfurter, Of Law & Men (Papers & Addresses edited by Philip Elumn) (1956), page 43.

"The core of the difficulty is that there is hardly a question of any real difficulty before the Court that does not entail more than one—so-called principle. Anybody can decide a question if only a single principle is in controversy. Partisans and advocates often cast a question in that form, but the form is deceptive. If the conflict (between two 'truths') cannot be resolved, the task of the Court is to arrive at an accommodation of the contending claims. This is the core of the difficulties and misunderstanding about the judicial process. This, for any conscientious judge, is the agony of his duty".

Much of this applies to law reform.

110.24. *Bagehot on Transfer.*—Bagehot has observed[1] that "A law reformer, in order that his work may be perfect, requires the conveyancing abilities. He must be able to bear in mind the whole topic, to draw out what is necessary of it on paper,— to see what is necessary,—to discriminate the rights of individuals,—to distinguish, with even metaphysical nicety, the advantage he would keep from the abuses he would destroy. A still and patient man, in quiet chambers, apt in niceties, anxious by temperament, precise in habit, putting the last extreme of perfection on whatever he may attempt, is the man for the employment."

110.25. We fully endorse these observations of Bagehot, and can merely say in all humility that we have tried not to lose sight of what he regards to be the desideratum of all good law reform.

NOTE OF DISSENT

We do not agree to the proposal contained in the proposed new section 123A which may be regarded as giving effect to the doctrine of part performance of an agreement to make a gift in cases where the transferee i.e. the intended donee of a property has taken possession of that property or any art thereof in pursuance of that agreement. We are afraid that an agreement to make a gift has no legal validity in our legal system. In the Indian Contract Act, 1872, "Consideration" is an essential ingredient of a valid contract. A consideration as defined in the Contract Act is valuable consideration. Mere natural love or affection or any other factor (based upon other considerations) without a valuable consideration cannot be the basis of a valid contract. Under section 2 of the Indian Contract Act, when at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise. On the principle of English Common Law of Contract which has been followed throughout in this country unless this consideration is a valuable consideration that is, to put in a simple language a pecuniary consideration, there is no valid contract. Under section 10 of the Contract Act all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not by the Contract Act itself expressly declared to be void. Whatever exceptions have been made to this rule in this respect are to be found in section 25 of the Contract Act which

1 Bagehot, Eassay on Brougham, reprinted in The Collected Works of Walter Bagehot (London 1968), Vol. 4, page 159.

lays down *inter alia in* clear terms that "A contract made without consideration is void, unless—

(i) it is expressed in writing and *registered* under the law for the time being in force for the registration of documents and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(ii) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or unless.

(iii) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1— Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given."

In view of these clear provisions of the Contract Act. We do not think that the proposed section 123A sought to be inserted in the Transfer of Property Act is at all called for. Such a provision, unless it can be brought within the scope of section 25 of the Contract Act would be illegal; and if it comes within the scope of section 25; it is redundent.

Lord Mansfield who is regarded as the greatest Chief Justice of England suggested that consideration as we understand it, should not be an essential ingredient of a valid contract. But his proposal was not accepted. In countries where the legal system is based upon the civil law system, that is, upon the Roman law, consideration as we understand it in our law or in the English common law is not an essential ingredient of a valid contract. But as consideration in the sense of valuable consideration is an essential ingredient in our law, we think the proposal made in the proposed section 123A cannot be accepted. This is why the doctrine of part performance which was given statutory recognition by section 53A of the Transfer of property Act inserted in 1929 clearly provides that a part performance of a contract to transfer any immoveable property is possible only where such contract to transfer is a contract *for consideration.* Without elaborating the point any further we think it has been sufficiently pointed out that the proposed section is opposed to the law relating to contract contained in the Indian Contract Act, 1872.

My learned and esteemed colleague Shri S.S. Dhavan has gone through this note and concurs in it.

(S. P. Sen-Varma)
Member
24-8-77

S S. Dhavan
24-8-77
Member

NOTE OF DISSENT

I have read the dissenting note of my colleague, Mr. S.P. Sen-Varma and agree with it. I would like to add a few words of my own.

I regret I cannot agree to the proposal that the law relating to the revocability of gifts should be so amended as to make a written promise of a gift irrevocable if the donee accepts possession of the property in pursuance of the promise. The proposal in effect is that if A makes a promise in writing to B that he will make a gift of his property to B and puts B in possession of that property, A cannot revoke the gift and recover possession of the property, even though the ownership still remains with him.

It may be noted that in the illustration given by me, B does not do any act on the faith of the promise of gift which will render it inequitable for A to revoke the gift. The only thing that A has done is that he has been put in possession and accepted possession of the property. But being put in possession or accepting possession is a benefit and not a deteriment and under the present law B cannot take advantage of the benefit derived by him so as to deprive A of his right to revoke the gift. The position would be different if, acting on the faith of the promise of gift by A, B has constructed a house on the property at his own cost or done something or refrained from doing something which has altered his position for the worth. All he can claim is that A promised in writing to make a gift of the property to him and also put him in possession. This does not create any equities in favour of B so as to deprive A of his right to revoke the gift, if he discovers that B did not deserve the gift.

It may be noted that in actual practice gifts of property are usually made by one party to another out of love and affection, or gratitude for the faithful attitude of the donee. For example a father may promise to make a gift of his property to one of his sons out of love and affection. But the ownership in the property is effected by a registered instrument signed by or on behalf of the father—in other words, until the property becomes in law the property of the son. Before this transfer of ownership takes place, the father will have the right to revoke the gift.

In my opinion, the father should have this right. For example, if the father finds that the son for whom he had such love and affection becomes unfaithful to him so as to forfeit his love and affection, the father has the right under the law to revoke the gift, assert his ownership and claim the return of the property to him and recover possession. But under the proposed S. 123—A, the father will have no remedy against such an unfaithful son and he will be in the position of King Lear who gifted his kingdom to there treacherous daughters and was subsequently thrown out from his own kingdom. I cannot agree to a proposal which will become a charter of protection for unfaithful or treacherous sons or relations or other unfaithful donees.

It may be noted that under the proposed law the accepting of possession by the donee will have the same effect as consideration. Under S. 53—A of the Transfer of Property Act, if B gives consideration for A's promise to transfer property to him and is put in possession, he acquires a title to the property against A and A cannot file a suit for the recovery

of the property on the ground that the transfer was not registered. But under the proposed S. 123—A, the equities arising out of the doctrine of consideration will be attached to gifts (without consideration) if the donor makes a written promise to gift the property and the donee accepts possession. I think the proposed change will deprive the donor of a very valuable right which today he can exercise till the last moment against undutiful, treacherous or unfaithful donees. Under the present social system, such a change will work havoc. I am strongly opposed to it.

Of course, after the gift deed is registered, the donor ceases to be the owner and he is helpless against an unfaithful donee, be he a son or a friend or a servant. But until this last moment arrives, he remains the owner and should have the right to revoke a gift and recover the property from any undeserving donee. The fact that the donor made a promise in writing is irrelevant when considering the equities between the parties. As far as equity is concerned, there is no difference between an oral or a written promise. The proposed section 123A, will treat acceptance of possession by the donee as having the same force as giving consideration for the gift. I must emphasise that mere acceptance of a gift is a benefit and the donee should not be allowed to take advantage of this benefit as if he has suffered any detriment or loss or given any consideration.

24th August, 1977. (S. S. DHAVAN)

NOTES OF DISSENT

I am sorry that I am recording my dissent on the points mentioned below :—

I do not agree to the proposal that the right of foreclosure available to a mortgagee in a mortgage by conditional sale or to a mortgage in an anomolous mortgage which specifically provides for foreclosure should be altogether taken away and that such mortgagee should be allowed to bring only a suit for sale. In other words, it is proposed to omit the right of foreclosure altogether from the law of mortgage in our country. The reason given is that if foreclosure is retained, then, mortgagor on the passing of a decree for foreclosure absolutely loses his property without receiving anything from the mortgaged property which he might have received out of the proceeds of the sale of the property. It is argued that if foreclosure is abolished and the mortgaged property is sold, then after satisfying the mortgage money due to the mortgagee, a portion of the sale proceeds may be available to the mortgagor. The idea of foreclosure is inherent in a mortgage by conditional sale which in many parts of India is known as *Kot Kobala,* vide the definition in section 58(c). Substitution of *sale* for *foreclosure* in a mortgage by conditional sale is inherently and essentially opposed to the concept of mortgage by conditional sale. Then, it is not true that the mortgagor does not get adequate money from the mortgagee

when he enters into the transaction of mortgage by conditional sale. The amount which a mortgagor in a mortgage by conditional sale receives from the mortgagee is much larger than the amount which is obtainable, say, in the case of a simple mortgage. The principal amount in a mortgage by conditional sale is very near the price which might be fetched by an out and out sale of the mortgaged property.

A mortgage by conditional sale without the right of foreclosure is in my opinion a contradiction in terms. Merely retaining a particular form (namely mortgage by conditional sale) is of no use unless its special characteristic, namely, the right of the mortgagee to a decree of forclosure debarring a mortgagor from redeeming the mortgage altogether, is retained. The Privy Council case of Ram Kinkar vs. Satyacharan A.I.R. 1939 P.C. reminds me only of what Lord Hallsbury and in *Quinn* v. *Leathem* (1901) A.C. 495 at p. 506.

> ".....every judgement must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

Therefore, we cannot entirely brush aside the different forms of mortgage mentioned in section 58 of the Transfer of Property Act. The entire sensuous phenomenal world is a world of forms and appearances and names. Through our sensuous experiences we cannot know the ultimate reality underlying all forms and names. The phenomenal world without forms is meaningless. Mortgage by conditional sale is no doubt a form of mortgage. But it is a form which cannot be ignored at all in our dealings with immovable property. Therefore, my view is, either retain fore-closure or abolish altogether mortgage by conditional sale. What is there in retaining a mere shell without the substance within the shell? It may also be pointed out that though it is proposed to give only a right of sale to the mortgage in a mortgage by conditional sale, the personal remedy is not proposed to be made available to such a mortgagee. Such a personal remedy, is available to a simple mortgagee who has a right to get a decree for sale from the court.

In this view of the matter I cannot agree with the proposal made in this respect.

II

I do not agree to the proposal made in section 106 of the Transfer of Property Act for leases for purposes of building. In the Transfer of Property Act there is at present no specific provision relating to leases for purposes of building.

Section 106 categories for the purpose thereof leases of immovable property as follows :—

1. Lease of immovable property for agricultural purposes;
2. Lease of immovable property for manufacturing purposes; and
3. Lease of immovable property for any other purposes.

But there is no specific mention for leases of immovable property for purposes of building. A lease of immovable property as defined in section 105 may be made for a certain term expressed or implied or in perpetuity. It is unnecessary to refer here to the other conditions mentioned in the section. To introduce the concept of lease of immovable property for building purposes may bring in complications. The first question may arise—what does such a lease exactly connote ? In English law the position is different. There leases for building purposes have been recognised for a long time and have a well-defined and settled meaning. Jowitt in the Dictionary of English Law defines "building lease", as a lease, often for a term of ninety-nine years at a rent known as a ground rent, under which the lessee covenants to erect certain specified buildings on the land demised by the lease, and to ensure and keep in repair such buildings during the term. At the expiration of the term the buildings become the property of the lessor. The ground rent is fixed at such a figure that the lessee, after paying it and after providing for the return of his capital at the end of the term, will make a reasonable rate of profit on the capital.

"By the Settled Land Act, 1882, section 2(10)(iii), a building lease is defined as a lease for the erecting and improving of, and the adding to and the repairing of, buildings and by the Law of Property Act, 1925, s. 205 as a lease for building purposes or purpose connected therewith. Such leases of settled land are regulated by the Settled Land Act, 1925, s. 44 and (as to leases by mortgagees) by s. 99 and s. 58(3)(9)(10) of the Law of Property Act, 1925. See the Landlord and Tenant Act, 1927, s. 2(1), as to a tenant's claim for compensation for improvements; see also the Landlord and Tenant Act, 1954, ss 47—50."

Uptil now no specific difficulty appears to have been felt in this country on account of the absence of specific provisions in the Transfer of Property Act, with respect to leases for building purposes. In my view, introduction of such provisions is not called for in view of the wide language of section 105 of the Transfer of Property Act, 1882.

III

I do not think that any change should be made in section 123 relating to the mode for making a gift of movable property. Section 123 provides *inter alia* that for the purposes of making a gift of movable property, the transfer may be effected either by a registered instrument, signed by or on behalf of the donor or by delivery. There is a difference between sale of moveable property and gift of moveable property. There is also a difference between a gift of moveable property *inter vivos* by act of parties and a gift of movable property by will. A will is a mere piece of paper unless it has been probated. The scheme throughout the Transfer of Property Act appears to be that, except in the case of transfer of actionable claims, whenever any writing is required, whether in sale, mortgage, lease, exchange or gift, the writing is required to be registered. In section 59 "registered"

was inserted in 1929. Gift is a vountary transfer i.e. a transfer without consideration. Therefore, here the formalities should be more stringent. There are two modes of making a gift of moveable property. It can be made by simple delivery or in the alternative, a gift of moveable property may be affected by a written instrument which must be registered. If simplicity is the aim to be achieved, then there should be only one mode for making a gift of moveable property, namely, delivery but if both the modes are to be retained then the written instrument must be registered.

Analogy to the English deed is inaccurate. A deed under the English law is full of formalities. In England there is no registration merely of assurances, but there is registration of title. In India the Registration Act deals only with registration of assurance and not with the registration of title.

In the case of transfer of actionable claims there are practical difficulties if registration is insisted upon. Then actionable claim, as the name indicates can be realised and effectuated only through court action when required. To point out anomoly in the present provision relating to gift of moveable property, it has been pointed out that writing of gift of small piece of jewellery must be registered, but a writing of gift of jewellery in another's possession need not be. Similarly, it is pointed out that a writing of a motor car must be registered but not a sale of a motor car or that a writing of a gift of wrist watch must be registered but not a writing of gift of moneys in bank. It has already been pointed out that gift being a voluntary transaction the provisions with respect thereto must be more stringent. Therefore, if we want to simplify the law in this respect we may simply provide that a gift of moveable property whatever may be its price, may be made only by delivery. In that case no writing and registration will be required. But if it is desired that there should be a second mode of making a gift of moveable property, namely, writing also, then the writing must be registered and that is what the present law provides. In this connection the language of clause (1) of section 25 of the Contract Act may be seen. In this clause an agreement made on account of natural love and affection between parties standing in a near relation to each other, must be in writing and *registered,* in order to be a valid agreement. I do not therefore think that any change is called for in section 123 in relation to the making of gift of moveable property.

(S. P. Sen-Verma)
24-8-1977

We would like to place on record our warm appreciation of the valuable assistance we have received from Shri Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. Gajendragadkar .....Chairman
P. K. Tripathi .....Member
S. S. Dhavan .....Member
S. P. Sen-Varma .....Member
B. C. Mitra .....Member
P. M. Bakshi .....Member-Secretary

Dated New Delhi
the 25th August, 1977.

MGIPF—885 M of Law/77—2750—11-8-80