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MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES (Ss. 58-104)

A.—MORTGAGES (Ss. 58-99 & 102-104)

Definition [S. 58(a)]

A "mortgage" is the transfer of an *interest* in *specific* immovable property for the purpose of securing—

(a) the payment of *money advanced* or *to be advanced* by way of *loan*.
(b) an existing or future *debt*, or
(c) the performance of an engagement which may give rise to a *pecuniary liability*.

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*, and the *instrument* (if any) by which the transfer is effected is called a *mortgage-deed*. The words 'mortgagors' and 'mortgagees' also include persons deriving title from them respectively.

In an old case, Mahmood J. observed : "A mortgage, as understood in this country, cannot be defined better than by the definition adopted by the Legislature in section 58 of the Transfer of Property Act. That definition has *not*, in any way, altered the law, but, on the contrary, has only formulated in clear language, the notions of mortgage, as understood by all the writers of text-books on Indian mortgages. Every word of the definition is borne out by the decisions of Indian Courts of Justice." (*Gopal* v. *Parsotam*, 1883 5 All. 121)

AGREEMENT TO MORTGAGE.— *Under English law*, an agreement to mortgage (at a future time) *may* amount to an equitable mortgage, and would be enforceable accordingly. The *Indian law* does *not* recognise such an agreement as a mortgage. *In India*, such an agreement gives rise only to a personal obligation, and is *not* capable of specific enforcement.

SIX KINDS OF MORTGAGES AND THEIR CHARACTERISTICS (Ss. 58, 62-65, 96 & 98)

The Transfer of Property Act, deals with the following *six kinds of mortgages* :

1. Simple mortgage : S. 58(b).
2. Mortgage by conditional sale : Ss. 58(c), 59 & 67.
3. Usufructuary mortgage : Ss. 55(d) & 62-68.
4. English mortgage : S. 58(e).
5. Mortgage by deposit of title-deeds (or *equitable mortgage*) : Ss. 58(f) & 96.
6. Anomalous mortgage : Ss. 58(g), 67(b) & 98.

1. Simple mortgage [S. 58(b)]

When—

(a) possession of the mortgaged property is *not* given (to the mortgagee), *and*

(b) the *mortgagor*—

(i) binds himself *personally* to pay the mortgage-money; and

(ii) agrees that, if he does not so pay, the mortgagee will have a right to cause the mortgaged property to be sold (by the Court), and the proceeds of such sale to be applied in payment of the mortgage-money,

the transaction is called a *simple mortgage*.

The mortgagee, in such cases, is called a *simple mortgagee*.

INGREDIENTS OF A SIMPLE MORTGAGE.— In a *simple mortgage*, one finds the following elements :

(a) a *personal obligation* on the part of the mortgagor *to pay* the debt;

(b) an express or implied power given to mortgagee to *cause* the *property to be sold* through the intervention of the Court;

(c) no transfer of ownership.

So, invariably in a simple mortgage, the *mortgagee must have the power to sell the property*. But the *sale cannot be made out of Court*. The words "cause to be sold" plainly indicate that it must be *through the intervention of* the *Court*. Thus, in order to avail himself of his security, the mortgagee should first get a *decree* directing the *sale* of the mortgaged property.

In a simple mortgage, the mortgagee is *not* put into possession of the property *pledged* to him. The debtor merely parts with the *right* of *sale* and nothing more. It is a right *in rem* realisable by sale given to a creditor by way of accessory security.

REMEDIES OF A SIMPLE MORTGAGEE.— A mortgagee of this type of mortgage cannot foreclose (*i.e.* keep the property in lieu of the mortgage-money). He acquires only the right of sale, and that too, only through the Court. He can also sue on the personal covenant (under S. 58), inasmuch as the simple mortgagor binds himself to repay.

(The concepts of "*foreclosure*" and "*sale*" are explained at length later in this Chapter.)

2. Mortgage by conditional sale [Ss. 58(c), 59 & 67]

Where the mortgagor *ostensibly* sells the mortgaged property, on condition that—

(i) on default of payment of the mortgage-money on a certain date,—the sale is to become *absolute; or*

(ii) on such payment being made,—the *sale* is to become *void; or*

(iii) on such payment being made,—the buyer is to *transfer the property to the seller,*—

the transaction is called a 'mortgage by conditional sale'. However, in such cases, the condition should be embodied in the *document which effects the sale* : S. 58(c).

MORTGAGE BY CONDITIONAL SALE.— In this form of mortgage, there is *no personal liability* on the part of the mortgagor to pay the debt. The *remedy* of the mortgagee is by *foreclosure* only. The mortgagee remains content with the property mortgaged, and *cannot* look to the other properties of the mortgagor, the latter not having any personal liability.

A mortgage by conditional sale is an *ostensible* sale which is to *ripen* into an *absolute sale* on breach of the condition as to payment; in other words, on the breach of the condition, the contract executes itself, and the transaction is closed, and becomes one of absolute sale to be enforced in a particular manner, called *foreclosure*. A mortgage is foreclosed by obtaining a declaration from the court to the effect that the mortgagor will be debarred of his right of redemption. Such a declaration ripens the *ostensible* ownership of the mortgage into *absolute ownership*.

A mortgage by conditional sale is non-possessory (*i.e.*, no delivery of possession is given under it), and therefore, the mortgagee does not have the advantage to *repay himself*, as is the case in a usufructuary mortgage.

The right of a mortgagee (in this type of mortgage) is to close the transaction in case of default of repayment on the due date, and claim the property as an absolute owner. But this right can be enforced, not *privately*, but only by a *suit for foreclosure*. The mortgagee does *not* acquire any personal right against the mortgagor as in the case of a simple mortgage; nor is he entitled to the possession of the property. In fact, by virtue of this mortgage, he can only acquire ownership over the property

which, however, will *not vest* in him in spite of a default of payment on the due date, *until* there is a decree for foreclosure.

In a *recent case* before Gujarat High Court, the first part of the document spoke of an outright sale, whereas the second part contained provisions for redemption of the land. The Court observed that *the document must be read as a whole*, and *held* that it was a *mortgage by conditional sale, and not* a sale with a right to re-purchase. (*Ismail Khatri* v. *Muljibhai Brahmabhatt*, A.I.R. 1994 Guj. 8)

PROBLEM.— Separate documents of sale deed and deed of reconveyance are executed between the parties in the same transaction and in respect of the same property. The owner wishes to redeem the property and contends that the transaction is in the nature of a mortgage by conditional sale. Will he succeed ?

Ans.— In a mortgage by conditional sale, it is absolutely necessary that the condition effecting the sale as a mortgage should be embodied *in the sale deed itself.* As this was not done in the present case, the "mortgagor" *cannot* say that the transaction was in the nature of a mortgage by conditional sale. (*Sunil K. Sarkar* v. *Aghor K. Basu*, A.I.R. 1989 Gau. 39)

How effected (S. 59)

Such a mortgage can be effected—

(a) where the principal money secured is Rs. 100 or upwards,—by a registered instrument *signed* by the mortgagor and *attested* by at least two witnesses;

(b) when the principal money secured is less than Rs. 100,—by a registered instrument *signed* and *attested* as aforesaid, *or by delivery* of the property.

Mortgagee's remedy (S. 67)

The remedy open to the mortgagee by conditional sale is by *foreclosure* only, and *not* by *sale.*

DIFFERENCE BETWEEN A MORTGAGE BY CONDITIONAL SALE AND A SALE WITH A CLAUSE FOR REPURCHASE : TEST—Whether a particular transaction is a mortgage by conditional sale or an out-and-out sale with a right of repurchase is to be determined by the *intention of the parties*, as gathered from the terms of the deed itself. If the relation of *debtor* and *creditor* is *intended* to subsist, the conveyance will amount to a mere *security*, and therefore, a *mortgage.* In the case of a sale with a clause for repurchase, the whole transaction is a *bona fide* sale, there is no relation of *debtor* and *creditor* subsisting between the parties, and the right of repurchase must be exercised *within the fixed time*, as time is regarded as the *essence of the contract.* If such a right is not exercised within the fixed time under the contract, there will be a discharge of the contract, and the seller will not be able to enforce the right of repurchase, whereas in the case of a mortgage by a conditional sale, the right of redemption continues to subsist even after the fixed period. *Once a*

mortgage always a mortgage. Therefore, the mortgagor can redeem the mortgage, so long as the law of limitation permits him, *or* before the mortgagee obtains a decree of foreclosure.

The difference in the legal effect of a sale with a condition of repurchase and a mortgage by conditional sale is clear, but there remains the practical difficulty of distinguishing between the two. S. 58 states that the transaction becomes a mortgage by conditional sale if the condition is embodied in the document which effects the sale. But the problem is,—should *every* transaction, where the sale and the condition are contained in the same document be treated as a mortgage by conditional sale? There was a difference of opinion among the various High Courts on this point. This conflict of decisions was set at rest by a decision of the Supreme Court in *Chunchun Jha* v. *Shaikh Ebadat Ali*, (1954 S.C.J. 469) where the Court observed as follows : "If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage, whether the documents are contemporaneously executed or not. *But the converse does not hold good.* That is to say, the mere fact that there is only one document *does not necessarily mean* that it must be a mortgage and cannot be a sale".

In the above case, the Supreme Court further *held* that whether the transaction contained in the document amounts to an absolute sale with an agreement of repurchase *or* a mortgage by conditional sale must depend on the *intention of the parties*, which must be ascertained from the *surrounding circumstances*.

3. Usufructuary mortgage [S. 58(d) & 62-93]

Where the mortgagor—

(a) *delivers* possession, or expressly or by implication binds himself to deliver possession, of the mortgaged property to the mortgagee, *and*

(b) *authorises* him— (i) to *retain* such possession until payment of the mortgage-money, *and* (ii) to *receive* the rents and profits accruing from the property, *and* (iii) to *appropriate them in lieu of interest* or, in payment of the *mortgage-money*, (or partly in lieu of interest and partly in payment of the mortgage-money), –

Define and state the characteristics of a usufructuary morigage.

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the transaction is called a *usufructuary mortgage*, and the mortgagee is called a usufructuary mortgagee.

USUFRUCTUARY MORTGAGE.—In this form of mortgage, the property is given as a security to the mortgagee, who is let into possession

or is permitted to *repay himself* out of the rents and profits of such property. *Two points* must be carefully noted with respect to a usufructuary mortgage : (i) possession must be given to the mortgagee, *or* the mortgagor must expressly or impliedly bind himself to deliver possession; *and* (ii) the mortgagor will *not* be personally liable, *unless* there is a distinct agreement to the contrary.

Write a short note on : Usufructuary mortgage.
B.U. June 96
Oct. 97

A usufructuary mortgagee, having the opportunity of *repaying* himself, is not put to the necessity of going to Court. This position accounts for the *prohibition* in Sec. 67 denying him the right of foreclosure *and* sale.

Its characteristics.—The following are the *five* main characteristics of a usufructuary mortgage :

(i) There is delivery of possession to the mortgagee.

(ii) The mortgagee is to retain possession until repayment of the money and is to receive rents and profits in lieu of interest, or in payment of the mortgage-money, or *partly* in lieu of interest and *partly* in payment of the mortgage-money.

(iii) The mortgagor is entitled to redeem when the amount due is personally paid or the debt is discharged by rents and profits received by the mortgagee : S. 62.

(iv) If the mortgage is for Rs. 100, or more, it must be registered; if below Rs. 100, it may be by a registered deed *or* by delivery of property : S. 59.

(v) No time-limit is fixed for repayment.

REMEDIES OF A USUFRUCTUARY MORTGAGEE.— A usufructuary mortgagee *cannot sue*, – either for sale or for foreclosure. His *only remedy* is to *retain possession of the mortgaged property* till the *mortgage-money* is paid up, and to *appropriate* the *rents* and *profits* thereof till then, as per the terms of the mortgage-deed. It may be noted, however, that if the mortgagee is *not* in possession, or if he loses such possession, he may sue to obtain *possession* and also mesne profits (*i.e.*, past profits); he may also sue for the mortgage-money under S. 68.

Neither the remedy of foreclosure nor that of a sale is open to usufructuary mortgagee, as he realises his right by possession and enjoyment of the profits. When his possession is disturbed, the usufructuary mortgagee has a personal remedy under S. 68 to sue for the mortgage-money.

Rights of usufructuary mortgagor to recover possession (S. 62)

A usufructuary 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) in the following *two* cases, *viz.*,—

(i) where the mortgagee is authorised to pay himself the amount of the mortgage-money from the rents and profits of the property,—when the mortgage money is paid;

(ii) where the mortgagee is authorised to pay himself from such rents and profits,—when the terms (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.

Accession in the case of a usufructuary mortgage (S. 63)

Where, in a usufructuary mortgage, an accession has been acquired at the expense of the mortgagee, the profits arising from the accession are, *in the absence of a contract to the contrary*, to be set off against interest, if any, payable on the money so spent.

DIFFERENCE BETWEEN :

ENGLISH MORTGAGE	USUFRUCTUARY MORTGAGE
1. There is a *personal liability* to repay the loan.	1. There is *no personal liability* to repay the loan.
2. The property is *absolutely* transferred to the mortgagee, *on condition* of its being retransferred to the mortgagor on his repaying the debt.	2. The mortgagee does *not* get ownership in the property; *only possession* is transferred to him, which he is entitled to retain until he is paid off.
3. The mortgagee can *sue* for sale, and has, in certain cases, a *power of sale* without the intervention of the Court.	3. The mortgagee *cannot sue* for sale; neither has he a power of sale without the intervention of the Court.

ZUR-I-PESHGI LEASE.—*Zur-i-peshgi* literally means a payment in advance *or* a lease for a premium. It also means a usufructuary mortgage in the form of a lease. In a *Zur-i-peshgi* lease, the mortgagee is the lessee and has physical possession of the property. The mortgagor receives an advance by way of future rent, and he purports to execute a lease, pure and simple. It is recited in the deed that, in consideration of the 'advance rent' received, the person advancing the money will remain in enjoyment of the property for which the rent has been paid for a certain number of years, and that, after the expiry of the period, the lessee is to give up possession. In such cases, the money is received as a loan, and property is given as security.

Zur-i-peshgi leases were devised to evade the laws against usury, as well as the canons of the Koran which forbade lending money at interest. If there was no debt, there could be no usury, and yet the rent might be so low as to leave a handsome margin for interest on the loan. By this device, the mortgagees entered into possession *not as mortgagees, but as lessees at fixed rent.*

Mortgage distinguished from a lease

In *Maharajadhiraj Sir Kameshwar Singh* v. *State of Bihar* (A.I.R. 1959

SC 1303), the Supreme Court has laid down the following *four tests* to ascertain whether a particular transaction is a *lease* or a *mortgage* :

(a) Is there any express term which makes the loan returnable, either by payment or by enjoyment of the usufruct ?

(b) Is the interest fixed?

(c) Is the right of redemption granted ?

(d) Is there any provision for personal liability, if any amount remains outstanding after the term of the lease?

4. English mortgage [S. 58(e)]

What is an English mortgage ? How can it be created ? What are the rights of such a mortgagee ?
B.U. Apr. 95
Apr. 98

Where the mortgagor—

(a) *binds himself to repay* the mortgage-money on a certain date, *and*

(b) 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".

CHARACTERISTICS OF AN ENGLISH MORTGAGE.—The following are the main characteristics of an English mortgage :

(i) It is followed by delivery of possession.

(ii) There is a personal covenant to pay the amount.

(iii) It is effected by an absolute transfer of property, with a provision for re-transfer in case of repayment of the amount due.

(iv) Power of sale out of Court is conferred on certain persons under certain circumstances stated in S. 69.

Remedy open to an English mortgagee.—His remedy is by *sale*, and *not* by *foreclosure*.

Though Section 58(e) states that the mortgagor transfers the property absolutely, yet it must be noted that *an absolute transfer can never be a mortgage*. The very definition of a mortgage is that there is the transfer of a *limited* interest for the purpose of securing the debt. Therefore, the word *absolutely* emphasises that the characteristics of a sale are more pronounced in the case of an English mortgage, but it does *not* suggest that there is an absolute transfer in the nature of a sale.

Write an explanatory note on : English mortgage.
B.U. Apr. 97

Thus, the use of the word "absolutely" in the definition of an English mortgage, is only a matter of *form*, and *not* of *substance*. What really passes is only an *interest* in the property, and *not the whole property*. This point has been amply clarified by the Privy Council in the case of *Ramkinkar* v. *Satyacharan* (66 I.A. 50), where it was observed as follows : "Their Lordships think that the sub-section (e) upon its true construction does *not* declare 'an English mortgage' to be an absolute transfer of property. It declares only that such a mortgage would be absolute were in *not* for the proviso to retransfer."

DISTINCTION BETWEEN :

ENGLISH MORTGAGE	SIMPLE MORTGAGE
1. *What is transferred to the mortgagee* - *Property* is transferred *absolutely* to the mortgagee.	Only the *right of sale* is transferred.
2. *Right to possession*— The mortgagee, being the owner of the property, has a right to enter into immediate possession of it.	The mortgagee has no right to enter into immediate possession of the property.
3. *Sale out of Court*— An English mortgagee has, in certain cases, a right of sale *without* the intervention of the Court.	A right of sale without the intervention of the Court is not conferred on a simple mortgagee.

DISTINCTION BETWEEN :

ENGLISH MORTGAGE	MORTGAGE BY CONDITIONAL SALE
1. *Personal liability to pay*—There is a covenant to repay, or some personal liability on the part of the mortgagor.	1. There is no such personal liability to pay.
2. *Conveyance of property to mortgagee*— Property is conveyed *absolutely* to the mortgagee, subject to a *condition of reconveyance* on payment of the mortgage-money.	2. The sale is ostensible, and not real or absolute. It *becomes* absolute on failure of payment of mortgage-money if a decree of foreclosure is obtained.
3. *Right of possession*— An English mortgagee has the right to enter into immediate possession of the property.	3. A conditional mortgagee has no such right.
4. *Change in conveyance*— Absolute conveyance is converted into a mortgage.	4. The sale is *ostensible*, *i.e.*, the mortgage is liable to be converted into an absolute sale, when a decree of foreclosure is obtained.
5. *Remedy*— Remedy of an English mortgage is by *sale*.	5. The remedy of a conditional mortgagee is by *foreclosure*.

5. Mortgage by deposit of title-deeds (Equitable mortgage) [Ss. 58(f) & 96]

Where a person—

(a) in 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, (*e.g.*, Ajmer, Allahabad, Delhi, Jaipur, Mysore etc.),

(b) *delivers* to a creditor (or his agent), *documents of title* to immovable property,

(c) with *intent to create a security thereon*,—

the transaction is called a 'mortgage by deposit of title-deeds'.

The provisions which apply to a *simple* mortgage apply, *so far as may be*, to a mortgage by deposit of title-deeds.

EQUITABLE MORTGAGE.— A mortgage by deposit of title-deeds is popularly called an *equitable mortgage* on the analogy of a similar expression used in *English law*. In England, this form of mortgage creates a mere equitable security, as distinguished from an actual mortgage, which is ordinarily called a *legal mortgage*, and is, therefore, unenforceable against a *bona fide* purchaser for value of the legal estate without notice. But *in India*, it creates, not merely a right *in personam*, but a right *in rem*, which cannot be defeated by any defence of *bona fide* purchaser without notice. Consequently, it will operate also against a subsequent legal mortgage of the same estate. *In England*, this form of mortgage is rightly called an *equitable* mortgage, but in India, the latter *expression is a misnomer*, because here, it is, in fact, a *legal* mortgage.

Write a short note on : Equitable mortgage.
B.U. Apr. 95

A mortgage by deposit of title-deeds may include lands outside the limits of the towns mentioned above. But it should be *made in* any one of those towns. When such a mortgage was created by deposit of title-deeds relating to immovable properties situate partly inside and partly outside the town of Calcutta as security, *Jenkins J. held* that it was a valid mortgage.

Discuss the charactertistics of a Mortgage by deposit of title-deeds.
B.U. Apr. 95
Apr. 99

Characteristics of a mortgage by deposit of title-deeds.— (i) It can be created in the towns of Calcutta, Madras and Bombay (and other towns which may be notified in the Official Gazette). It can be created in such towns by deposit of title-deeds, even though the property is *outside* those towns.

(ii) It is not necessary that *all* the deeds should be deposited. It is sufficient if *material* documents are deposited. It is effected by deposit of *material* title-deeds.

(iii) No delivery of possession of property takes place.

(iv) It is made to secure a debt or advances made, or to cover future advances.

(v) No registration is necessary, even if there is a writing recording the deposit : S. 59.

(vi) It prevails against a subsequent transferee who takes under a registered instrument.

(vii) It prevails against all who are not *bona fide* purchasers for value without notice.

Explain fully the principal characteristics of a mortgage by deposit of title-deeds. How is it created ?
B.U. Oct. 98

REMEDIES AVAILABLE.— S. 96 of the Act puts equitable mortgages on the same footing as simple mortgages. Therefore, the remedy of the *mortgagee* by deposit of title-deeds is by a *suit for sale;* he is *not entitled*

to sue for *foreclosure*. He can also sue for the mortgage-money. (*Nityanand* v. *Rajpur Chhaya Bani Cinema Ltd.*, 1953 A.C. 208)

The *mortgagor's* remedy is a suit for redemption, and *not* an action to recover the title-deeds.

PROBLEM.— *A* borrowed a sum of money from *B* in Bombay. As a security for the loan *A* deposited with *B* in Bombay, by way of equitable mortgage, the title-deeds of his property in Itarsi (which is *not* a notified town). *B* filed a suit in Bombay for sale of the mortgaged property. *A* argued that there was no valid or enforceable mortgage in *B's* favour, as the mortgaged property was situated outside the towns notified under S. 58. Will *A's* contention succeed ?

Ans.—*No*, *A's* contention will *not* succeed, because a mortgage of property situated in *any* place (whether notified or not) can be effected by a deposit of title-deeds in Bombay. (*Central Bank of India* v. *Nusserwanji*, 34 B.L.R. 1384).

DIFFERENCE BETWEEN *ENGLISH* LAW AND *INDIAN* LAW AS REGARDS EQUITABLE MORTGAGES

ENGLISH LAW	INDIAN LAW
1. *What right is created*— In England, it creates a *mere equitable* security, as contrasted with a legal mortgage.	In India, it creates, *not* merely a right *in personam*, but a right *in rem*.
2. *Whether enforceable against a purchaser*— In England, it is *not enforceable* against a bona fide purchaser of the estate, for value, without notice.	In India, *it is enforceable* against such a purchaser, and prevails against a subsequent legal mortgage of the same estate.
3. *True nature of the mortgage*— It can *rightly* be called *"equitable"*.	It is *wrongly so called* because in India it is, in fact, a *legal* mortgage.
4. *Whether 'tacking' and 'consolidation' allowed*— Yes.	*No*, – they are abolished by the Transfer of Property Act.

DIFFERENCE BETWEEN :

ENGLISH MORTGAGE	MORTGAGE BY DEPOSIT OF TITLE-DEEDS
1. The mortgagor *binds* himself to repay the money.	1. There is *no personal liability* to repay the loan.
2. Mortgaged property is transferred *absolutely* to the mortgagee.	2. Mortgaged property is *not absolutely* transferred to the mortgagee.
3. Operation is *not* restricted to any place.	3. Operation is restricted to certain centres of commerce.

4. Must be effected by a *registered instrument*—(i) where the principal money secured is Rs.100 or upwards; *or* (ii) where there is no delivery of the property.	4. Can be affected by a mere delivery of the title-deeds, with intent to create a security thereon. Whatever be the principal money secured, no writing is required.
5. In certain cases, the mortgagee has a power of sale without the intervention of the Court : see S. 69.	5. The mortgagee has no power of sale without the intervention of the Court.

6. Anomalous mortgagee [S. 58(g) & 98]

A mortgage which is not— (i) a simple mortgage, (ii) a mortgage by conditional sale, (iii) a usufructuary mortgage, (iv) an English mortgage, *or* (v) a mortgage by deposit of title-deeds,

is called an 'anomalous mortgage'.

The rights and liabilities of the parties to such a mortgage are to be determined— (i) by their contract, as evidenced in the mortgage-deed, and failing that, (ii) by local usage.

ANOMALOUS MORTGAGE.— An anomalous mortgage is a transaction which is, in fact, a mortgage (as defined in the Act), but is not any of the types of mortgages considered above. In other words, it is a mortgage other than those categorically defined in the section. Instances of such mortgages are the *kanom, otti* and *peruartham* mortgages of Madras and the *san* mortgage of Gujarat.

Characteristics of anomalous mortgage :

(i) It would include a simple mortgage usufructuary and a mortgage usufructuary by conditional sale.

(ii) Possession may or may not be delivered.

(iii) If for Rs. 100 or upwards, it must be registered; if below Rs. 100, it may be by a registered deed or by delivery of possession : S. 59.

REMEDY OF THE MORTGAGEE.— The mortgagee's remedy is by *sale* and *foreclosure*, if the terms of the mortgage permit it : S. 67(a).

The remedy of a mortgagor, if he becomes a trustee or legal representative of the mortgagee, is by a *suit for sale* only : S. 67(b).

REMEDIES AVAILABLE TO DIFFERENT MORTGAGEES REMEDY OF :

1. A simple English and Equitable mortgagee	2. Mortgagee by conditional sale—	3. Usufructuary mortgagee—	4. Anomalous mortgagee —	5.Mortgagee of public works–
Sale. No. Foreclosure: S. 67(a)	Foreclosure. No. Sale : S. 67(a)	Neither sale nor foreclosure : S. 67(a)	Ordinarily, sale. Foreclosure allowed if so provided in mortgage deed : S. 67(a)	Appointment of receiver. [Neither foreclosure nor sale] : S. 67(c)

NATURE OF RIGHTS TRANSFERRED IN EACH KIND OF MORTGAGE

Type of Mortgage	Nature of the right transferred
(1) A simple mortgage	(1) The right of sale.
(2) A usufructurary mortgage	(2) The right of possession and enjoyment of the usufruct.
(3) A mortgage by conditional sale	(3) The right of ownersnip subject to a condition.
(4) An English mortgage	(4) The right of ownership subject to a condition.
(5) A mortgage by deposit of title-deeds	(5) The right of sale.

SUB-MORTGAGE.—A mortgage-debt being an immovable property, the mortgagee *can* assign his interest in the mortgaged property. A mortgage *by the mortgagee* of his interest under the original mortgage is called a *sub-mortgage*. A sub-mortgagee is entitled to a decree for sale of the mortgage-rights of *his* mortgagor.

A puisne mortgage arises where *A* mortgages his property to *B* by a legal mortgage and then mortgages it *again* to *C* either by an equitable mortgage or by creating a charge on the same property.

MORTGAGE WHEN TO BE BY ASSURANCE, *i.e.*, WHEN TO BE *REGISTERED* AND *ATTESTED* (S. 59)

Where the principal money secured is—	(a) *Rs.* 100 *or upwards* - a 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.

(b) *Less than* Rs. 100, a mortgage may be effected—	(i) either by a registered instrument *signed* by the mortgagor *and attested* by at least *two* witnesses, *or* (ii) (except in the case of simple mortgage) by delivery of the property.

TRANSFER WHEN COMPLETE.—The completion of the mortgage does *not* depend upon the payment of consideration, *unless there is a contract to the contrary.* The transfer is complete as soon as the mortgage deed is executed, *or* where there is no deed, as soon as possession is delivered.

EFFECT OF NON-REGISTRATION.—If the transaction intended to be a mortgage, and requiring registration, is *not* registered, the mortgage is *not* converted a *charge* under S. 100, but may be used to establish a personal liability. (*Vani* v. *Bani*, 20 Bom. 553). The mortgagor cannot sue for *redemption*, the mortgage being invalid, but he can sue for *possession* on his offering to repay the loan. (*Maung Tung* v. *Maung Aung*, 2 Ran. 313).

Although a deed may be invalid for want of registration, if, possession has been delivered under it, the doctrine of Part-Performance (S. 53A) may be brought into play.

MORTGAGOR'S RIGHTS
(Ss. 60-61, 63-66, 83-84, 91-92 & 102-108)

A mortgagor has the following *six rights :*

I. Right of redemption : Ss. 60-61, 83-84, 91-92, 95 and 102-103.
II. Right to transfer to a third party instead of retransference to mortgagor : S. 60-A.
III. Right to inspection and production of documents : S. 60-B.
IV. Right to accession : S. 63-64.
V. Right to grant a lease : S. 65-A.
VI. Right to reasonable waste : S. 66.

I. REDEMPTION
(Ss. 60-61, 83-84, 91-92, 95 & 102-103)

The following *nine* topics are discussed here :

1. Right of redemption.
2. Right of redemption, how extinguished.
3. Effect of redemption.
4. Right to redeem a part of the mortgaged property.
5. Right to redeem separately or simultaneously.

Write an explanatory note on : Redemption.
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6. Who can sue for redemption.
7. Right of subrogation.
8. Right of redeeming mortgagor to claim expenses.
9. Mortgagor's right to deposit money in Court.

1. Right of redemption (Ss. 60, 83-84)

At any time *after* the principal money has become due, and on *payment* or *tender* of the mortgage-money, the mortgagor has the right to get back his property, and demand—

(a) the return of the mortgage instrument, together with all the title-deeds;

(b) delivery of possession of the mortgaged property (when the mortgagee is in possession); *and*

(c) a re-transfer of the property (at the *mortgagor's* cost) or an acknowledgement in writing of the extinction of the mortgagee's right. (S. 60)

However, the above right *cannot* be exercised if it has been extinguished by any *act of the parties*, or by *a decree of the Court.*

The right conferred by this section (S. 60) is called a '*right to redeem*', and a suit to enforce it is called a '*suit for redemption*'.

Moreover, S. 60 does not render invalid any provision to the effect that—

Explain the equity of redemption of a mortgage.
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(i) if the time fixed for payment of the principal money has been allowed to pass, *or*

(ii) if no such time has been fixed,—

the mortgagee is to be entitled to *reasonable notice* before payment or tender of such money.

RIGHT OF REDEMPTION.— *Redemption means paying off the mortgage-money*, and getting back the mortgated property. Redemption takes place when the mortgagor discharges his obligations under the mortgage, and thus becomes entitled to have his property re-vested in him, free of the charge. The mortgagor's right to have his property returned to him contemporaneously with the discharge of his obligation is called the *right of redemption.*

Its nature.— Under the Indian law, the terms "right to redeem" and "equity of redemption" are synonymous. There is no distinction between the legal right of redemption and the equity of redemption. The mortgagor's right to redeem, even after the expiry of the date fixed for payment, is *not* an equity; it is a *statutory* right recognised by S. 60 of the Transfer of Property Act.

ONCE A MORTGAGE, ALWAYS A MORTGAGE.— The right to redeem is a natural incident of a mortgage. Notwithstanding any stipulation to the contrary, a mortgagor, at any time *after* the principal money has become payable and *before* his *equity of redemption* has been actually foreclosed, has, on payment of his debt, the right to get back his property

free of all conditions or liens. This right of redeeming the mortgagor's property is an indefeasible right, and cannot be taken away from him by any law or contract. The right of redemption *cannot* be detached from the mortgage. This rule is well expressed by the maxim *"Once a mortgage, always a mortgage."*

The mortgage may be redeemed at any time *after* the principal money has become due. Therefore, *unless* the money becomes *due*, the mortgagor *cannot* insist on redeeming his property, nor can the mortgagee attempt to foreclose. Again, the right of redemption subsists until the mortgage is actually foreclosed, that is, till a decree is passed in foreclosure suit. So, generally, these two rights accrue at the *same* time and subsist upto the same time, and this incident is often described by saying that *the right of redemption and foreclosure are co-extensive*. This maxim, of course, assumes the absence of any valid stipulation (express or implied) to the contrary.

"Once a mortgage, always a mortgage" Discuss extensive with reference to the doctrine of clog on the equity of redemption

B.U. Oct. 95

Clog on Redemption

The right of redemption is statutory right, and it is so absolute that *it cannot be defeated* even by the parties themselves. Nor can this right be fettered by any condition. It may be noted that in section 60, there are no such words as "in the absence of a contract to the contrary." The legal position is that any condition contained in mortgage deed, which obstructs the right of redemption, will be considered as a *clog* on redemption, and will be nul, and void.

However, it may also be noted that the *doctrine of clog on redemption* relates only to dealings which take place between the parties to a mortgage at the time when the contract of mortgage is entered into. It does *not* apply where they subsequently vary the terms upon which the mortgage may be redeemed.

Pollock has described this doctrine as "an anachronism", and has suggested that it should be limited to cases of oppressive or unconscionable bargains. However, both in England and in India, it is now settled that a mortgage *cannot* be made irredeemable (except as regard companies, which may issue secured irredeemable debentures); nor can the right to redemption be made illusory or superfluous.

Write a short note on Clog on redemption

B.U. Oct. 93

Vaddiparthi v. *Appalanarasimhalu* (41 Mad. L.J. 563).— *A* mortgaged his land to *B* for five years, with a provision that rents and profits would be set off against interest. The deed further provided that if the mortgage was not redeemed within 20 years, the mortgagee should treat the land as sold to him absolutely. This was *held* to be a *clog on redemption*, and the mortgage was held redeemable even after 20 years.

"Once a mortgage, always a mortgage, and nothing but a mortgage" Comment with reference to "clog on redemption."

B.U. Oct. 95

Shankar v. *Yeshwant* (22 B.L.R. 965). – *X* mortgaged his land to *Y* with possession, and the mortgage provided that in default of redemption after 20 years, *Y* would become the owner of *half* the land. This provision was a clog on the equity of redemption. But, four years after the expiry of the 20 years period, while *Y* was still in possession, *X* executed a deed by which half the land was conveyed to *Y*, and *Y* released the other half from the mortgage. The Court *held* that this was an arrangement for the discharge of the mortgage, and it was *valid*.

Pomal Govindji v. *Vrajlal Purohit* (A.I.R. 1989, S.C. 436). – The Supreme Court has *held* that a long term for redemption, by itself, is *not* a clog on the equity of redemption. But, a very long period for redemption (99 years in the present case), taken with other relevant factors (as for instance, inflation and rise in prices) could create a presumption that it *was* a clog on the equity of redemption.

PROBLEM.— *A* mortgaged his land to *B* with possession for 5 years, the rent and profits to be set-off against interest. The mortgage further provided that if the mortgage was *not* redeemed within a period of 20 years from the due date, the mortgagee should treat the land as sold to him absolutely. *A* filed a suit for redemption after 20 years from the due date. Will *A* succeed ?

Ans.— The provision to treat the land as sold is invalid as a clog on the equity of redemption, and the mortgage is redeemable even after 20 years.

The right of a mortgagor to redeem a mortgage has been the subject of anxious protection in law. Any attempt made to obstruct such right is known as *clog on the equity of redemption.* The clog on the equity of redemption might be in any one of the following forms :

(1) The mortgagor may be *totally prevented* from redeeming the mortgage.

(2) The terms of the mortgage might give a *collateral benefit* to the mortgage *or* impose a *collateral burden* on the mortgagor, which is expected to last even *after* the discharge of the debt and the redemption of the mortgage.

So far as any direct attempt at preventing a mortgagor from redeeming the mortgage is concerned, it has been *held* that such terms are null and void. This is based on the principle, "*Once a mortgage, always a mortgage*". So far as collateral advantages or disadvantages are concerned, it was *held* in *Noakes v. Rice* (1902 A.C. 24) that such collateral stipulations, which do *not* cease to operate on the redemption of a mortgage, are in the nature of a clog on the equity of redemption, and therefore void.

In *Noakes* v. *Rice*, *R* mortgaged his premises to *N and Co.*, brewers, with a condition that *R* should not, whether during the continuance of the mortgage or afterwards, sell on the premises any other liquors than those prepared by the company. Such a condition was *held* to be a clog.

However, in a subsequent case, *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.*, (1914) A.C. 25, it was *held* that a stipulation for a collateral benefit in a mortgage does *not* cease to operate immediately on redemption, if —

(a) it is not unfair or unconscionable;

(b) it is not in the nature of a penalty clogging the equity of redemption; *and*

(c) it is not inconsistent with or repugnant to the contractual or equitable right to redeem.

Therefore, in English law, the collateral conditions which satisfy the test laid down in *Kreglinger's case* will be deemed to be *valid*.

Kreglinger's Rule and Indian Law

In view of the wordings of Sec. 60 of the Act, it has been *held* that the rule in *Kreglinger's case* is *not applicable* in India. Therefore, a stipulation which is intended to operate beyond the redemption of a mortgage is a *clog*, and *cannot* operate beyond redemption. (*Bhimrao v. Sakharam*, 46 Bom. 409)

PROBLEMS.—1. *X* borrows money from *Y*, and executes a usufructuary mortgage for the amount, redeemable in any month of *Jeth*. *X* then borrows a further sum from *Y*, and executes a simple money bond, in which he covenants *not* to redeem the mortgage until the money due on the second bond is paid. Is such a covenant valid ?

Ans.— *No*, this covenant is *not valid*, as it amounts to a clog on redemption. (*Sheo Shankar* v. *Parma Mahton*, (1904) 26 All. 559)

2. *X* borrows Rs. 500 from *Y*, and executes a usufructuary mortgage for Rs. 300, the rents and profits to be taken in lieu of interest. *X* covenants in the deed that the payment of the balance of Rs. 200 with interest at 2% per month would be compulsory at the time of redemption. Does this covenant amount to a clog on redemption ?

Ans.— *No*, this covenant is *not* a clog on redemption; it only creates a further charge for Rs. 200. (*Jeut Koeri* v. *Mathura*, (1926) 24 All. L.J. 125)

Right of Redemption

(a) How exercised (Ss. 60, 83-84)

The right of redemption can be exercised in *three ways, viz.*—

(i) By paying or tendering the mortgage-money to the mortgagee outside Court. [Ss. 60 and 102-103]

(ii) By depositing the amount due on the mortgage in the Court. [Ss. 83-84].

(iii) By a regular suit for redemption.

2. Right of redemption, how extinguished (S. 60)

The right of redemption is extinguished :

(i) by act of parties (S. 60) as when the mortgagor sells his equity of redemption and thereby extinguishes his right.

(ii) by an order of Court (S. 60). Thus, where a decree is passed in a foreclosure suit, or when the mortgaged property is sold by an order of the Court, the mortgagor's right is lost.

3. Effect of Redemption (Ss. 60-60A & 62-64)

All the effects of redemption are discussed below at the appropriate places. Shortly stated, they are as follows :

1. Return of documents and return of possession of the mortgaged property : Ss. 60 and 62.

2. The mortgagor may require the mortgagee that, instead of retransferring the property to the mortgagor, the mortgagee shall assign the mortgage-debt to a third person named by the mortgagor : S. 60A.

3. The mortgagor becomes entitled to (a) accessions to the mortgaged property (S. 63); (b) improvements made thereon (S. 63A); and (c) the renewed mortgage-lease : S. 64.

4. Right to redeem a part of the mortgaged property (S. 60)

A person interested in a *share only* of the mortgaged property is *not* entitled to redeem his own share *only*, on payment of a proportionate part of the amount remaining due on the mortgage, — *except* where a mortgagee (or if there are more mortgagees than one, *all* such mortgagees) has (or have) acquired, in *whole* or in *part*, the share of a mortgagor : S. 60.

A mortgage is one and indivisible. The *general rule* is that the mortgage-debt being indivisible and the mortgaged property being held in its entirely as security for the debt and every part of it, the property can only be redeemed in its entirety on payment of the *whole debt*. In other words, the holder of a partial interest in the equity of redemption *cannot* redeem a part of the property on payment of a proportionate part of the debt. So also, one of the mortgagees *cannot* claim to realise a portion of security for a proportionate part of the debt. *All* the mortgagors are entitled to be made parties to one proceeding, and are not to be exposed to a variety of proceedings.

This general rule is deducible from sections 60 and 67 of the Transfer of Property Act. But there are *exceptions* to the rule, and in the following *four cases*, a mortgagor can claim to depart from the rule :

1. Where the terms of a mortgage provide for partial redemption: in other words, the rule is to be applied *subject to a contract to the contrary*.

2. Where the co-mortgagors have distinct and separate interests.

3. Where the mortgagee recognises a partition of the mortgaged property amongst the co-mortgagors : *Mahadaji* v. *Gampatishet*, 15 Bom. 257.

4. When the mortgagee himself acquires a *portion* of the mortgaged property (*Moro* v. *Balaji*, 13 Bom. 45), and not the *whole* of the mortgaged property. When a mortgagee acquires, in whole or in part, the share of a mortgagor, the indivisible character of the right of redemption is destroyed, and the mortgagor will be allowed to redeem his share.

5. Right to redeem separately or simultaneously (S. 61)- Consolidation abolished

A mortgagor who has executed *two or more mortgages* in favour of the *same mortgagee* is, *in absence of contract to the contrary*, when the principal money of any two or more of

the mortgages has become due, entitled to redeem any *one* of such mortgages *separately,* or any two or more of such mortgages together.

ABOLITION OF CONSOLIDATION. - *By consolidation of mortgages* is meant the mortgagee's power to compel the mortgagor to redeem together all the securities in his hands, *or* to prevent the mortgagor from redeeming one of such securities without redeeming the others. As such a consolidation may cause considerable hardship to the mortgagor, section 61 abolishes it, by providing that a mortgagor, who has executed several mortgages *in favour of the same mortgagee,* may redeem one or more of such mortgages when they become due, *without redeeming the other mortgages.*

If there are several mortgages between the parties, the mortgagor can redeem separately or simultaneously, according to his convenience. The rule contains no reference to the property which has been mortgaged, so that it will not make any difference whether the different mortgages are on the *same* property *or* on *different properties or* on *different portions of the same property.*

The *doctrine of consolidation* enables the mortgagee of two different properties mortgaged by the same mortgagor to consolidate those mortgages, and force him to redeem all of them, or to prevent him from redeeming one of them without redeeming the other. Of course, there could be no question of consolidation as regards any mortgage where the time for redemption has not expired. The doctrine was supposed to be based on the maxim : "He who seeks equity must do equity." However, in practice, it led to inequitable results, and has, therefore, been abolished by S. 61 of the Transfer of Property Act.

The words *"in the absence of a contract to the contrary"* in S. 61 indicate that *the parties may allow consolidation by mutual consent.* Such a provision, however, must be *clear* and *explicit.*

However, it may be noted that, under Sec. 67A, a mortgagee who holds two or more mortgages executed by the same mortgagor is bound to sue on all the mortgages in respect of which the mortgage-money has become due, provided such mortgages entitled him to obtain the same kind of decree. Thus, to a certain extent, consolidation of mortgages is necessary, though the doctrine has been abolished so far as the right of the mortgagor to redeem the mortgage is concerned.

Who can sue for redemption (S. 91)

The following *three* categories of persons can sue for redemption under S. 91, *viz.*—

(i) Any person (other than the mortgagee) having –
  (a) any interest in, *or*
  (b) charge upon,

— the property mortgaged, *or*

— the right to redeem the same.

Persons falling under clause (i) fall into *two* groups, *viz.*—

(a) those having an interest in, or charge upon, the mortgaged property, as for instance, puisne mortgagees who have a charge on the mortgaged property; and

(b) those having a right to redeem the property, – as for instance, the purchaser of the equity of redemption.

(ii) Any surety for the payment of the mortgaged debt, or any part thereof.

Under clause (ii), a surety of the mortgagor is also entitled to redeem. This is in keeping with the principle of law that a creditor may recover the debt *either* from the principal debtor *or* from the surety. If the debt is recovered from the surety, the latter becomes entitled to all the securities which the creditor had in respect of the debt. Thus, a surety may choose to pay off the debt of the mortgagee and subrogate himself to the position of a mortgagee.

(iii) 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.

Clause (iii) is based on the English case, *Christian* v. *Field* (1842-2 Hare, 177). A right to redeem is given to such a creditor of the deceased mortgagor, so that he may get the benefit of his decree.

7. Right of subrogation (S. 92)

PERSONS ENTITLED TO BE SUBROGATED.—Any of the persons referred to in S. 91 above (other than the mortgagor) and any co-mortgagor, have, on redeeming the property subject to the mortgage (so far as regards redemption, foreclosure or sale of such property is concerned), the *same* rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. (This is known as *legal subrogation.*)

A person who has advanced to a mortgagor, money with which the mortgage has been redeemed is *subrogated* to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has, by a registered instrument, agreed that such person be so subrogated. (This is known as *conventional subrogation.*)

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.

The right of subrogation cannot be conferred *unless* the mortgage in respect of which the right is claimed has been redeemed *in full.*

SUBROGATION.— "Subrogation is a Roman law term meaning *"Substitution"*. It is the right of a person to stand in the place of a creditor. When a mortgagee transfers his mortgage-debt, his assignee becomes vested with all his rights, *i.e.*, his assignee is *substituted* or *subrogated* in the place of the mortgagee. In order to be entitled to subrogation, a person must pay off the *entire amount* of a prior mortgage, because subrogation takes place by redemption, and unless there is redemption, there can be no subrogation.

S. 92 makes it very clear that the doctrine of subrogation *cannot* be invoked unless the prior mortgage is discharged as a whole. The *principle of this rule* is that there cannot be subrogation without redemption. Therefore, a partial payment of the mortgage-debt *cannot* give rise to a claim for a partial subrogation.

LEGAL AND CONVENTIONAL SUBROGATION.— Subrogation is of *two kinds* : (1) legal, and (2) conventional, and S. 92 covers both. Legal subrogation takes place by operation of law, when the mortgage-debt is paid off by some person who has some interest to protect, *e.g.*, where a subsequent mortgagee pays off a prior one.

Legal subrogation may occur in *four ways* :

(i) A subsequent mortgagee may redeem a prior mortgage.

(ii) A co-mortgagor may redeem a mortgage.

(iii) The mortgagor's surety may redeem the mortgage.

(iv) The purchaser of the equity of redemption may redeem the mortgage.

Conventional subrogation (also sometimes called subrogation by agreement) takes place where the person paying off the mortgage-debt is a stranger and has no interest to protect, but he advances the money under an agreement, express or implied, that he would be subrogated to the rights and remedies of the mortgagee who is paid off. (*Gurudeo Singh* v. *Chandrika Singh*, (1909) 36 Cal. 193). A provision for conventional subrogation is also made in the section, and it requires the agreement of subrogation to be in writing and registered.

BASIS OF THE DOCTRINE. – The essence of the doctrine of subrogation is that the party who pays off a mortgage gets clothed with all the rights of the mortgagee. The doctrine is *based on principles of justice, equity and good conscience,* and the Supreme Court has *held* that the doctrine would apply even in those parts of India where the Act itself was not applicable. (*Ganeshi Lal v. Jyoti Pershad, A.I.R. 1953 S.C. 1*)

DOCTRINE NOT APPLICABLE WHEN MORTGAGOR REDEEMS.– The doctrine of subrogation *cannot* be invoked if the mortgagor himself redeems. The mortgagor who discharges a prior debt is *not* entitled to be subrogated to the rights and remedies of his creditor. This is because, by discharging a prior encumbrance created by his own self, he is merely discharging his own obligation to his creditor. (*Narain* v. *Narain*, A.I.R. 1931 All. 40)

WHETHER BENEFIT TO MORTGAGOR OR MORTGAGEE NECESSARY. – The Madras High Court has *held* that when a subsequent mortgagee redeems a prior mortgage, no question arises as to whether

the payment is for the benefit of the mortgagor or the mortgagee. All that is necessary for the application of S. 92 is to see whether the person claiming the benefit of the section was a mortgagee at the time when he made the payment. (*Nagayyar* v. *Govindayuyar*, A.I.R. 1923 Mad. 349)

8. Right of redeeming co-mortgagor to claim expenses (S. 95)

Where one of several mortgagors redeems the mortgaged property, he is, in enforcing his right of subrogation under S. 92 against his co-mortgagors, 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.

9. Mortgagor's right to deposit money in Court (Ss. 83-84)

At any time *after* the principal money has become due and *before* a suit for redemption is barred—

—the mortgagor, or any other person entitled to sue for redemption under S. 91, may deposit,

—in any Court in which he might have instituted the suit for redemption,

—to the account of the mortgagee,

—the full amount remaining due on the mortgage.

The Court thereupon causes a written notice of the deposit to be served on the mortgagee, who may, by a petition, state the amount then due on the mortgage and his willingness to accept money in full discharge of such amount. He may, after depositing all documents in the Court, receive the money so deposited. All the documents so deposited are to be delivered to the mortgagor.

Where, however, the mortgagee is in possession of the property, before paying the amount so deposited, the Court must direct him—

(i) to deliver possession thereof to the mortgagor;

(ii) to transfer the property to the mortgagor or his nominee at the cost of the mortgagor; *or*

(iii) to execute and (where the mortgage is 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.

When the mortgagor has tendered or deposited in Court the full amount due on the mortgage, the interest ceases to

run from the date of the tender; or in the case of deposit where no previous tender of such amount has been made, as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of the Court, and notice has been served on the mortgagee.

However, if 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 is payable from the date of such withdrawal.

Moreover, nothing in the above rules can deprive the mortgagee of his right to interest when there is a contract that he would be entitled to a reasonable notice before payment or tender of mortgage-money, and such notice has not been given.

Service on, or tender to, agent (Ss. 102-103)

Where the person on whom or to whom any notice or tender is to be served or made, does *not* reside in the district in which the mortgaged property is situated, service or tender on or to an agent would be deemed to be sufficient. If such a person or agent *cannot* be found, the person making the tender may deposit the amount in Court, and such deposit has the effect of a tender of such amount.

Where the person making or accepting a notice or tender is incompetent to contract, a legal curator or a guardian *ad litem* may be appointed for the purpose.

II. RIGHT TO TRANSFER TO THIRD PARTY INSTEAD OF RE-TRANSFERENCE TO MORTGAGOR (S. 60A)

Where a mortgagor is entitled to redemption, he may require the mortgagee, instead of re-transferring the property, to *assign* the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee is bound to assign and transfer accordingly.

The rights conferred by this section belong to and may be enforced by, the mortgagor or by any encumbrancer, notwithstanding an intermediate encumbrance. However, a requisition of any encumbrancer would prevail over a requisition of the mortgagor, and, as between encumbrancers, the requisition of a prior encumbrancer, prevails over that of a subsequent encumbrancer.

The above rules do *not* however, apply in the case of a mortgagee who is, or has been, in possession of the property.

A new provision is made in S. 60A, on the lines of S. 95 of the English Law of Property Act, 1925, which enables the mortgagor to require the mortgagee to assign the mortgage-debt to a person whom he nominates, instead of having a re-transfer of the property, as provided in S. 60, to himself or any other person as he may direct.

The distinction between these two rights of the mortgagor is to be carefully noted. Under S. 60, the mortgagor pays off the money and gets back the property free from the encumbrance, and he may accordingly ask the mortgagee to reconvey the property to himself or any other person of his choice. Under this section, the mortgagee is, of course, paid off, but he is required to keep the mortgage alive, and transfer it to some person whom the mortgagor nominates. The obligation thus imposed upon him is absolute, and he is not concerned with any arrangement that the mortgagor may have made with the proposed assignee in regard to the question of paying him off. In this case, the mortgage as such is not extinguished, but it is *assigned* by the mortgagee to another person.

This provision, it will be noticed is intended to help the mortgagor to pay off the mortgagee by raising a loan from another person on the same security. A lot of trouble and expense would be saved by this method of assignment of the mortgage instead of first getting the reconveyance and then creating a fresh mortgage in favour of the new creditor.

This right is exercisable *not only* by the mortgagor and any person claiming through him, *but also* by any puisne mortgagee. The requisition of a puisne mortgagee will prevail over that of the mortgagor, and as between the mortgagees themselves, the requisition of a prior mortgagee will take precedence over that of a subsequent one.

Exception.—The benefit of this provision, however, is denied where the mortgagee is, or has been, in possession of the mortgaged property. The *reason* is that such a mortgagee remains liable to account for the rents and profits of the property even after the assignment of the mortgage. The request of the mortgagor for an assignment, if allowed in such a case, would certainly debar him from calling the mortgagee to account for the acts of the assignee; yet, the liability might be enforced by subsequent encumbrances, unless they have also agreed to the assignment. But for this exception, the mortgagee may permit the mortgagor to make use of this mortgage as the first enumbrancer to keep out the other creditors. The exception is, therefore, enacted with a view to protect the interest of the subsequent encumbrancers and persons interested in the equity of redemption.

III. RIGHT TO INSPECTION AND PRODUCTION OF DOCUMENTS (S. 60B)

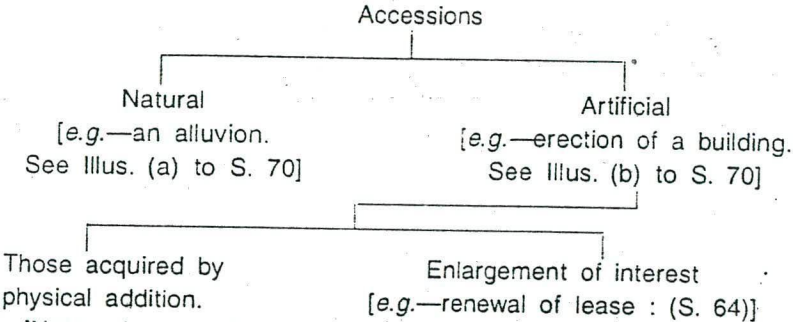
As long as his right of redemption subsists, a mortgagor is entitled, at all reasonable times, at his request and at his own cost, to *inspect* and make copies of (or extracts from)

documents of title relating to the mortgaged property, which are in the custody or power of the mortgagee.

IV. RIGHT TO ACCESSION (Ss. 63-64)

ACCESSION.—*Accession* denotes physical accretion of additions, whether brought about by natural or artificial means.

The *general rule* is that an accession to the mortgaged property enures to the benefit of the mortgagee and his security (S. 70), and at the same time, is subject to redemption (Ss. 63 and 64), no matter whether it is the mortgagor or the mortgagee who makes the accession. But this general rule is subject to modification in matters of detail. All *natural* accessions and those acquired by the mortgagor go with the property and ultimately belong to the mortgagor; but *artificial* accessions, if made by the mortgagee, sometimes belong to the mortgagee and sometimes not, and S. 63 makes provision for adjustments of the rights of the parties.



[Note.—As regards a mortgagee's right to accession, see Ss. 70-71 below.]

Thus, there are *two* kinds of accessions : (1) *natural;* and (2) *artificial.* Artificial accessions may again be divided into *two* classes : (a) those which are acquired by physical addition; (b) those which result from enlargement of interest.

All *natural accessions* enure to the benefit of the mortgagor on redemption; *artificial accessions* sometimes enure to the benefit of the mortgagor and sometimes not. (See. S. 63, below.) When the mortgagor proposes to take the accession, he must pay the cost thereof, *except* where the accession is voluntary, and *is not separately enjoyable.* It should further be noted that section 63 (as well as section 70) is subject to a *contract* between the parties. So, any of the above provisions may be altered by agreement.

When the mortgagor is entitled to accession (S. 63)

(1) Where the mortgaged property is in the possession of the mortgagee, and the mortgagee has, during the continuance of the mortgage, received any accession, upon redemption, the mortgagor is, in *the absence of a contract to the contrary,* entitled, as against the mortgagee, to such accession.

(2) When such accession is acquired at the expense of the mortgagee, and is—

(a) *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;

(b) *not* capable of separate possession or enjoyment,—the *accession must be delivered with the property.* In such a case, the mortgagor is bound to pay the cost of the acquisition 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 9 *per cent* per annum, *provided that* the accession was (i) necessary to preserve the property from destruction or forfeiture, *or* (ii) the accession has been made with the mortgagor's assent. The profits, if any, arising from the accession are to be credited to the mortgagor.

In the case of a usufructuary mortgage, if the accession has been acquired at the expense of the mortgagee, the profits arising from the accession are, *in the absence of a contract to the contrary,* to be set off against any interest payable on the money expended as the cost of acquisition.

Improvement to mortgaged property (S. 63A)

Where the mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, *in the absence of a contract to the contrary,* upon redemption, the mortgagor is entitled to such improvement, and he is *not* liable to pay the cost thereof. But, he is liable to pay proper costs, *in the absence of a contract to the contrary,* if such improvement was effected at the cost of the mortgagee, *and* (i) was necessary (a) to preserve the property from destruction or deterioration; *or* (b) to prevent the security from becoming insufficient; *or* (ii) was made in compliance with the lawful order of any public servant or public authority.

In order to make this section applicable, *three* points should be noted :

(1) The mortgaged property should be in the possession of the mortgagee.

(2) The improvements should have been affected during the continuance of the mortgage.

(3) The improvements must have been effected at the cost of the mortgagee.

The cardinal principle which is to be borne in mind is that "You cannot improve a mortgagor out or his estate". The Court will never regard an improvement as reasonable if it is one which will jeopardise the mortgagor's right of redemption, as for instance, when the improvement puts the matter of redemption beyond the mortgagor's means. The principles underlying cases of accessions and improvements are very much the same, with this difference that the latter do *not* admit of separate enjoyment, and therefore, the illustrations relating to accessions may be referred to in connection with improvements also.

Renewal of mortgaged lease (S. 64)

Where the mortgaged property is a *lease*, and the mortgagee obtains a renewal of the lease, upon redemption, the mortgagee has the benefit of the new lease, *in the absence of a contract to the contrary.*

However, if the lease is renewed by the mortgagor during the continuance of the mortgage, the renewal will enure to the benefit of the mortgagee and his security. This rule is contained in S. 71, which also provides that if the mortgaged property is a renewable leasehold, the mortgagee may charge the mortgagor with the cost of its renewal.

V. RIGHT TO GRANT A LEASE (Ss. 65 & 65A)

A mortgagor, while lawfully in possession of the mortgaged property, has the power to make leases thereof which are binding on the mortgagee.

However, the above provision applies *only if a contrary intention is not expressed* in the mortgage-deed.

S. 65A further provides that every such lease should satisfy the following *eight* conditions :

(a) It should be such as would be made in the ordinary course of management of the property concerned.

(b) It should be in accordance with any local law, custom or usuage.

(c) It should reserve the best rent that can reasonably be obtained.

(d) No premium should be paid or promised.

(e) No rent should be payable in advance.

(f) The lease should take effect *within six months* from the date on which it is made.

(g) It should not contain a covenant for renewal.

(h) In the case of buildings, the duration of the lease cannot exceed *three years.* Further, such a lease must

contain a covenant that if the rent is not paid within a specified time, the lessor can re-enter on his property.

The above provisions may be varied or extended by the mortgage-deed : S. 65A.

VI. RIGHT TO REASONABLE WASTE (S. 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.

A security is deemed to be insufficient, *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.

Under this section, the security will be sufficient if the value of the mortgaged property exceeds the mortgage-amount by one-third. Thus, if the mortgage-amount is Rs.12,000 the value of the property should be at least Rs.16,000. But in the case of *buildings*, it should exceed, not by one-third but by one half. Thus, in the above illustration, if the securit 's a building, its value should be at least Rs. 18,000.

LIABILITIES OF THE MORTGAGOR (S. 65)

IMPLIED CONTRACTS BY THE MORTGAGOR (S. 65)

There are *five implied contracts* which the mortgagor is deemed to enter into with the mortgagee, *in absence of a contract to the contrary* :

1. Covenant for title [S. 65(a)]

The mortgagor is deemed to contract that the interest which he professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same.

There is an implied *warranty of title* by the mortgagor in the property mortgaged by him. If the title turns out to be defective, there is a breach of this warranty, and the mortgagee can sue (i) for the principal money, as well as (ii) for damages, even before the stipulated period.

2. Covenant for defence of title [S. 65(d)]

The mortgagor is also deemed to covenant that he will defend,— or if the mortgagee be in possession of the mortgaged property, enable him to defend,— the mortgagor's title to the property.

There is an implied covenant on the mortgagor's part to indemnify the mortgagee against all expenses incurred in protecting his title. The mortgagor is bound to defend, or enable the mortgagee to defend his (*i.e.*, the mortgagor's) title. This rule is based on the principle that the mortgagor

is bound to keep the mortgage security intact by guarding it against all invasion or intrusion.

3. Covenant for payment of public charges [S. 65(c)]

The mortgagor is also deemed to contract that he 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.

There is an implied contract on the mortgagor's part during the time of his remaining in possession, to pay Government revenue and other public charges. If a sale results from the breach of this implied contract, the mortgagee may, under section 68, sue for the mortgage-money; and if there are any surplus sale-proceeds after such revenue sale, the mortgagee will have a charge on them under section 73.

4. Covenant for payment of rent [S. 65(d)]

Where the mortgaged property is a *lease,* the mortgagor is deemed to contract with the mortgagee 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 mortgage; and that the mortgagor will pay the rent reserved by the lease (or, if the lease be renewed, the renewed lease), and perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims, sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts.

It may be noted that there is *no covenant to renew the lease.*

5. Covenant for payment of prior encumbrances [S. 65(e)]

Where the mortgage is a second or subsequent encumbrance on the property, the mortgagor is deemed to contract that he will pay the interest accruing due on each prior encumbrance when it becomes due, and will, at the proper time, discharge the principal money due on such prior encumbrance.

The above covenants run with the land (S. 65)

The benefit of all the above contracts are annexed to, and 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.

The *benefit* of these implied covenants passes or *runs with the land;* so, a mortgagee's assignee is also entitled to the same. But, the *burden*

of these covenants is confined to the mortgagor *alone*, and does *not* pass to a purchaser of the equity of redemption. Thus, where the mortgagor's vendee allows Government revenue to fall in arrears and himself purchases the property at a revenue sale, he (*i.e.*, the purchaser) is *not* liable to the mortgagee whose security has been extinguished. His position in this respect is different from that of the mortgagor. The mortgagee, in such a case, can only look to the surplus sale proceeds, if any; therefore, he should be on the alert to prevent revenue sales.

The covenants implied by S. 65 are *subject to any contract to the contrary*. It has been *held*, for example, that such a contract may be presumed when the mortgagee was fully aware of the nature and extent of the mortgagor's title.

RIGHTS OF THE MORTGAGEE (Ss. 67-73 & 94)

1. Right of foreclosure or sale (S. 67)

Define "mortgage". Discuss the rights and liabilities of a mortgage of immovable property.
B.U. Oct. 96
Apr. 99

At any time *after the mortgage-money has become due* and *before redemption or before the money has been paid or deposited in Court,* the mortgagee has the right to obtain from the Court a decree for *foreclosure* of the mortgage or for *sale* of the property.

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*".

RIGHT TO FORECLOSURE.— As the mortgagor has the right to redeem, a corresponding right is given to the mortgagee, known as the *right of foreclosure*. This right implies that when the time fixed for repayment of the mortgage-money has expired, and the mortgagor's right to redeem has become complete, and he has failed to avail himself thereof, the mortgagee has the right to institute a suit for a decree that the mortgagor be absolutely debarred of his right to redeem the property. It must be remembered that *the right to redeem and the right to foreclose are co-extensive.*

The general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose are co-extensive, and that where there is a stipulation to pay a mortgage-debt within say, ten years, the mortgagor cannot redeem at an earlier date.

It may be noted that the right of redemption *cannot* be modified by agreement between the parties, but such is not the case with the right of foreclosure.

Who *cannot* foreclose or sell [S. 67. cls. (a), (b), (c) & (d)]

(i) A simple mortgagee *cannot foreclose.*

(ii) A usufructuary mortgagee *cannot foreclose* or *sell.*

(iii) A mortgagee by conditional sale *cannot sell.*

(iv) A mortgagee's trustee or legal representative happening to be a mortgagor and possessing the power of sale *cannot foreclose.*

Write an explanatory note on : Foreclosure.
B.U. Oct 97

(v) A mortgagee of works of public utility *cannot foreclose* or *sell.*

(vi) An English mortgagee *cannot foreclose.*

(vii) A person interested in *part* only of the mortgage-money *cannot* institute a suit relating to a corresponding part of the mortgaged property, *unless* the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

A fractional mortgagee cannot sever his interest, and sue alone for the corresponding part of the mortgaged property without the consent of the mortgagor and the other mortgagees. A similar correlative restriction follows as a corrollary from the rule that *every mortgage is indivisible.*

"OPENING THE FORECLOSURE". — *Under the English Law, every* mortgage contains within itself a *personal* liability to repay the amount advanced. The *mortgagor's liability to repay* the mortgage-money and the *mortgagee's obligation to reconvey* the mortgaged property are reciprocal. Consequently, after foreclosing a mortgagee *cannot* sue on the personal covenant, *unless* he still retains the mortgaged property in his hands. If a mortgagee sues on the personal covenant *after* foreclosing, he *cannot* require the mortgagor to repay his loan or the balance thereof, unless he is himself ready and willing to surrender the security: he, by taking an action on the personal liability of the mortgagor, gives him a *renewed* right to redeem the property. This is known as "opening the foreclosure." *In India, there is nothing like "opening the foreclosure".*

DIFFERENCE BETWEEN *FORECLOSURE* AND *SALE*

1. *Foreclosure* is allowed only in the case of a mortgage by conditional sale and an anomalous mortgage, if under its terms, the mortgagee is entitled to foreclose. A suit for *sale* can be brought in the case of a simple mortgage, an equitable mortgage, an English mortgage (in which the mortgagor makes a personal covenant to pay the mortgage-money on a certain date), *and* an anomalous mortgage, if a power of sale can be implied from the terms of the mortgage.

2. *Foreclosure* is possible *only by a suit. Sale* is possible *either* out of Court *or* by a suit.

3. *Foreclosure* absolutely discharges the mortgage-debt. The mortgagee *cannot*, thereafter, proceed against the mortgagor on the personal covenant. In the case of sale, the mortgagee can recover the balance amount if the sale-proceeds are not sufficient to satisfy the mortgage-debt.

2. Right to sue for mortgage-money (S. 68)

The mortgagee has a right to sue for the mortgage-money in the following *four cases*, and in no others, *viz.*-

1. Where the mortgagor *binds himself* to repay the same. However, a transferee from the mortgagor or from his legal representative, is *not* liable to be sued for the mortgage-money.

2. 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, *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. (This clause covers cases where the security may be destroyed by accidental causes, such as fire or flood or any *vis major,* without the fault of either party.)

It is to be noted that when a suit is brought under the above two clauses, the Court *may,* at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, *unless* the mortgagee abandons his security, and, if necessary, re-transfers the mortgaged property.

3. 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.

EXAMPLE.— *A* executes a usufructuary mortgage of his house to *B,* but remains in possession as *B*'s tenant. Failure on the part of *A* to pay the rent does *not* entitle *B* to sue under Section 68.

4. Where the mortgagee is entitled to *possession* of the mortgaged property, and 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 the mortgagor.

Fateh Din v. *Kishen Lal* (73 I.C. 902).— *A* made a usufructuary mortgage of 10 plots of land to *B.* Two of these did *not* belong to *A,* and therefore, *B* was unable to obtain possession of them. The Court *held* that *B* was entitled to sue for the mortgage-money.

PERSONAL LIABILITY TO PAY.— Personal liability is an essential ingredient of (i) a simple mortgage, (ii) an English mortgage, and (iii) a mortgage by deposit of title-deeds. (*Nityanand* v. *Rajpur Chhaya Cinema Ltd.,* 1953 A.C. 208) In these cases, the mortgagor "binds himself" to repay the mortgage-money. The personal obligation to repay may be express or implied. Personal liability is *not* an essential ingredient of any other mortgage described in S. 58; here, the personal liability can be created only by a covenant expressed or clearly implied.

3. Right to sell *without* the intervention of Court (S. 69)

A mortgagee (or any person claiming on his behalf) has the 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 *three* cases,– and *in no others*,– namely :

1. Where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a (i) Hindu, (ii) Muhammedan, or (iii) Buddhist, or (iv) a member of any other race, sect, tribe or class from time to time specified by the State Government in the Official Gazette.

2. Where the Government is the mortgagee, *and* a power of sale without the intervention of Court is expressly conferred by the mortgage-deed.

3. Where the mortgaged property is situated in Calcutta, Madras or Bombay, or any other Gazetted town or area, *provided that* the power of sale without the intervention of Court is expressly conferred by the mortgage-deed.

However, this power can be exercised only —

(i) When the principal money (or part thereof) has remained unpaid for *three months* after service of *notice* in writing requiring payment on the mortgagor or one of several mortgagors; *or*

(ii) When interest not less than Rs. 500 in amount is in arrears and remains unpaid for 3 *months*.

Discuss when can a mortgaged property be sold without intervention of the Court.
B.U. Oct. 97

Any one of the above two conditions will justify a private sale. Of course, notice of demand *cannot* be given before the *due* date.

If the mortgage-money is payable by instalments, the power of sale is exercisable when *any* instalment has become due. (*Payne* v. *Cardiff Rural Council*, (1932) K.B. 241)

It has been *held* by the Bombay High Court that the power of sale *cannot* be exercised when interest alone is due unless the principal money is also due. (*Baba Miya Mohiddin Shakkar* v. *Jehangir Dinshaw Belgaumwala*, 43 Bom. L.R.)

Effect of sale under this power. — The *effect* of such a sale is to destroy the equity of redemption, and to transfer an absolute estate to the purchase.

WHO MAY PURCHASE AT SUCH SALE.— The mortgagee himself *cannot* buy the property directly or through an agent, for a man *cannot* sell to himself. Thus, a sale by a building society to its secretary is *void*, and does *not* prevent the mortgagor from redeeming the mortgage, unless he has assented to such purchase.

Remedy for improper exercise of the power of sale [(S. 69(3)]

When a sale has been made in the professed exercise of such a power, the title of the purchaser is *not* impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, – but any one put to any loss by an unauthorised or improper or irregular exercise of the power, has a remedy in damages against the person exercising the power.

Sale proceeds how to be disposed of [S. 69A(4)]

The proceeds of the sale have first to be applied in discharging any prior encumbrances subject to which the sale is made, in paying the amount due in respect thereof into Court under Sec. 57.

As to the balance, the mortgagee is constituted a trustee for *three* purposes : (1) for the payment of the costs of sale; (2) for the payment of the mortgage-money, including costs due in respect of the mortgage, under which the sale is made; and (3) for the payment of the surplus to the person entitled to the mortgaged property, *i.e.*, the subsequent encumbrances, and ultimately the mortgagor.

4. Right to appointment of a receiver (S. 69A)

A mortgagee having the right to exercise a power of sale without the intervention of Court (under S. 69) is entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property.

Appointment how made [S. 69A(2)]

Any person named in the mortgage-deed, and willing and able to act as a receiver may be appointed receiver. If a fresh appointment is to be made, it must be with the consent of the mortgagor, and on failing to obtain such consent, the mortgagee is entitled to apply to the Court for appointment of a receiver, and any person appointed by the Court is to be deemed to have been duly appointed by the mortgagee.

Removal of the receiver [S. 69A(2)]

A receiver can be removed : (i) by a writing signed by the parties; *or* (ii) by the Court, on the motion of either party.

Position of the receiver [S. 69A(3)]

The receiver will be regarded as an agent of the mortgagor, who is responsible for his acts or defaults,– *provided that* such acts or defaults are *not* due to the improper intervention of the mortgagee and the mortgage-deed does *not* provide otherwise.

His powers [S. 69A(4)(5)]

The receiver has the power to demand and recover all the income of which he is appointed receiver, and give valid receipts for the same, and to exercise any powers which may have been delegated to him by the mortgagee. Even when the appointment of the receiver is invalid, a payment to him will exonerate the person paying from liability.

His remuneration [S. 69A(6)]

The receiver will be remunerated at a rate not exceeding 5 per cent as is specified in his appointment, and if no rate is fixed, at 5 per cent on his gross collections. It is, however, open to the Court to allow him a different rate.

His duty to insure [S. 69A(7)]

On a written requisition from the mortgagee, the receiver is bound to insure the property.

Money in his hands, how applied [S. 69A(8)]

The money in the receiver's hands should be applied as follows :

(i) in discharge of all rents, taxes, land revenue and outgoings whatever, affecting the property;

(ii) in payment of all annual sums and interest on all principal sums, having priority to the mortgage;

(iii) in payment of his commission and of the premium on insurance properly payable, and the cost of executing proper repairs;

(iv) in payment of the interest falling due under the mortgage; *and*

(v) in discharge of the principal money, if so directed in writing by the mortgagee.

The *residue*, if any, is to be paid to any person otherwise entitled to the mortgaged property.

5. Right to accession (S. 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,* is for the purposes of the security, entitled to such accession.

Illustrations.— (a) *A* mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purpose of his security, *B* is entitled to the increase.

(b) *A* mortgages a certain plot of building land to *B*, and afterwards erects a house on the plot. For the purpose of his security, *B* is entitled to the house *as well as* the plot.

PROBLEMS— *1. M* mortgages his plot of land in Chembur to *N*. Afterwards, *M* raises a skyscraper on the same plot. Is *N* entitled to the skyscraper for the purposes of his security ?

Ans.— As a mortgagee is entitled to all accessories for the purpose of his security under S. 70, in this case, *N* would be entitled to the skyscraper also, as far as his security is concerned.

2. *S* mortgages to *C* a field on the river Koyna. The field is increased by alluvion. Is *C* entitled to the increase for the purpose of his security ?

Ans:— For the reason given above, *yes.*

6. Right to renewal of mortgaged lease (S. 71)

When the mortgaged property is a *lease* for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, *in the absence of a contract to the contrary,* is, for the purposes of the security, entitled to the new lease.

The section is based on the principle of *Rakestraw* v. *Brewer* (1729 2 P.Wms. 511), "that the new lease is treated as engrafted on the stock of the old lease and forming part of the mortgage security".

7. Right to spend money (S. 72)

A mortgagee may spend such money for the following purposes as is necessary and may, *in the absence of a contract to the contrary,* add the amount so spent to the mortgage-debt with interest at the stipulated rate *or* at 9 per cent per annum–

(1) for the preservation of the mortgaged property from destruction, forfeiture or sale;

(2) for supporting the mortgagor's title to the property;

(3) for making his own title thereto good against the mortgagor; *and*

(4) for renewal of the leasehold mortgaged to him, where property is a renewable leasehold.

Charges for insurance of the mortgaged property (S. 72)

Where the property is by its nature insurable (*e.g.* being liable to destruction by fire etc.), the mortgagee may insure it for an amount not exceeding the amount specified in this behalf in the mortgage-deed, or (if no amount is specified) two-thirds of the money required to reinstate the property in case of total destruction, and he may add the insurance premia to his principal amount with interest at the same rate as is payable on the principal money, *or* where no such rate is fixed, at the rate of 9 per cent per annum. But the mortgagee is *not entitled* to insure where the mortgagor has insured to the specified amount and keeps up the insurance.

8. Rights to proceeds of revenue sale or compensation on acquisition (S. 73)

1. Where the mortgaged property is sold owing to failure to pay arrears of revenue or public charges or rent due in respect of such property, and such failure did *not* arise from any default of the mortgagee, – the mortgagee is entitled to claim payment of the mortgage-money out of any surplus of the sale proceeds remaining after payment of the arrears, charges, deductions etc.

2. Where the mortgaged property is acquired under the Land Acquisition Act, 1894, *or* any other like enactment, the mortgagee is entitled to claim payment of the mortgage money, out of the amount due to the mortgagor as a compensation. 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.

SUBSTITUTED SECURITY.– Section 73 enunciates the *doctrine of substituted security.* By virtue of this doctrine, the rights and interests of the mortgagee in the mortgaged property attach to the property *or* to the compensation which may replace the mortgaged property.

If the mortgage contains a personal covenant, the substitution of security would not affect the mortgagee's remedy on that covenant.

9. Right of mesne mortgagees (S. 94)

Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

A mortgage-debt being on immovable property, the mortgagee can assign his interest in the mortgaged property. A mortgage *by the mortgagee* of his interest under the *original* mortgage is called a *sub-mortgagee*. A *sub-mortgagee* is entitled to a decree for sale of the mortgage rights of *his* mortgagor. A *puisne mortgage* arises where *A* mortgages his property to *B* by a legal mortgage and then mortgages it *again* to *C* either by an equitable mortgage, or by creating a charge on the same property.

"REDEEM UP, FORECLOSE DOWN". — The rights of a mesne (also called 'puisne') mortgagee are well summed up in the maxim, 'Redeem up, foreclose down'. This maxim means that a mesne mortgagee has, as far as the redemption, foreclosure and sale of the mortgaged property are concerned, the same rights against him or them, and the same rights against subsequent mortgagees, as he has against the mortgagor. In other words, a mesne mortgagee can redeem any prior mortgage just as much as his own mortgagor. And he can exercise the same rights of foreclosure and sale against any subsequent mortgagee as he may do against his mortgagor. Accordingly, where there are several mortgagees of the same property, the later *can* always redeem the earlier, but the earlier cannot redeem the later, except by consent. (*Chimna* v. *Venkat*, (1917) 40 Mad. 77).

Maxim illustrated.— *A* mortgages his property first to *B*, then to *C*, then to *D* and then to *E*, *C*, as assignee of part of the equity of redemption of *A*, has the right to redeem *B*. Similarly *D* can redeem *B*, or *C*, or both. For the same reason, *E* can redeem any or all of the three prior mortgages. But neither *C* nor *D* nor *E* can foreclose any prior mortgage. On the other hand, *B* can foreclose all or any of *C*, *D* and *E*. Similarly, *C* can foreclose *D* or *E* or both, and *D* can foreclose *E*. *E* can only foreclose *A*, the mortgagor. He has none else to foreclose because there is no mortgagor subsequent to his own. The right to "redeem up" is given by S. 91(a), and the right to 'foreclose down' by S. 94.

Where, however, the third mortgagee, in ignorance of the second mortgagee, pays off the first mortgagee, in the absence of fraud, he acquires all the rights of the mortgagee, which he can use as shield against the second mortgagee seeking to enforce his mortgage. The principle has been laid down in S. 92.

Under S. 91(a), any person having an interest in the equity of redemption may redeem. Where a property is mortgaged for successive debts to successive mortgagees, all the mortgagees are not on the same footing. They are assignees of a part of the equity of redemption only. A puisne mortgagee, being an assignee of the equity of redemption, is entitled to redeem a prior mortgagee. Thus, suppose *A* mortgages his property first to *B*, then to *C*, and then *D*. Here, *C* is the assignee of part of the equity of redemption of *A* against *B*; therefore *C* can redeem *B*. On the same ground, *D* can redeem *C* or *B* or both. This is what is meant by "redeem up".

S. 94 gives a prior mortgagee same rights against mortgagees subsequent to himself as he has against the mortgagor, *i.e.*, he may

foreclose a puisne mortgagee. Thus, in the above illustration, *B* can foreclose (or bring to sale) *A*. *B* can foreclose (or bring to sale) *C* or *D* or both. This is what is meant by "foreclose down".

LIABILITIES OF THE MORTGAGEE (Ss. 67A & 76-77)

1. Mortgagee to bring one suit on several mortgages (S. 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, is, *in the absence of a contract to the contrary*, bound to sue on *all* the mortgages in respect of which the mortgage-money has become due.

MORTGAGEE WHEN BOUND TO BRING ONE SUIT ON SEVERAL MORTGAGES. – Under S. 61, a mortgagor who has executed two or more mortgages in favour of the *same* mortgagee is entitled to redeem each mortgage separately. But, if the mortgagee holds two or more mortgages of the same property or of different properties from the *same mortgagor*, he must enforce *all or none*, in the absence of a contract to the contrary (S. 67A).

In other words, although *consolidation* is abolished by S. 61, so far as the *mortgagor* is concerned, it is applied to the *mortgagee* under S. 67A, where he has a right to the same kind of relief in respect of each of the mortgages, and sues to obtain it only on one of them. In such a case, the section lays down that he must bring one suit to enforce *all* the mortgages.

This provision is, however, *subject to a contract to the contrary* that may be made between the mortgagor and the mortgagee. Accordingly, the mortgagor may agree that in spite of the rule of consolidation, he may enforce any one or more of the mortgages at one time according to his own choice. Such a covenant will be binding upon the mortgagor and all other persons entitled to redeem under S. 91.

2. Liabilities of the mortgagee in possession (Ss. 76-77)

When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he is bound–

(1) to *manage the property* as a person of ordinary prudence would manage it if it were his own;

(2) to use his best endeavours to *collect the rents and profits thereof;*

(3) *in the absence of a contract to the contrary,* – *to pay Government revenue and other charges* of a public nature and all rent, out of the income of the property;

(4) *in the absence of contract to the contrary,* – to make such *necessary repairs* as the income of the property permits;

(5) *not to commit any* act which is destructive or permanently injurious to the property;

(6) where he has insured the whole or any part of the property against loss or damage by fire, in case of such loss or damage, *to reinstate the insured property* with the money obtained from the insurance policy *or* to discharge the mortgage-debt with it if the mortgagor so directs;

(7) *to keep* clear, full and accurate *accounts* of all sums received and spent by him as mortgagee, and give them to the mortgagor when asked for;

(8) to debit receipts from the mortgaged property, or where such property is personally occupied by him, a fair occupation rent thereof (after deducting the expenses of management, the collection charges, revenues and costs of repairs) first against the *interest* on the mortgage-money and then against the *principal;*

(9) to account for the receipts from the property, when the mortgagor tenders and deposits the due amount.

But where there is a contract between the mortgagor and the mortgagee that, so long as the mortgagee is in possession of the property, the receipts from the mortgaged property are to be taken in lieu of interest on the principal money (or partly in lieu of interest and partly in lieu of defined portions of the principal), the question of accounting does *not* arise.

LIABILITIES OF MORTGAGEE FOR LOSS OCCASIONED BY HIS DEFAULT.— If the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken, be debited with the loss (if any) occasioned by such failure.

LAW AS TO PRIORITY OF SECURITIES
(Ss. 78-79 & 93)

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 is to be postponed to the subsequent mortgagee (S. 78)

QUI PRIOR EST TEMPORE, POTIOR EST JURE.– The rule as to priority of mortgages is stated in the equitable maxim *qui prior est tempore, potior est jure,* enunciated in S. 48 (*He who is first in time is first in law.*) S. 78 is an exception to the above principle. It lays down that the prior legal estate would be postponed to a subsequent estate where the owner of the legal estate had assisted in, or connived at, the fraud which led to the creation of a subsequent equitable estate without notice of the prior legal estate.

Write a short note on : Priority.
P.U. Apr. 96

The mortgagee who is first in time has priority over a subsequent mortgagee of the same property (S. 48). But the following are *two exceptions* to this general rule :

1. The prior mortgagee loses his priority by (i) fraud, (ii) misrepresentation *or* (ii) gross negligence. (This is laid down in S. 78.)

2. Where *A* mortgages his property to *B* to secure a present advance as well as *future* advances upto a fixed maximum, then any further advance made by him (*B*) within that maximum, will be treated as part of the first mortgage to *C, provided C* had notice of *B*'s mortgage (S. 79).

PROBLEM.— *A* deposited the title-deeds of his property with Bank *N* to secure an overdraft, *A* then asked for return of deeds saying that he wished to sell the property and clear the overdraft. The usual practice was for the prospective purchaser to inspect the title-deeds in the office of the mortgagee's solicitors. But, *A* said that he would not get a good price if the purchaser came to know that the Bank had the deeds; and the Bank Manager returned the deeds to *A*. *A* then borrowed money from Bank *L* on the deposit of the same deeds, falsely representing that there was no encumbrance. As between Bank *N* and *L* who has the priority ?

Ans.— To permit a mortgagor to have possession of the title-deeds is to put him in a position where he can raise money on a mortgage of that property, by representing that no mortgage thereof by way of deposit of title-deeds has been effected. Bank *N* is guilty of gross and wilful negligence in surrendering the title-deeds to *A*. Therefore, the mortgage to Bank *L* has priority over the mortgage to Bank *N*. (*Lloyds Bank Ltd.* v. *P.E. Guzdar and Co.*, 56 Cal. 686)

TACKING (Ss. 79 & 93)

WHAT IS TACKING.– Where there are three mortgages over the same property, of whom the first only has the legal estate and the third mortgagee has taken his security without notice of the second mortgagee, such third mortgagee can acquire a preference over the second mortgage, by redeeming the first mortgage and taking delivery of his legal estate. This is so because, by redeeming the first mortgage, the third

mortgagee gets an equal equity, and by taking the legal estate as well, he acquires a priority on the strength of the maxim "where the equities are equal, the law shall prevail". In other words, a third mortgagee, by acquiring the rights of the first legal mortgagee, can *tack his security* to the prior security and insist on his security being first paid off. Thus, he can unite the two mortgagees, and thereby 'squeeze out' the intermediate mortgagee. This principle is commonly known as *tacking.*

In India, where law and equity are *not* separately administered, the doctrine of tacking *cannot* apply, and the mortgagees rank according to their priority. *S. 93 abolishes tacking,* by laying down that a mortgagee, by paying off an earlier mortgage, does *not* acquire any priority in respect of his original security over an intermediate mortgagee. *The different mortgages rank only according to their priority in time.*

Write a short note on : Tacking.
B.U. Apr. 97
Apr. 98
Apr. 99

Prohibition of tacking (S. 93)

Write a short note on : Prohibition of tacking.
P.U. Apr. 96

Under S. 93, no mortgagee can, by paying off a prior mortgage (whether with or without notice of an intermediate mortgage), thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79 (below), no mortgagee, making a subsequent advance to the mortgagor (whether with or without notice of an intermediate mortgagee) can thereby acquire any priority in respect of his security for such subsequent advance.

Tacking when allowed, and to what extent (S. 79)

The prohibition against tacking of subsequent advances admits of one *exception* which is provided for in S. 79, which can be analysed as follows :

If a mortgage, made to secure-
- (i) future advances;
- (ii) the performance of an engagement, *or*
- (iii) the balance of a running account,

expresses the maximum to be secured thereby,

— a subsequent mortgage of the same property *if made with notice of the prior mortgage,* is to be postponed to the prior mortgage –

— in respect of all advances or debits *not exceeding the maximum,* though made or allowed with notice of the subsequent mortgage :

Illustration.— *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. At the date of the second mortgage, the balance due to *B & Co.*, does not exceed Rs. 5,000. *B & Co.* subsequently advance to *A*, sums making the balance of the account against him exceed the sum of Rs. 10,000. *B & Co.* are entitled to the extent of Rs. 10,000, priority over *C*.

It will be seen that two *points* must be ascertained in such a case : (1) whether first mortgage fixes the maximum amount to be secured by it, *and* (2) whetner the subsequent mortgagee had notice of the first mortgage.

Now, it is *not* difficult to prove notice where the first mortgage is registered, even if the subsequent mortgagee had no direct notice under S. 3 of the Act. It is only where the first mortgage is effected otherwise than by a registered instrument, as where the amount secured is less than Rs. 100, *or* the mortgage is effected by deposit of title-deeds, that the question of notice will present some difficulty. However, it may be observed that a mortgage made to secure less than Rs. 100 will rarely be of a type in which future advances may have to be made. In the case of an equitable mortgage, the title-deeds will remain with the mortgagee, and therefore, if the second mortgagee advances the money without asking for them, he will be doing so at his own risk, and he will be affected with constructive notice of the equitable mortgage.

DISTINCTION BETWEEN

CONSOLIDATION	TACKING
1. *Nature of right*— In consolidation, the right is to throw together on one estate, several debts lent on different estates, and to do so without reference to any priority or protection afforded by the legal estate, but solely upon the equitable maxim "he who seeks equity, must do equity."	In *tacking*, the right is to throw together several debts lent on the same estate, and to do so under the priority and protection afforded by the legal estate under the maxim "where there is equal equity, the law shall prevail."
2. *Whether possession of legal estate necessary ?*	
No.	*Yes.*
3. *Notice*- Notice at the time of lending money on the second estate is *wholly immaterial* as regards the rights of consolidation.	Such notice is *fatal* to any subsequent right of tacking.

MARSHALLING AND CONTRIBUTION (Ss. 81-82)
MARSHALLING SECURITIES (S. 81)

Doctrine explained (S. 81)

Discuss the doctrine of marshalling and contribution under the provisions of the Transfer of Property Act.

B.U. Nov. 95
June 96
Apr. 97
P.U. Apr. 92

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 properties not mortgaged to him,* so far as such property will extend –

— but not so as to prejudice the rights of the (i) prior mortgagee, or (ii) of any other person who has, for consideration, acquired an interest in any of the properties.

MARSHALLING OF SECURITIES.—It is the rignt of a puisne mortgagee to demand of a prior mortgagee that he should satisfy his debt first out of the property *not* mortgaged to the former. A right of marshalling is conferred on a subsequent *purchaser* by S. 56, and S. 81 confers a similar right on puisne *mortgagees.*

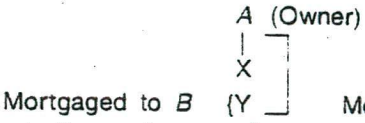
The right arises when the owner of two or more properties mortgages them to one person and then mortgages one or more of them to another person. The subsequent mortgagee is entitled, *unless there is a contract to the contrary,* to have the prior mortgage-debt satisfied out of the property or properties *not* mortgaged to him, so far as the same will extend;–*but not* so as to prejudice the rights to the prior mortgagee or any other person who has for-consideration, acquired an interest in any of the properties. Further, the exercise of this rignt does *not* depend on the later mortgagee having notice of the prior mortgage.

Write a short note on : Marshalling.

B.U. Apr. 95
P.U. Oct. 91

The *principle of the doctrine* of Marshalling has been thus stated in the leading English case *Aldrish* v. *Cooper* (8 Ves. 382) : "If there are two creditors who have taken securities for their respective debts, and the security of the one is confined to both, and the security of other is confined to one of those funds, the Court will arrange or marshal the assets, so as to throw the person who has two funds liable to his demand on that which is *not* liable to the debt of the second creditor. *i.e.,* it shall *not* depend upon the will of one creditor to disappoint another."

Suppose *A* is the owner of two properties X and Y. He mortgages both X and Y to *B*, and later mortgages Y only to *C;* thus—

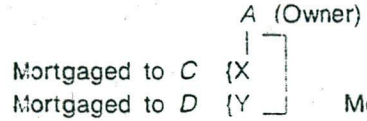


Now, in these circumstances, if *B* seeks to realise the mortgage-debt out of property Y, *C* can compel *B* to proceed first, against X, and realise as much as he can out of it. If *B's* debt is satisfied out of X, Y is left for *C*

quite intact. If *B* is *not* able to realise the whole of his debt from X, he is entitled to recover the balance out of Y, and *C* will have no right to prevent him from doing so.

The section clearly lays down that the right cannot be exercised so as to prejudice the rights of the prior mortgagee in regard to his securities. It must be noted here that the right must be exercised at the time when the first mortgagee seeks or threatens to realise his security. (*Unniamalai* v. *Gopala Swami*, (1931) 54 Mad. 59)

It is also to be noted that under the doctrine (as laid down in S. 81) the right *cannot* be exercised so as to prejudice the rights of any other person who has, for consideration, acquired an interest in any of the properties. Thus, if *A* mortgages X and Y to *B*, and then X to *C* and Y to *D*, thus—



Here, *C cannot* compel *B* to realise his debt only from Y because that would leave nothing for *D*. *B's* debt would, therefore, be recovered rateably both from X and Y, and *C* would get the surplus of the sale-proceeds realised from X, and *D* would get surplus realised from Y. *But*, if *D* instead of being a mortgagee is only a volunteer, such as a donee, *C* can certainly insist that *B* should realise this debt first from Y, and he is not bound to see that there must be something left of Y for the benefit of *D*.

Marshalling applies only when—

(1) there is a *common* debtor;

(2) *two or more properties* of the debtor have been first mortgaged to *one* person, and subsequently one (or more) of the *same* properties is (or are) mortgaged to *another* person;

(3) it does not prejudice (i) the prior mortgagee or (ii) third parties claiming as purchasers; *and*

(4) there is no contract to the contrary.

Inderdawan v. *Govind* (23 Cal. 790).—*A* mortgages properties X and Y to *B*. Later, he mortgages X to *C*. *C* obtains a sale-decree for X and purchases it himself. *B* then obtains an order for sale on his mortgage. Under these circumstances, *C* is entitled to require *B* to bring Y to sale first and realise his security as far as possible out of Y.

As seen above, the principle of marshalling does *not* apply :

(i) So as to prejudice the prior mortgagee. If the property not mortgaged to the subsequent mortgagee is not sufficient to satisfy him (*i.e.*, the first mortgagee), he can proceed against the other property as well.

(ii) So as to prejudice the interest of a third person who has, for consideration, acquired an interest in any of the properties. Thus, when property not comprised in the security of the second mortgagee, who can exercise the right of marshalling, is mortgaged to or purchased

by, a third party, a subsequent mortgagee *cannot* marshal to the prejudice of third party.

(iii) Unless the same person is liable to both the creditors and is also the owner of the properties.

(iv) Unless the first mortgagee has equal rights over the two properties mortgaged to him. Thus, he has a charge on one property but on the other he has a right of set-off, there can be no marshalling, as the securities are *not* equal.

(v) Where only a portion of the property already mortgaged is subsequently mortgaged to another person, *i.e.*, it does not consider different fragments of the same property to constitute different properties.

MARSHALLING AND SUBROGATION.— *Marshalling* and *subrogation* are closely allied to each other, both being adjustments of the rights of different encumbrances according to equity. Thus, for example, properties X and Y are mortgaged to *A*, and then X is mortgaged to *B*; here, *B* can compel *A* to resort to property Y in the first instance. This is marshalling. But if *A* satisfies his claim out of property X, *B* will be entitled to be subrogated in the place of *A*, for then the sum obtained by *A* (out of X), for his satisfaction will be deemed to have been obtained from *B*. By reason of this fiction of *B's* subrogation to *A's* rights, *B* gets from property Y what he loses in property X. By marshalling, X is kept intact for *B*; or by subrogation. *B's* loss in *X* is made up by a gain in *Y*.

Thus, it will be seen that subrogation restores matters to their original condition, and thereby achieves the same object as marshalling would have done though in a slightly different way; in other words, marshalling is subrogation in another shape.

CONTRIBUTION (S. 82)

Contribution to mortgage-debt (S. 82)

DOCTRINE OF CONTRIBUTION.—The doctrine of contribution provides that *several properties* mortgaged to secure *one debt* are liable to contribute to that debt rateably in proportion to their values *at the date of the mortgage*, the amount of the previous mortgage or charge being deducted. The rule of contribution applies, *not only* where several properties are mortgaged and their owner is compelled to satisfy the whole mortgage-debt, *but also* where only one property held by several co-owners is mortgaged and the portion of one co-owner is made to satisfy the mortgage.

Two simple rules are laid down in this connection :

1. Where property subject to the mortgage, belongs to two or more persons having distinct and separate rights of ownership therein, the different shares 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 mortgage-debt.*

VALUE OF PROPERTIES HOW CALCULATED.— For the purpose of such contribution, the value of the different properties, that is, the interests of different co-owners, are to be calculated as at the date of the original mortgage, making proper allowance for any other mortgage or charge to which the properties may happen to be subject.

2. Where, of two properties— | (i) belonging to the same owner, (ii) one is mortgaged to secure one debt, (iii) and then both are mortgaged to secure another debt, (iv) 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.

However, nothing in the above rules applies to a property liable under section 81 to the claim of the subsequent mortgagee.

The *principle* of the *doctrine of contribution* is that the law requires that a property which is equally liable with another property to pay a debt, should *not* escape, just because the creditor has been paid out of that other property alone. But a claim for contribution *cannot* arise until the *whole* of the mortgage-debt has been satisfied. (*Ibn Hasan* v. *Brijbhusan,* 26 All. 407)

As seen above, the mortgaged properties are liable to contribute rateably to a mortgage-debt only in the absence of a contract to the contrary. The words "contract to the contrary" mean a contract between the mortgagor and mortgagee, and *not* between the mortgagor and his vendor *or* between the mortgagors.

EXAMPLE.— Two estates X (the value where of is Rs. 1,000) and Y (valued at Rs. 800) are mortgaged to *D* for Rs.1,000, X having been previously mortgaged to *C* for Rs. 200; X and Y are sold to *E* and *F* respectively. What amount would *E* and *F* each have to pay to satisfy the debt?—After deducting Rs. 200 from Rs. 1,000 (the original value of X) it is seen that X and Y become equal; therefore, *E* and *F* would each have to pay Rs. 500.

CASES.— (1) *A* mortgages two properties X and Y to *B*. *A* sells X to *C*. alleging that the mortgage to *B* has been discharged. Thereafter, *B* realizes his mortgage by the sale of Y only. In the circumstances, *A* is *not* entitled to contribution from *C*.

(2) *A* mortgages 8 villages to *B*. *A* then sells his interest in 3 of the

villages to *C*. *B* realizes his mortgage by the sale of 2 of *A's* villages. *A* is entitled to contribution from *C*.

MARSHALLING AND CONTRIBUTION DISTINGUISHED. — Contribution, if it differs from marshalling, does so in species rather than generally, and in form rather than in nature.

(i) *Marshalling* arises when the competing mortgagees hold from *one* mortgagor: *contribution* arises when the mortgaged properties belong to *several* owners.

(ii) By *marshalling*, a creditor having several securities is so to exercise his right as *not* to injure the right of another creditor on some of those securities. By *contribution* all the securities are to contribute equally and the whole liability is *not* thrown on one security only.

(iii) If there is a conflict between the two, *marshalling* will prevail.

B.—CHARGES (Ss. 100-101)

Definition (S. 100)

Where immovable property of one person is— (a) by act of parties *or* operation of law, (b) made security for the payment of money to another,

Write a short note on : Charge. B.U. Apr. 95

and the transaction *does not amount to a mortgage*,—the latter person is said to have a '*charge*' on the property.

All the provisions which apply to a *simple* mortgage, apply to a charge.

Exception.—S. 100 does *not* apply to the charge of a trustee on the trust-property, for expenses properly incurred in the execution of his trust.

Moreover, no charge can be enforced against any property in the hands of a person to whom such property is transferred *for consideration* and *without notice of the charge.*

WHAT IS A *CHARGE.*—It may be that in a particular case, there may not be an actual mortgage of an immovable property, in the sense that any interest in the property is transferred to the transferee, and yet a person may have a right to recover a debt from that property. Where such a right exists, it is called a 'charge', and the person who is entitled to it is called a *charge-holder*, and the right is exercisable by a suit for sale of the property for realising the money charged on it.

No particular form of words is necessary to create a charge; all that is necessary is that there must be a clear intention to give property as security for payment of money *in praesenti*. (*J & K (Bombay) Pvt. Ltd.* v. *New Kaiseri-Hind Spg. & Wvg. Ltd.*, A.I.R. 1970 SC 1041)

Exceptions

1. The section lays down an exception, not to the definition of 'charge',

but to the rights of a chargee, namely, that a trustee who has incurred expenses in execution of a trust, though having a charge on the trust property in respect of such expenses, is *not* entitled to sue for a sale of the trust property in order to realise the same, for it would have the effect of destroying the trust estate. He can only sue for recovery of the money : *Akbar Saheb* v. *Soran*, (1915) 38 Mad. 260; *Peary* v. *Narendra*, (1910) 37 Cal. 229 (P.C.). Or, he may reimburse himself out of the income of the trust property and prohibit any disposition of the property without previous payment of such expenses. (See S. 32 of the Indian Trusts Act.)

2. The section also lays down *another exception* as regards the extent of the enforceability of a charge, namely, that no charge can 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. This exception marks an important distinction between a charge and a mortgage. A mortgage, being a *jus in rem*, can be enforced against the mortgaged property in the hands of *any* transferee from the mortgage, irrespective of notice. But a charge is a *jus ad rem*, and can be enforced against a transferee for consideration. *only if it is shown* that he has taken the transfer with notice of the charge. In other words, a charge *cannot* be enforced against a *bona fide* purchaser for value who was not aware of the charge : *Royzauddi* v. *Nath*, (1906) 33 Cal. 985; *Akhoy* v. *Corporation of Calcutta*, (1915) 42 Cal. 625.

A charge may be created by an act of parties (*e.g.*, when property is charged for the maintenance or education of another,) *or* by operation of law (*e.g.*, a vendor of immovable property has a charge on the property sold for his unpaid purchase-money : S. 55(4) (b) or the charge of buyer for advances made by him : S. 55(6)(b); etc.)

PROBLEM :—*A* sues *B* on a promissory note. In a compromise decree passed in the matter, it is directed that *B* shall *not* dispose of his share in a factory until satisfaction of the entire decretal amount. Has *A* any right to proceed against the property ?

Ans.— A charge may be created (1) by act of parties *or* (2) by operation of law. A charge created by a compromise decree is a charge created by the act of the parties to which S. 100 applies. In the present case, *A* has a charge on the property specified, and he has a right to proceed against the property.

Charges by act of parties.—Instances— A charge by act of parties can be created by an instrument *inter vivos* or by will. Thus, a document stating "I have willingly fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said village for my eldest brother" creates a valid *charge*. Similarly, a will devising immovable properties, and directing the devisee to pay certain debts of the testator from these properties, creates a *charge* in them in respect of these debts.

Charges by operation of law.— Charges by operation of law are based upon the consideration of duty or implied intention on the part of the owner of the property to make it answerable for a specific claim.

Instances of charges created by operation of law :

(a) A Hindu widow's charge on the family property for her maintenance, if created by a decree (See Sec. 39).

(b) A vendor's charge for unpaid purchase-money— Sec. 55(4).

(c) A party entitled to claim contribution under Sec. 82 also acquires a charge in respect thereof.

REQUISITES OF A CHARGE BY ACT OF PARTIES

1. A charge does *not* contemplate any *transfer of an interest* in the immovable property.

2. The property should be *specified*, and it should be made *security* for the payment of money.

3. In order to constitute a charge, the form of words is immaterial; it is *not necessary* to use any technical terms. (*Nathan* v. *Durga Das*, A.I.R. (1931) All. 62.)

4. A charge must be created in favour of a *particular* person; such person must be specifically named.

5. A charge may be created orally, although if it is created by an instrument in writing, it must be registered, *unless* made by a will, *or unless* the amount secured is less than one hundred rupees.

6. A charge *cannot* be created on a future contingency. (*Mohani* v. *Purna Shashi*. A.I.R. (1932) Cal. 451)

7. A charge on future property is valid and operates on such property when it comes into existence.

How a charge can be enforced.— A charge, even when created by a decree, can be enforced only by a *suit*.

How a charge is extinguished.— Under S. 100, all the rules which *apply* to a simple mortgage also apply to a charge. So, a charge can be extinguished by an act of parties, *i.e.*, (i) by a release by the chargee of the debt or security; *or* (ii) by novation, *or* (iii) by merger.

CASES.— 1. *A* inherited an estate from his maternal grandmother and executed an agreement to pay his sister *B*, a fixed annual sum out of the rents of the estate. *B* has a *charge* on the estate. (*Chalamanna* v. *Subbamma* (1884) 7 Mad. 23)

2. *A* sued *B* on a promissory note. The compromise decree directed the payment of the money and further directed that *B* shall *not* dispose of his share in a factory until satisfaction of the entire decretal amount. In the circumstances, it was *held* that *A* had a *charge* on the specified property. (*Narain Das* v. *Murli Dhar* (1929) 121 I.C. 81)

ENGLISH LAW.—Under the English law, when a mortgage fails for want of some formality, the transaction may be valid as an equitable charge. Thus, a mortgage which fails because of improper attestation or for want of registration, will be transformed into a charge.

But this equitable doctrine cannot be applied in India in the face of statutory provisions which make a charge a distinct kind of security as contrasted with a mortgage. A charge arises only when the transaction evinces an intention for creating it. *It is not the necessary corollary of*

the invalidity of a mortgage. The words "and the transaction does not amount to a mortgage" (in section 100 of the Transfer of Property Act) signify that if the relation created by the instrument is *not* that of a mortgagor and mortgagee, *and* immovable property has been made security for the property of money, there is a charge on the property. The expression does not signify that if the transaction on the fact of it purports to be a mortgage, but the instrument is not operative as such by reason of defective execution or non-compliance with the formalities prescribed by the law, *i.e.*, if it fails as a mortgage on account of some technical defects, the transaction is converted into a charge.

Define, explain & distinguish between "mortgage" and "charge".
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Thus, the broad distinction between mortgage and a charge is that, whereas a *charge* only gives a right to payment out of a particular fund or property, a *mortgage* is in essence a transfer of an interest in specific immovable property.

DIFFERENCE BETWEEN

MORTGAGE	CHARGE
1. *As to security* —	
(a) A mortgage is a security for the payment of a debt.	(a) A charge is a security for the payment of money (and such money may or may not be a debt.)
(b) A mortgage may be a security for the performance of an engagement giving rise to a pecuniary liability.	(b) Such is not the case with a charge.
2. *Covenant to pay*—	
There *may* be a covenant to pay.	There is *no* covenant to pay.
3. *Transfer of interest*—	
A mortgage involves a transfer of an interest in specific immovable property.	A charge does *not* operate to transfer any interest in the property in favour of the charge-holder. It merely gives the charge-holder the right to have a claim satisfied out of a particular property, without transferring that property to him. It is only under a decree for sale that an interest in the property is transferred in the case of a charge.
4. *As to creation*—	
A mortgage can only be made by act of parties.	A charge may arise either by an act of parties *or* by operation of law.

Define, explain and distinguish between "mortgage" and "charge".
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5. Right in rem—

A mortgage gives rise to a right *in rem*.	A charge does *not* create any such right. It is available only against a particular set of persons, *i.e.*, persons, who are affected with notice of the charge. A charge becomes a right *in rem* only when a decree has been obtained to that effect.

6. As to following the security—

(a) A mortgagee can follow his security into whatsoever hands it goes.	(a) A charge-holder *cannot* do so.
(b) A mortgagee can follow a *bona fide* purchaser for value without notice.	(b) A charge-holder *cannot* do so.

7. Defence of purchase for value without notice—

Such a defence is wholly unavailing against a mortgage.	It is a good defence against a charge.

DISTINCTION BETWEEN

CHARGE	LIEN
1. A charge may be created both by an act of parties *or* by operation of law.	1. A lien arises by operation of law.
2. A charge can exist on immovable property only.	2. A lien can exist on both movable and immovable property.
3. A charge-holder can satisfy his claim by selling the property subject to his charge.	3. A lien-holder satisfies himself by (i) private sale, *or* (ii) retaining possession of the property.
4. A charge is not possessory in its nature.	4. A lien is possessory in nature.

DOCTRINE OF MERGER (S. 101)

WHAT IS 'MERGER'.—The *general principle of law* is that when two estates in the same property become united in the *same person*, a *merger* results as a necessary consequence, that is, upon such union of the two interests in the same person, the smaller interest is regarded as having *merged* in the bigger one.

A mortgage or a charge can be extinguished by a merger. A merger occurs (1) by the union of a lower and a higher security, or (2) by the union of a lesser estate and a greater estate. Thus, a debt which is sued upon merges in the judgment obtained in respect of it. The judgment here

is a higher security. Similarly, an equitable mortgage merges into a formal legal mortgage when executed.

But there will *not* be a merger if the remedies in respect of the two securities are *not co-extensive*. For instance, a promissory note will *not* merge in a mortgage for the same debt. Accordingly, even if a judgment is obtained on the promissory note, the mortgage remains unaffected, and any remedy available under the same may be sued for.

A mortgage effects a division of interest in the mortgaged property as between the mortgagor and the mortgagee. The bundle of interest which remains with the mortgagor is *one estate*, and the bundle of interest which pass to the mortgagee is *another estate*. Where these two estates combine themselves and vest in one of the parties, there is a merger, and the mortgage is extinguished. The *reason* for this merger is either that the lesser estate is drowned in the greater, *or* a man cannot be his own debtor.

A merger in respect of a mortgage can arise in him. Thus, if (1) by the mortgagee acquiring the equity of redemption; *or* (2) by the mortgagor redeeming the mortgage; or (3) by the purchaser of the equity of redemption redeeming the mortgage.

S. 101 abolishes this doctrine of merger in plain terms. In other words, the object of S. 101 is to 'keep alive' a charge.

No merger in case of subsequent encumbrance (S. 101)

Any mortgagee of, or a 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.

Moreover, no such subsequent mortgagee or charge-holder is entitled to *foreclose* or *sell* such property without redeeming the prior mortgage or charge.

CASE.— *A* mortgages property to *B*. *B* sues *A* to realize the mortgage-debt. During the pendency of the suit, *B* purchases the equity of redemption in execution of a money decree against *A*. In these circumstances, the mortgage is extinguished by merger, and *B's* suit would be dismissed.

PROBLEM.— *A* mortgaged property, first to *B*, and then to *C*. *B* obtains a decree on his mortgage and instead of bringing that property to sale, makes a further advance to *A*, and takes a fresh mortgage for the decretal amount as well as the further advance. *C* claims priority for his mortgage over *B*. Advise *B*.

Ans.— *B's* first mortgage is *not* extinguished by merger, as there is a subsequent mortgage. Therefore, *B* is entitled to priority over *C* in respect of the decretal amount.

6

LEASES OF IMMOVABLE PROPERTY (Ss. 105-117)

Definition (S. 105)

A *lease* of immovable property is a transfer of a right to enjoy such property for a certain time (express or implied), *or* in perpetuity, in consideration of (i) a price paid or promised, *or* (ii) money, (iii) a share of crops, (iv) service, *or* (v) any other thing of value, to be rendered periodically, *or* on specified occasions, to the tranferor by the transferee, who accepts the transfer on such terms.

In the case of a lease, the price is called the *premium*, and the money, share, service or other thing to be rendered is called the *rent*; the transferor is called the *lessor*, and the transferee is called the *lessee*.

THE FOLLOWING ARE THE ESSENTIAL ELEMENTS OF A LEASE :

1. The *Lessor* — He must be competent to contract *and* he must have title or authority.

2. The *Lessee*.— He also must be competent to contract at the date of execution of the lease. A sale or a mortgage to a minor is valid. But a *lease to a minor is void*, as the lease is to be executed both by the lessor and the lessee : S. 107.

3. The *subject-matter* of the lease must be *immovable property*.

4. There must be a transfer of a right to *enjoy* such property.

5. *Duration* of the lease.—A lease must be made for a certain time, express or implied, *or* in perpetuity.

6. *Consideration*, which may be premium *plus* rent, as well as premium alone or rent alone. *Premium* is the price paid or promised in consideration of a transfer by way of lease. Any payment by the lessee that is part of the consideration of the lease is *rent*.

7. The lessee must *accept the transfer*.

8. It must be in the mode indicated by S. 107.

In an interesting decision delivered by a majority of the House of Lords in 1962, it was *held* that *a man could not grant a lease to himself*. (*Rye v. Rye*, 1962 A.C. 496). It is submitted that if the question arose in India, the Indian courts would take an identical view.

LEASES IN PERPETUITY.— Under *English Law*, a lease in perpetuity is unknown. *In India*, however, such leases (generally agricultural leases) are created by an express or a presumed grant.

The Calcutta High Court was faced with the question as to *whether a lease for 999 years is legal*, especially in view of the fact that substantial stamp duty can be saved by executing such a lease. The Court *held* that there was nothing illegal in executing a lease for 999 years, and just because stamp duty is saved thereby, the transaction does not become unlawful. The solution may be to amend the law relating to stamp duty or prohibit parties from entering into long leases. But until that is done, such leases remain *valid* and *lawful*. (*M. Haque* v. *G. Mullick*, A.I.R. 1993 Cal. 58)

AGREEMENT TO LEASE.— It may be noted that a *contract to let* and a *lease* are different things; a contract to let, just like a contract to sell, gives rise to no right *in rem*. It creates only a personal obligation, which may be enforced by a suit for specific performance under the Specific Relief Act, *provided that* the agreement to lease is in writing and is accompanied by delivery of possession. In this respect, it materially differs from an agreement to sell. The latter agreement may be specifically enforced, even if oral and unaccompanied by delivery of possession; but not so with respect to an agreement to let or lease. A *lease* does, but an *agreement for lease* does *not*, establish the legal relationship of landlord and tenant between the parties. This is so, because a lease is a *transfer* of a right to enjoy property, whereas an agreement to lease is not.

An agreement to lease, *not* creating a present *demise*, is *not* a lease, and does not require either writing or registration. The term 'demise' is not defined in the Transfer of Property Act. It is a term of English law, and it denotes a *transfer of a lease*. When it is said that a particular agreement of lease creates a *present demise*, what is meant is that though in form of an agreement, it actually effects a transfer by lease, *i.e.*, transfer of a right to enjoy a specific immovable property. The *real test* for determining whether an agreement to lease effects a *present demise*, is *not whether* the transfer is to operate immediately, *but whether* the right to enjoy the property is actually transferred or not. Once the right *is* transferred, the agreement creates a *present demise*, though the right is to operate sometime in the future. Such an agreement to lease creating a *present demise* requires writing and registration, and therefore, without such registration, it will *not* be admissible in evidence.

The following tabular analysis will be useful :

DIFFERENCE BETWEEN

LEASE	AGREEMENT TO LEASE
1. *Right 'in rem"* — A lease creates a right *in rem*.	1. An agreement to lease does *not* create any such right.
2. *Relationship of landlord and tenant*— A lease establishes the relationship of landlord and tenant between the parties.	2. An agreement to lease does *not* create any such relationship.
3. *Transfer*— A lease operates as a transfer.	3. An agreement to lease does *not* operate as a transfer.

LEASE AND *SALE*.— In a *sale*, there is an absolute transfer of all rights in the property which is sold. The transferor parts with all his rights therein. In a *lease*, on the other hand, there is a *partial transfer* or demise of the property, and *some* rights over the property are transferred to the lessee. The rights which are left with the transferor are called the *reversion rights*.

LEASE AND *LICENCE* DISTINGUISHED.— Ordinarily, a lease is a grant of property, for a time, by one who has a greater interest in the property, the consideration being usually the payment of rent. A licence, on the other hand, is governed by the Indian Easements Act, and is a permission to do some act which, without such permission, would be unlawful. In both, certain rights are conferred on the lessee or licensee. Both have several elements in common, but the following are the points of difference between the two :

1. In a lease, there is a *transfer of an interest* in the immovable property. In the case of a licence, there is *no transfer of interest*, although the licensee acquires a right to occupy the property.

For determining whether an interest in land is transferred or not, the *main test* is the delivery of "exclusive possession". If the exclusive possession is *not* with the grantee, and the subject-matter is in the control and possession of the grantor, then it is a *licence*, and *not* a *lease*. It is always open to a licensor to have access to the property, possession being with him, and not transferred to the licensee.

2. If during the continuance of the lease, any accretion is made to the property, such accretion is deemed to be comprised in the lease. A licensee has no property in the land, and therefore, he acquires no right by accretion.

3. A lease is *transferable* and *heritable*. A licence being purely a personal privilege, is *non-transferable* and *non-heritable*.

An *exception* is made in the case of a licence to attend a place of public entertainment, which can be transferred by the licensee, *unless* a different intention is expressed or necessarily implied. (S. 56 of the Indian Easements Act)

4. A lease can be terminated by *forfeiture*. There is no corresponding provision in the case of a licence in the Indian Easements Act.

5. A lease can be terminated only in one of the eight different ways enumerated in S. 111 of the Transfer of Property Act. A licence can be revoked at pleasure. *unless* (i) it is coupled with a transfer of property *and* such transfer is in force: *or* (ii) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution. Therefore unlike a lessee, a licensee, is *not* entitled to a *notice* to quit before eviction

6. The lessee's interest is *not* liable to be defeated by a *subsequent transfer* of the leased property : S. 109 of Transfer of Property Act. A licence is determined when the grantor makes an assignment of the subject-matter of the licence : S. 59 of the Indian Easements Act.

7. A lessee is entitled to *maintain a suit in his own name* against trespassers and strangers. A licence does not create an interest in property in favour of a licensee and, therefore, he is *not* entitled to maintain suits in his own name.

8. *Death of either party* does not affect a lease, whereas a licence is terminated in such circumstances.

The following tabular analysis gives the points of distinction between a lease and a licence :

DIFFERENCE BETWEEN

LEASE	LICENCE
1. In a lease, there is a transfer of interest in the property.	1. In a licence, there is no transfer of interest.
2. Accretions are deemed to be comprised in the lease.	2. A licensee acquires no interest in accretions.
3. A lease is transferable and heritable.	3. A licence is neither transferable: nor heritable.
4. A lease can be terminated by forfeiture.	4. There can be no termination by forfeiture in the case of a licence.
5. A lease can be terminated by one of the eight ways prescribed by S. 111 of the Act.	5. A licence is usually revocable by pleasure, except in the two cases mentioned above.
6. A lessee's interest is not defeated by a subsequent transfer of the property.	6. A subsequent transfer of the property terminates a licence.
7. A lessee can sue trespassers and strangers in his own name.	7. A licensee *cannot* sue trespassers and strangers in his own name.
8. Death of either party does not affect a lease.	8. A licence is terminated by death of either party.

Natesa v. *Tungareiu*, (38 Mad. 83) :— *A* grants *B* a "lease" for two years to tap toddy from the trees in his garden, but *B* is *not* to cut the leaves. This creates no interest in the immovable property, and is actually a licence.

In one *case*, the question before the Delhi High Court was whether an agreement amounted to a lease or a license. It was provided that the licensee would be entitled to use the premises, but would have no right, title or interest to possess the premises. A license fee per day was to be paid to the owner. In the circumstances, the Court *held* that it was a license, and *not* a lease. (*Hind Trading & Mfg. Co.* v. *Didi Modes Pvt. Ltd.*, A.I.R. 1993 Del. 301)

LEASES HOW MADE (S. 107)

A lease of immovable property	Can be made
1. (i) from year to year, *or* (ii) for any term exceeding one year, *or* *(iii) reserving a yearly rent,—*	only by a registered *instrument.*
2. In any other case—	(i) *either* by a registered instrument, *or* (ii) *by oral agreement accompanied by delivery of possession.*

It is to be noted that in the case of a lease by a registered instrument, or by two or more instruments, the instrument, or each of the instruments, must be executed *by both* the *lessor* and *lessee.*

DURATION AND TERMINATION OF LEASES (S. 106)

A lease of immovable property for—	is deemed to be a lease from—	terminable, on the part of either lessor or lessee, by —	expiring with the end of—
1. Agricultural or manufacturing purposes—	year to year—	*six months' notice*—	a year of the tenancy.
2. Any other purpose,	month to month—	*fifteen days' notice*	a month of the tenancy.

The above statutory presumptions as to duration arise *only when there is no agreement* between the parties *or local usage to the contrary.*

Requisites of notice (S. 106)

Every notice under S. 108 must be in writing, signed by or on behalf of the persons giving it, and must 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.

Waiver of notice to quit (S. 113)

Notice to quit is deemed to have been waived, when, with the express or implied *consent* of the person to whom it is given, the person giving it does *an act showing an intention* to treat the lease as subsisting.

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

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

When a landlord, serving a notice to quit on default of payment of rent, serves a subsequent notice and demands a larger amount, it results in the *waiver* of first notice. (*Tayabali* v. *Messrs. Ahsan & Co.*, A.I.R. 1971, S.C. 102)

COMPUTATION OF LEASES (S. 110)

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

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

3. 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*, is to have such an option.

RIGHTS AND LIABILITIES OF THE LESSOR [S. 108(a) to (c)]

Define Lease. State the rights and liabilities of a lessor and a lessee.
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1. 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 : S. 108(a).

It has been *held* that a defect in the lessor's *title cannot* be said to be a material defect in the property within the meaning of this clause (*Syed Mukhtar* v. *Rani Sunder Koer*, 17 C.W.N. 960)

2. The lessor is bound, on the lessee's request, to put him in possession of the property : S. 108(b).

If the lessor fails to give such possession, the lessee can sue both the lessor, as also a third person in possession.

3. The lessor is also 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 : S. 108(c).

This covenant is called *a covenant for quiet enjoyment*, and is *absolute* and *unconditional*. It protects the lessee against the disturbance of his possession by the lessor or by persons claiming under the lessor, but *not* against any disturbance by a trespasser.

The benefit of the above contract is annexed to, and goes with the lessee's interest as such, and may be enforced by any one in whom such interest is vested : S. 108(c).

RIGHTS OF THE LESSEE [S. 108(d) to (j)]

1. If during the continuance of the lease, any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) is deemed to be comprised in the lease : S. 108(d).

2. If by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property is wholly destroyed, or rendered substantially and permanently unfit for the purpose for which it was let, at the option of the lessee, the lease becomes *void*. (However, if the injury is occasioned by the wrongful act or default of the lessee, he is *not* entitled to avail himself of this benefit) : S. 108(e).

3. 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 : S. 108(f).

4. If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor : S. 108(g).

5. The lessee may, *even after the termination 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 : S. 108(h).

6. When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal

representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them : S. 108(i).

7. 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. In such a case, the lessee does *not*, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease : S. 108(j).

When a transfer of a lease is made, the question as to whether the transferee of the lessee becomes directly liable to the lessor or not deserves consideration. As S. 108 makes it clear, the lessee is *not* relieved from his liability *unless* the lessor consents to the transfer, *or* releases him from the liability. So far as the liability of the transferee is concerned, it should be noted that there is no privity of contract between the lessor and the transferee of the lessee. But it is a principle of English law that when there is a *privity of estate* between the lessor and the transferee, the transferee will be liable to the lessor.

It was once doubted as to whether this principle of English law could be applied in India in view of the provisions of the Transfer of Property Act. However, it has now been *held* that such principle of privity of estate is applicable in India. (*Keshavlal* v. *Maganlal*, 36 Bom. L.R. 197)

But it must be noted that such privity of estate is created between the lessor and the transferee only where there is a transfer of the *whole* of the lessee's interest. No privity of estate arises when a subsidiary interest is carved out of the lessee's interest. Only where the lease is absolutely assigned to the transferee, there will be a *privity of estate*, and such transferee becomes *directly* liable to the lessor in respect of the covenants that are binding upon the lessee either under the terms of the lease or under S. 108 of this Act.

LIABILITIES OF THE LESSEE
[S. 108(k) to (q)]

1. 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 : S. 108(k).

2. The lessee is bound to pay or tender, at the proper time and place, the preimum or rent to the lessor or his agent in this behalf : S. 108(l).

3. The lessee is bound to keep, and on the termination of

the lease, to restore, the property in as good condition as it was at the time when he was put in possession, subject only to the changes caused by *reasonable wear and tear* or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof, and give or leave notice of any defect in such condition; and when such defect has been caused by any act or default on the part of the lessee, his servants, or agents, he is bound to make it good within *three months* after such notice has been given or left : S. 108(m).

4. 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 : S. 108(n).

5. 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 : S. 108(o).

6. The lessee must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes : S. 108(p).

7. On the termination of the lease, the lessee is bound to put the lessor into possession of the property : S. 108(q).

RIGHTS AND LIABILITIES OF LESSOR'S TRANSFEREE (S. 109)

If the lessor transfers the property leased or any part thereof, or any of his interest therein,—

1. The transferee, *in the absence of any contract to the contrary,* possesses all the *rights,* and if the lessee so elects, is subject to all the *liabilities* of the lessor as to the property or part transferred, so long as he is the owner of it.

However, the lessor does *not,* by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, *unless* the lessee elects to treat the transferee as a person liable to him.

EXAMPLE.— *A* leases a house and a stable to *B*, who agrees to keep the premises in good repair. During the term of the lease, *A* sells the stable to *C*. *C* can enforce the covenant to repair as regards the stable.

2. The transferee is *not* entitled to the arrears of rent due before the transfer. If the lessee, *not* having reason to believe that such transfer is made, pays rent to the lessor, the lessee is *not* liable to pay such rent over again to the transferee.

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

PROBLEM.— *A* lets a field to *B* at a rent of Rs. 100 and then transfers the field to *C*. *B* pays rent to *A* in good faith even after the transfer, having no notice of the transfer. *C* files a suit against *B* for recovery of rents due after the transfer. How will you defend *B*?

Ans.— Under S. 109 of the Act, if the lessor transfers the leased property, and the lessee, not having reason to believe that such a transfer is made, pays rent to the lessor, the lessee is *not* liable to pay such rent over again to the transferee. Here, *B* has paid rent to *A* in good faith, having no notice of the transfer. Therefore, *C* will *not* be able to recover the rent from *B*.

DETERMINATION (i.e. TERMINATION) OF A LEASE (Ss. 111-113)

A lease of immovable property *determines* (*i.e. terminates*) in the following *eight cases* :

1. By *efflux of the time* limited thereby.

Thus, a lease created for a certain term (*e.g.*, two years) determines on the last day of the term, without any formality, such as a notice on either side.

2. Where such time is limited conditionally on the happening of some event. — by *the happening of such event.*

Thus, for instance, if a lease for 20 years is, at the same time, made conditional upon the life of the lessee, the lease determines on the death of the lessee, even if this takes place within the stipulated period of 20 years; if the lessee does *not* die within this period, the lease determines at the end of the period.

3. 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.*

This clause operates in cases where the lessor has only a limited interest or a limited power to grant a lease. Thus, it has been *held* that a lease by a Hindu widow who is entitled only to a life-estate, determines on her death. (*Raghobir* v. *Jethu*, 2 Pat. 171)

Similarly, a lease granted by a mortgagee in possession and extending beyond the term of the mortgage, determines on redemption. (*Jhagru* v. *Ragunath*, A.I.R. 1929 Pat. 630)

Discuss the grounds for determination of a lease. P.U. Apr. 96

4. *Merger, — i.e.*, when the interests of the lessee and the lessor in the whole of the property become vested at the same time in *one person* in same right.

The lease determines when the right of the lessee *merges* in that of the lessor. The same man *cannot* be a landlord and tenant of the same property at the same time in the same right.

Merger may take place *either* (i) by act of parties, *e.g.*, when the lessor releases his interest in favour of the lessee, *or* (ii) by operation of law, *e.g.*, when the lessee takes the lessor's interest by succession. When a superior owner acquires a subordinate's tenure, merger is the inevitable result, and if he intends to avoid merger, he must evince a clear intention to keep the inferior interest alive.

5. By *express surrender, i.e.*, in case the lessee yields up his interest under the lease to the lessor by mutual agreement.

In the case of an express surrender, no formalities are required. The lessee must merely express his intention to surrender and the lessor must agree to it. This must be followed by delivery of possession.

6. By *implied surrender.*

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

It has been *held* that mere execution of a usufructuary mortgage in favour of the lessee in respect of the same property does *not* automatically result in implied surrender. Whether or not there is an implied surrender in such a case would depend upon the terms and conditions of the two transactions. (*Ramrao* v. *Pahumal*, A.I.R. 1963 M.P. 296)

7. By *forfeiture*— (*See below.*)

8. On the *expiry 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 : S. 111(h). Such notice may be waived with the express or implied consent of the person to whom it is given, by an act on the part of the person giving it, showing an intention to treat the lease as subsisting : S. 113.

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

(b) If in the above example, *B* remains in possession even after the expiry of the notice and *A* gives a second notice to quit, the first notice is *waived.*

A valid notice must satisfy the following *three requisites, viz.*—

(a) It must expressly convey the *intention* to terminate the tenancy, although it is *not necessary* to state any ground for the notice to quit.

(b) It must specify the *date* on which the tenancy is to expire.

(c) It must be *unconditional.* Thus, a notice given by a tenant that he will quit when he gets another suitable accommodation is *not valid.* (*Farrence* v. *Elkington,* 1811 2 Camp. 591)

FORFEITURE OF A LEASE (Ss. 111-112 & 114-115)

Definition [S. 111(g)]

A lease determines *by forfeiture,* if the lessee —

(i) breaks an express condition, which provides that on breach thereof, the lessor may re-enter; *or* (ii) renounces his character, as such, by—		
(a) setting up a title in a third, person, or		the lessor (or his transferee) gives *notice in writing* to the lessee of his intention to determine the lease.
(b) by claiming title in himself [this is known as *forfeiture by denial of landlord's title]; or* (iii) is adjudicated insolvent, *and* the lease provides that the lessor may re-enter on the happening of such event,	*provided that* —	

FORFEITURE.— The lessee will forfeit the lease in any of the three cases mentioned above by S. 111(g). However, there will be no forfeiture even in such cases, *unless a power of re-entry is distinctly reserved by the lessor.* Therefore, where there is no provision for re-entry in the lease, the lessor can sue only for damages or an injunction, but *not* for ejectment.

Explain fully the salient features of "lease". When can a lease be forfeited?

B.U. June 96

As seen earlier, under S. 10, the lessor has the right to impose a condition on the lessee restraining him from alienating the property. On the lessee's attempt to break this condition, the lessor may restrain him by an injunction, or in case of an actual breach thereof, he may sue for damages. Under such circumstances, a case of forfeiture does *not* arise, *unless* there is a *distinct provision for re-entry* attached to the lease.

After forfeiture has been incurred, it is further necessary that the lessor should give a notice in writing to the lessee of his intention to determine (*i.e.* terminate) the lease. Thereafter, the landlord, *i.e.* the lessor, can maintain a suit for possession, *provided* he does not waive his right.

Discuss the law as to forfeiture of lease.

B.U. Nov. 95

A condition restraining assignment by the lessee does *not* cover the case of a mortgage of the leasehold property, inasmuch as an *assignment* means only an absolute transfer. But, by virtue of Sec. 12, it is possible for a lessor to impose a condition on his lessee that on the latter becoming insolvent, the lease would stand terminated. Such a condition will operate as a determination (*i.e.* termination) of the lease, or have the effect of forfeiture, *only if* a right of re-entry upon the lessee's bankruptcy is distinctly reserved, and further if a *written notice* announcing the lessor's intention to terminate the lease is given. For the purpose of the above rule, it is immaterial that the lease is a permanent one.

In other words, there can be no forfeiture of the tenancy on any of the grounds specified in S. 111, *unless* there is a *right of re-entry and unless a written notice* of the intention to determine the lease is given to the lessee. The expression "right of re-entry" means a right to re-enter the land. It is a personal right and implies no interest in property. The mere institution of a suit for ejectment is *not* tantamount to giving notice as contemplated herein, because the forfeiture must be completed and the lease determined before the commencement of the suit. Service of notice is a condition precedent to the determination of the tenancy, and therefore to the institutition of the ejectment suit.

Explain fully the salient features of a lease. Discuss the rules as to forfeiture and surrender of a lease.

B.U. Apr. 99

Forfeiture by denial of landlord's title arises as soon as the lessee disclaims his lessor's right by setting up a title in a third person or by claiming title in himself, and the lessor does some act showing his intention to determine the lease.

PROBLEM.— *A* is a tenant of *B*, but *C* claims to be the landlord. *B* sues *A* for rent, and *A* in his written statement states "I have never paid rent to *B*. *C* now claims the rent. I am ready to pay whosoever is the rightful owner". *B* on the ground of disclaimer wants to eject *A* by suit.

What are his chances?

Ans.— He has no chances. This is not a disclaimer by virtue of which *B* can evict *A*.

Waiver of forfeiture (S. 112)

A forfeiture is *waived* —

(i) by acceptance of rent which has become due since the forfeiture, *or*

(ii) by distress for such rent, *or*

(iii) by any other action on the part of the lessor showing an intention to treat the lease as subsisting.

The above rule applies only if the lessor is aware that the forfeiture has been incurred.

Furthermore, if the rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance does *not* amount to a waiver.

RELIEF AGAINST FORFEITURE (Ss. 114-114A)

(i) For non-payment of rent (S. 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—

(a) *pays or tenders* to the lessor, the rent in arrear, together with interest and costs, *or*

(b) furnishes security for such payment within 15 days,

—the court *may*, instead of making a decree for ejectment, pass an order relieving the lessee against the forfeiture, –and thereupon, the lessee continues to hold the property as if the forfeiture has not occurred.

(ii) In certain other cases (S. 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 lies, unless and until— the lessor has served on the lessee a notice in writing— specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails, within reasonable time from the date of service of the notice, to remedy the breach if it is capable of remedy.

The above provisions do *not*, however, 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.

Effect of surrender and forfeiture on under-leases (S. 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 purposes of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee, are to be respectively payable to, and enforceable by, the lessor.

The forfeiture of such a lease annuls all such under-lease, *except*—

(i) where such forfeiture has been procured by the lessor in fraud of the under-lessees; *or*

(ii) relief against the forfeiture is granted under sec. 114.

SURRENDER AND FORFEITURE DISTINGUISHED

1. *Surrender* of a lease, which means a yielding up of the lessee's interest to the lessor, *moves from the lessee. Forfeiture* of a lease is at the *instance of the lessor.*

2. *Surrender* of a lease implies *mutual consent* on the part of the lessee and the lessor. *Forfeiture* of a lease does *not* imply any consent on the part of the lessee.

3. *Surrender* of a lease does *not* prejudice a sub-lease previously granted by the lessee on the terms and conditions substantially the same (except as regards the amount of the rent) as house of the original lease. In case of *forfeiture* of a lease, the sub-lease falls with the lease from which it is derived, except where (i) such forfeiture has been procured by the lessor in fraud of the under-lease, or (ii) relief against forfeiture is granted under S. 114.

HOLDING OVER (TENANCY-AT-WILL) S. 116

If a lessee or under-lessee of a property remains in possession thereof *after* the termination of the lease granted to the lessee, and the lessor (or his legal representative) accepts the rent from the lessee or under-lessee, or otherwise

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 the property is leased, as specified in section 106. In other words, if the original lease is for agricultural or manufacturing purposes, it will be an *annual* tenancy and when for any other purposes, it will be a *monthly* tenancy.

Examples

(a) *A* lets a house to *B* for 5 years; *B* underlets the house to *C* at a monthly rent of Rs. 100. The 5 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.

(c) *A* lets out lands for manufacturing purposes to *B* for 10 years. After the expiry of the terms, *B* is allowed to remain in possession with the consent of *A* for two years more. If *A* then wants to eject *B,* to what notice would be the latter be entitled ?

The lease being for a manufacturing purpose, the holding over gives rise to an annual tenancy terminable with 6 months' notice. But in this case, notice will be necessary as the holding is for *two* years only with consent; therefore, the lease will come to an end by efflux of time.

(d) If, in Example (c) above, *B* is allowed to hold over indefinitely and not for a definite period of two years, 6 months' notice will be necessary.

TENANCY BY HOLDING OVER. — When termination of the lease takes place, the lessee is bound to surrender possession of the property, and on default, he may be ejected without notice. But if he remains in possession of the property, and if the lessor consents to the continuance of the lease by accepting rent, or otherwise assents to it, there will be a *new* tenancy by the tenant's so *holding over.* The new tenancy so created is called a *tenancy by holding over,* sometimes also referred to as *tenancy-at-will.*

But so long as the lessor does *not* assent to the continuation of the lease, there is no holding over, and by continued possession, the tenant becomes what is known as *tenant-at-sufferance, i.e.,* a tenant who comes in by right and holds over without the consent of the landlord, and therefore, without right.

DIFFERENCE BETWEEN

TENANT HOLDING OVER	TENANT-AT-SUFFERANCE
1. *Interest in the property—*	
A tenant holding over remains in possession with the assent of the lessor, and has therefore some right to the property.	A tenant-at-sufferance merely enjoys possession of the property, without having any interest in the property.
2. *Privity of estate*	
There is some privity of estate between a tenant holding over and his landlord.	Though a tenant-at-sufferance is not strictly a trepasser, in the sense in which criminal law understands it, yet, there is no privity of estate between him and the landlord.
3. *Whether heritable?*	
Yes.	He *cannot* transfer any interest in the property to anybody; nor can he transmit any right to successors. So, when a tenant-at-sufferance dies, his heirs in possession of the property may be treated as trespassers.
4. *Notice to quit, if necessary*	
A tenant holding over *cannot* be ejected without notice to quit under Sec. 106.	A tenant-at-sufferance is not entitled to any such notice.

Tenant-at-will

A tenant-at-will is the result of a tenancy arising from the implication of law and sometimes by agreement. It is a tenancy which is terminable at the will *either* of the landlord *or* of the tenant. It may arise in the following circumstances :

(a) It may arise when a person is in possession of premises with the consent of the owner, there being no agreed period for which he should be so.

(b) It may also arise by an agreement to let, for an indefinite term, for compensation accruing from day to day, so long as both parties agree.

(c) A tenancy-at-will may also arise when a person enters into possession under a void lease.

Such a tenancy is terminable by either party giving notice. In such a tenancy, the tenant is liable to pay compensation

for use and occupation. The tenant is *not liable* to pay rent as there is no demise to him. Therefore, obviously such a tenancy is not alienable and it is terminated with the death of the tenant.

A lease is *not* extinguished by the death of the lessee holding over, and devolves on his heirs like any other interest in immovable property. That is the essential difference between a tenant holding over and tenant-at-will. A tenant-at-will is determined by the death of either tenant or his landlord. But in case of a tenant holding over, his interest is heritable and alienable. (*Kariya* v. *Vishnu*, (1971), K.L.T. 340)

Legal implications of tenacy-at-will and tenancy-at-sufferance

Tenancy-at-sufferance is merely a fiction to prevent the *possession* from being a *trespass*. It can arise only by implication of law when a person has been in possession under a lawful title, and continues in possession after that title has come to an end, without the consent of the person entitled. According to the Madras High Court, the concept has no place after the enactment of the Transfer of Property Act : *Govindaswamy* v. *Ramaswamy*, (1916) 30 Mad. L.J. 492. But *Sir D.F. Mulla* points out that the Act is not exhaustive, and the term is useful to distinguish a possession *rightful in its inception* but *wrongful in its continuation*, from a trespass wrongful both in its inception and its continuance.

Exemption of lease for agricultural purposes (S. 117)

Ss. 105 to 117 do *not* apply to leases for *agricultural* purposes. But the State Government may, by notification (published 6 months before it takes effect), make *all* or *any* of the above provisions applicable to agricultural leases also.

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7

EXCHANGES (Ss. 118-121)

Definition (S. 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.*

EXCHANGE.—It may be noted that an exchange also includes a *barter* of goods or movable property. The provisions will, therefore, apply to exchanges *both of movable* and *immovable* property.

Write a short note on : Exchange.
B.U. Apr. 95
Apr. 97
Oct. 99

The essential condition of every transaction in the nature of an *exchange* is that it must be a transfer of a thing for another thing, and both or either of these things may be movable or immovable. Thus, there may be an exchange of *X*'s pen for *Y*'s book, or of *X*'s house for the house of *Y.* But, according to the definition, there *cannot* be an exchange of a table for Rs. 100, or of a house for Rs. 5000. These are *sales,* because one of the items transferred is money, and they will be governed by the principles applicable to sale. If the sale is of immovable property, the provisions of Ss. 54 to 57 will apply. If, on the other hand, the sale is of movable property, the provisions of the Sale of Goods Act, 1930, will apply.

It must, however, be observed that the definition does *not* exclude the payment of money *altogether.* What it says is that no transfer of a thing for money *only* can amount to an exchange. It follows, therefore, that if one of the two properties which are to be exchanged exceeds the other in value, the transaction would nonetheless be an exchange, even if some money is paid by the owner of the property in addition, in order to equalise the value of both properties. For example, if *A*'s house worth Rs. 2,000 is to be exchanged for *B*'s field worth Rs. 1,200 and in pursuance of this bargain, *B* agrees to pay to *A* Rs. 800 in cash, the transaction is *not a sale but an exchange.* (*Ismail* v. *Saleh Muhammed,* (1927) 7 Lah. L.J. 18)

Similarly, where the Government of India, as owners of the G.I.P. Rly., exchanged lands valued at 89 lacs of rupees for lands belonging to the Bomaby Port Trust valued at 86 lacs of rupees and rupees 3 lacs paid in cash by the Port Trust, it was *held* that the transaction was an *exchange* and *not a sale,* having regard to the relative value of the lands and the money paid for equality of exchange. (*In the Matter of the Indian Stamp Act,* 1899, (1934) 36 Bom. L.R. 497)

Exchange how effected (S. 118)

A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by *sale.*

EXCHANGE HOW EFFECTED.—The mode of transfer by way of exchange is the same as in the case of sales. Thus, a registered instrument is necessary in an exchange of—

(i) tangible immovable property of the value of Rs. 100 and upwards; *and*

(ii) a reversion or other intangible thing.

Non-registration of the document can be cured by part-performance under S. 53-A.

In the case of *tangible* immovable property, of a value *less* than Rs. 100, exchange can be effected by a registered instrument *or by delivery* of the property.

In the case of *movable* property, the relevant portions of the Indian Sale of Goods Act will apply.

SALE AND EXCHANGE DISTINGUISHED.— Sections 118, 119 and 120 show that the Legislature has put an exchange on the same footing as a sale *in almost every respect.* For example, a transfer of property by way of an exchange can be made only in the manner provided for the transfer of such property by sale. Moreover, each party has the rights, and is subject to the liabilities, of a *seller* as to that which he gives, and has the rights and is subject to the liabilities of a *buyer* as to that which he takes.

The *only distinguishing point* between sale and exchange is that while a sale is always for a *price*, which means money or the current coin of the realm; in exchange, there is no *price*, but one specific thing is transferred for another; money may, however, be *added* to the thing to equalise the consideration.

If *one* of the things transferred is money, the transaction is not an exchange, but a sale. If *both* things transferred are money, the transaction is not a sale, but an exchange. In an exchange of money, there is an implied warranty as to the genuineness of money. (S. 121)

DIFFERENCE BETWEEN

EXCHANGE	PARTITION
1. *As to its nature*—	
(a) An exchange is the mutual transfer of respective ownership of two persons in two different specific properties.	(a) A partition is a mere arrangement, by virtue of which the several co-owners hold in severalty the lands which they had before held in common.
(b) Exchange is brought about by a contract between the parties.	(b) Right of partition is a natural incident of property.

2. *Interest in property—*

In an exchange, the persons exchanging properties are respectively the parties to the exchange. One person cannot say that he had, previous to the exchange, any interest in the property he got by the exchange.	In the case of a partition, each person has as much interest in the entire property as the other. There is no question of exclusive ownership in case of partition.

Right of party deprived of thing received in exchange (S. 119)

Define "exchange". Explain the rights of a party deprived of a thing received in "exchange". B.U. Oct. 97

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 it) 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 to any person claiming through or under him)—

(i) for any loss caused thereby; *or*

(ii) at the option of the person so deprived, for the return of the thing so transferred, if it is still in the possession of—

(a) such other party, *or*

(b) his legal representative, *or*

(c) a transferee from him without consideration.

Rights and liabilities of parties to an exchange (S. 120)

As stated above, except as otherwise provided above, each party has the rights and is subjected to the liabilities of a *seller* as to that which he *gives,* and has the rights and is subjected to the liabilities of a *buyer* as to that which he *takes.*

Exchange of money (S. 121)

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

So, when money is paid for forged bills or forged currency notes, the money may be recovered.

SALE, MORTGAGE, EXCHANGE AND LEASE COMPARED.—These are all different forms of transfer. A *sale* transfers the *entire ownership* in the property. A *mortgage* transfers only some interest in the property. A *lease* transfers only the right of enjoying the property.

A *sale* is a transfer of ownership for a *price.* An *exchange* also implies a transfer of ownership—but *not* for a *price;* in an *exchange,* the ownership of one *thing* is tranferred for the ownership of another thing, neither *thing* being money only. In a *sale,* the *price* is always *money.* If we substitute a *thing* for *money,* a sale will become an "exchange".

8

GIFTS
(Ss. 122-129)

"Gift" defined (S. 122)

A *gift* is the transfer—

—of certain existing movable or immovable property,

—made (i) voluntarily, *and*

(ii) without consideration,

—by one person (called the *donor)* to another (called the *donee), and*

—accepted by (or on behalf of) the donee.

Define "gift". What are the essential elements of a gift? When can a gift be suspended or revoked ?
B.U Oct. 98

Such *acceptance* must be made during the life-time of the donor, and while he is still capable of giving. If the donee dies before acceptance, the gift is *void.*

Gift how effected (S. 123)

A gift of—

(a) *immovable* property must be effected by a *registered instrument*—	(i) *signed* by (or on behalf of) the *donor, and* (ii) attested by at least *two witnesses.*
(b) *movable* property may be effected—	either by a registered instrument signed and attested as above, *or* by *delivery.* [Such delivery may be made in the same way as goods sold may be delivered.]

Define a gift, donor and donee. What are the essentials of a valid gift ?
P.U. Apr. 96

REQUISITES OF A VALID GIFT.—

(1) There should be a *donor* and a *donee.*
(2) The *subject of the gift* must be *certain* and *existing* and capable of transfer.
(3) The gift should be made *voluntarily* and *without consideration.*
(4) There should be a *transfer* on the part of the donor.
(5) There should be an *acceptance,* by or on behalf of the donee during his life-time.
(6) The acceptance must be at a time when the *donor* is *alive and capable of giving.*

Define and explain a "gift". How is a gift of immovable property effected ? When is a gift revocable ?
B.U. Apr. 97

(7) Therefore, it necessarily follows that the *donor* and the *donee* must both be *living* persons.

(8) When the property is *immovable*, there must be a *registered instrument properly attested.*

(9) In case of *movable* property, there must be *either*, a registered instrument properly attested *or* delivery of possession.

S. 122 lays stress on the acceptance of the gift. Acceptance implies existence of the property; therefore, the definition uses the words "certain existing", and consequently, *there can be no gift of future property.*

Emphasis is also laid on the *voluntary* character of the transaction to make it sure that it is made not under undue influence, duress etc., and to repel an argument that a gift, by reason of absence of consideration, is *not* a contract like the other forms of transfer.

PROBLEM.—*A* executes a gift in favour of *B*. The given land is worth Rs. 90. The deed is not registered but *B* is put in possession. Is the gift valid?

Ans.— A gift of immovable property, of *whatever value*, can only be made by a registered instrument. A deed *cannot* be dispensed with even for a property of small value, as in the case of a sale. Even if the intended donee is put in possession, a gift of immovable property is *invalid without a registered instrument.*

GIFTS UNDER HINDU LAW AND MAHOMEDAN LAW.— The Hindu law, which requires delivery of possession to complete a gift of immovable property, has been abrogated by S. 123 of this Act. So also, a gift of movable property may be made simply by a registered instrument without delivery of property.

Under Mahomedan law, the essentials of a gift are, (i) a declaration of gift by the donor, (ii) acceptance of the gift by the donee, and (iii) if possible, delivery of possession. This rule of Mahomedan law is, by virtue of S. 139 (below) of the Act, unaffected by the provisions of S. 123, and consequently a registered instrument is *not necessary* to validate a gift by a Mahomedan of an immovable property. So, it follows that even a registered deed of gift is *not* effectual under the Mahomedan law, if it is not accompanied by delivery of possession.

REGISTRATION.—Registration is compulsory in the case of a gift of *immovable* property, *whatever be the value of the property.* But it is *not necessary* that the deed should be registered by the donor himself.

It may be noted that a gift becomes irrevocable once the deed of gift is delivered to the donee, even before its registration. Once the deed is executed, it will be registered according to the Indian Registration Act, even though the donor has changed his mind subsequently. Once the deed is executed and the gift is accepted during the life-time of the donor, the deed of gift may even be registered after the death of the donor. *But an unregistered deed of gift cannot be used under the doctrine of part-performance as the doctrine of part-performance* is applicable to transfers for consideration only.

The Delhi High Court has reiterated that in case of a gift of

immovable property, if the document is not registered, mere delivery of possession *cannot* pass a title to the donee. (*Dawar* v. *Dhama*, A.I.R. 1993 Del. 19)

PROBLEM.—A deed of gift is executed, attested and delivered to the donee. The donee accepts the gift. Before registration of the Deed, the donor seeks to revoke the gift, contending that the gift is not complete until registration. Advise the donee.

Ans.—A deed of gift becomes irrevocable once it is executed, attested and delivered to the donee, and accepted by the latter. Thereafter, the deed may be registered later on, even if the donor has changed his mind, and even after the death of the donor. Thus, in the present case, *the gift is complete,* and the donee is entitled to it.

DIFFERENCE BETWEEN

GIFT	SALE
1. *Attestation*—	
Is compulsory.	Not so.
2. *Registration*—	
Compulsory for a gift irrespective of the value of property.	It is not altogether compulsory. Thus a sale of property below Rs. 100 may be effected by delivery of possession.
3. *Acceptance*	
Is a necessary condition for a gift.	Acceptance is implied, when consideration passes.

KINDS OF GIFTS (Ss. 6, 122 & 124-127)

1. Void gifts (Ss. 6, 122 & 124-126)

The following gifts are *void, viz.*—

1. Gift made for an unlawful purpose : S. 6.
2. Gift depending on a condition, the fulfilment of which is impossible, *or* forbidden by law : S. 6.
3. Where the donee dies before acceptance : S. 122.
4. Gift by a person incompetent to contract, *e.g.,* a minor, lunatic etc. : S. 7.
5. A gift comprising existing and future property is void as to the latter : S. 124.

PROBLEM.—*X* gives to his daughter a gift of his bungalow, Prabhu Prasad, built in 1999, and also of a Maruti Car which *X* was to buy in future. Is the gift valid ?

Ans.—S. 124 of the Act provides that a gift comprising existing and future property is void as to the latter. In this case, therefore, the gift of the bungalow is *valid,* (as it is existing property), but the gift of the car to be bought in future is *void* (as it is future property).

6. 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 : S. 125.

When a gift, is made to two or more persons jointly, *it does not fail in its entirety,* if one of the donees does not accept. The gift is void only as to the interest of the donee who does not accept.

7. A gift which, under an agreement between the parties, is revocable, wholly or in part, at the mere will of the donor, is *void* wholly or in part, as the case may be : S. 126.

MISTAKE.—A gift is *not* liable to be set aside merely on the ground of mistake, *provided* it is not vitiated by fraud, undue influence etc.

GIFT FOR PAST ILLICIT COHABITATION.— A gift requires no consideration, and past illicit cohabitation can be a *motive* for a gift, but not its *object* or *consideration,* and a gift in consideration of past cohabitation is *immoral* and *invalid* (*Subama* v. *Yamanappa,* 35 B.L.R. 345).

Under S. 2(d) of the Indian Contract Act, past illicit cohabitation *cannot* be the consideration for an agreement or a transfer of property, and such an agreement or transfer is void. If such a void agreement precedes a gift and the gift is made in discharge of that agreement, then the gift also is *void.* (*Istak Kamu* v. *Ranchhod Zipru,* 38 Bom. L.R. 775)

2. Onerous gifts (S. 127)

A gift may not always be of a purely beneficial character, but may, at times, be burdened with an obligation, *e.g.,* when shares in a company subject to heavy calls form the subject-matter of a gift. Such a gift is called an 'onerous gift'. The law as to *onerous gifts* is laid down in S. 127 of the Act.

1. 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.*

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

2. 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.*

Illustration.—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 his refusal, forfeit the *money*.

S. 127 is based on the simple principle that he who wants the roses must not fear the thorns.—*Qui sensit commodum, debt et sentire onus.* The rule is *analogous to the doctrine of election,* as the donee has to elect to accept the *whole* gift or not to accept anything at all. What he cannot do is to retain the benefit of the transaction, and reject its burden.

Onerous gift to disqualified person (S. 127)

If a donee, who is not competent to contract, accepts property burdened by any obligation, he is *not* bound by his acceptance. But, if after becoming competent to contract, and being aware of the obligation, he retains the property given, he becomes so bound.

A disqualified person (*e.g.*, a minor) may be a donee, but he cannot create obligations against himself. So, when an onerous gift is made to him and he accepts it, he is *not* bound by the obligations with which the gift is burdened. The *result* is that when the disqualification is removed, he may avoid the obligation by returning the property to the donor within a reasonable time. But where a minor is the donee of an onerous gift and after attaining majority, retains the property given, he will be bound by the obligation with which the gift is burdened.

UNIVERSAL DONEE (S. 128)

Write a short note on : Universal donee.

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A universal donee is one to whom the donor's *whole property* is given, and who consequently becomes 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 in the gift.

Subject to the provisions of S. 127 (-- seen above --) where a gift consists of the donor's *whole* property, the donee is personally liable for all the debts due by the donor at the time of the gift, to the extent of the property comprised therein.

The essential condition for the application of S. 128 is that *all* the properties of the debtor should have been transferred to the donee. However, it has been *held* that even if a life-interest in a part of the property is retained by the donor, the donee is nevertheless a universal donee. (*Shahzad Singh* v. *Madan Gopal,* A.I.R. 1963 All. 146)

However, if only all the immovable properties are transferred, and the donor continues to own movables, *the donee cannot be called a universal donee.* (*Anrudh* v. *Lachmi,* A.I.R. 1928 All. 500)

But, if only a small, insignificant part of the property is retained by the donor, *the donee will be treated as a universal donee.* (*Bapurao* v. *Bulakidas,* A.I.R. 1944 Nag. 225)

Where, in a gift-deed, the donor had *not* included the equity of redemption in respect of property mortgaged by him, he *cannot* be said to have transferred the whole of his property, and *the donee cannot be regarded as a universal donee.* (*Ram Raj* v. *Lal Chandra,* A.I.R. 1941 Oudh, 205)

There is no rule under *Mahomeddan Law* which conflicts with the provisions of S. 128 of the Transfer of Property Act. (*Abid Husain* v. *Ram Nidh,* A.I.R. 1930 Oudh, 268)

HOW S. 128 DIFFERS FROM S. 53.—S. 53 of the Act deals with *fraudulent transfers* of immovable property, whereas S. 128 deals with both movable and immovable property.

What are the ingredients of a gift ? When is a gift irrevocable ?

Secondly, a gift under S. 128 is *not necessarily fraudulent.* If the gift is fraudulent and it covers immovable property, S. 53 would apply; but, if it is not fraudulent, a remedy will still be available under S. 128.

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Lastly, under S. 53, the fraudulent gift need not comprise of the entire property of the donor, whereas S. 128 will come into play only if there is a gift of the *whole* property of the donor.

REVOCATION OR SUSPENSION OF GIFTS (S. 126)

A gift once made is irrevocable, except in the following *two* cases :

1. A gift is revocable if the donor and the donee have agreed that on the *happening of a specified event* (not depending upon the will of the donor), the gift should be suspended or revoked.

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

Write a short note on : Revocation of a gift.

A gift, which the parties agree is revocable wholly or in part, *at the mere will of the donor,* is *void* wholly or in part, as the case may be.

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

2. 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 (*e.g.*, when the gift is made under coercion, undue influence, fraud, misrepresentation etc.)

The above rules do *not,* however, affect the rights of transferee for consideration without notice.

When the gift is revoked owing to the causes mentioned in S. 126, the donee ceases to have any interest in the property. But, if before

revocation, the donee has transferred the property to a third party, who takes it for consideration and without notice, the donor *cannot* exercise his power of revocation given to him by S. 126 to the prejudice of such third person.

Undue influence is a common ground for revocation, *e.g.*, a gift by a child to a parent, by a *cestui que trust* to a trustee, by a patient to his doctor or by a client to his solicitor. *Hardy, L. J.* once said that "the only competent independent advice that should be given to a man who proposes to make a gift to his solicitor is to tell him not to do so."

INCOMPLETE GIFT.— The rule that a gift cannot be revoked except according to the provisions of Sec. 126 does not apply to an incomplete gift. Such a gift can be revoked at any time.

A *donatio mortis causa of* movable property is by virtue of S. 129 of the Act, revocable at the will of the donor.

Saving of *donatio mortis causa* and Muhammadan law (S. 129)

S. 129 of the Act provides that nothing in the chapter (relating to gifts)—

(i) relates to gifts of movable property made in contemplation of death (*i.e. donatio mortis causa*); *or*

(ii) shall be deemed to affect any rule of Muhammadan law.

S. 129 exempts gifts of *movable* property made in contemplation of death from the operation of all the foregoing provisions relating to gifts. Such gifts are governed by S. 191 of the Indian Succession Act, 1925, as they are treated as being in the nature of gifts by will. But, a similar gift of *immovable* property must be made according to the provisions of this Act.

GIFTS BY MAHOMEDANS.—S. 129 also exempts gifts made by Mahomedans from the operation of these provisions in so far as they are consistent with the principles of Mahomedan law. Under Muhammadan Law, a gift of an immovable property may be made orally by simple delivery of possession. Similarly, the rules regarding revocation of a gift are entirely different from those enacted in S. 126. In these cases, therefore, none of the relevant provisions of the Act will apply.

But in so far as the rules under this Act are founded upon equity and reason, and do not *conflict* with any rule of that law, they will be applied. Accordingly, S. 128 about onerous gifts, being an embodiment of a rule of equity, has been *held* to apply to Mahomedan gifts. (*Abdul Satar* v. *Satyabhusan,* (1908) 35 Cal. 667)

GIFTS BY HINDUS.—Formerly, no portion of the Transfer of Property Act, relating to gifts, except S. 123, affected the Hindu law of gifts. But by the Amending Act of 1929, the *whole* of the Transfer of Property Act was made applicable to Hindus. Therefore, today, gifts by Hindus *will be* governed by the provisions of this Chapter.

9

TRANSFER OF ACTIONABLE CLAIMS (Ss. 3 & 130-137)

'Actionable Claim' defined (S. 3)

Actionable claim means a claim to—	(a) any debt, other than a debt, secured —	(i) by a mortgage of immovable property, *or* (ii) by hypothecation or pledge of movable property,
	or	
	(b) any beneficial interest in movable property—	not in the possession (either actual or constructive) of the claimant,

which claim the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be *existent, accruing, conditional* or *contingent.*

Write a short note on : Actionable claim.

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An actionable claim is similar to what is known as a *chose-in-action* in England. It comprises—

(i) a claim to an unsecured debt; *or*

(ii) a claim to any beneficial interest in movable property not in actual or constructive possession of the claimant.

Although negotiable instruments, debentures, stocks, shares and mercantile documents of title to goods might come under the definition of an actionable claim, yet the formalities prescribed for the assignment of an actionable claim are *not* applicable to negotiable instruments and transfers of such instruments. (S. 137)

Transfer how effected [S. 130(1)]

What is an actionable claim ? State the rules governing transfer of an actionable claim.

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The transfer of an actionable claim (whether with or without consideration) can be effected only by the execution of an instrument (i) in writing (ii) signed by the transferor (or his duly authorised agent), –and the transfer is complete and effectual upon the execution of such instrument.

[Note—S. 130 does not require 'registration' as one of the formalities.]

The assignment of an actionable claim under the Transfer of Property Act combines in itself some features of the *legal*, and some of *equitable* modes of assignment under English law.

In England, a *legal* assignment—

(a) must be an *absolute* assignment;
(b) must be *in writing;*
(c) takes effect from the date of *notice* to the debtor. Without notice, an assignment is bad;
(d) enables the assignee to *sue* in his own name and to give a valid discharge.

In an *equitable* assignment (*in* England) :

(a) It is *not necessary* that it should be an absolute assignment. It may be by way of a charge.
(b) As the intention to assign is important, it may be expressed in any form and *writing is not necessary.*
(c) *Notice* to the debtor is *not necessary* to complete the assignment, though it may be necessary to bind the debtor and to fix the priorities.
(d) The assignment must be made *for value.*
(e) The assignee must implead the assignor as a party.

What is an "actionable claim" ? What are the modes for transfer of an actionable claim ?
P.U. Apr. 96

The features of an assignment under the Transfer of Property Act are :

(a) It *need not be* an *absolute assignment.* It may be by way of a charge.
(b) It must be in *writing.*
(c) *Notice* is not necessary to complete the assignment, – though it might be necessary to bind the debtor.
(d) The assignee can *sue* in his own name.

PROBLEM.— *M* and *V* were rival claimants of the proceeds of a policy of life insurance on the life of their debtor, which had been paid into Court by the Insurance company. *M* relied on an instrument in writing constituting an assignment in his favour, and *V* based his claim on a deposit of the policy with him by the debtor unaccompanied by any writing. Discuss the right of *M* and *V* over the moneys deposited.

Ans.— *V*'s claim is *not* sound, because a written instrument is necessary for an assignment. Hence, *M* will succeed.

Rights of a transferee of an actionable claim (Ss. 130 & 132)

1. The rights and remedies of the transferor (whether by way of damages or otherwise) vest in the transferee (whether any notice of such transfer is or is not given in the manner prescribed by S. 133).

What is an actionable claim ? What are the rights and liabilities of a transferee of an actionable claim ?
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However, every dealing with the debt (or other actionable claim) by the debtor [or other person, from or against whom the transferor would, but for such instrument of transfer, have

been entitled to recover or enforce such debt or actionable claim] is (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) valid as against such transferee. [S. 130(1)]

Illustration.— *A* owes money to *B*, who transfers the debt to *C*. *B* then demands the debt from *A*, who not having received notice of the transfer as prescribed in S. 131, pays *B*. The payment is valid, and *C cannot* sue *A* for the debt.

NOTICE.— A transfer of an actionable claim is complete when the instrument has been executed, *even if no notice has been served.* But the question of notice has an important bearing on the transferee's right. Though the transfer of an actionable claim is complete without notice, yet *the position of the transferee is not secured unless the necessary notice is given.* The debtor, who pays off the debt to the creditor, not having any such notice, and not being a party to the transfer, can successfully resist the claim of the transferee, and absence of notice protects him. So long as proper notice is *not* served, the debtor is *not* directly liable to the transferee. It should be noted that when the debtor is a party to the transfer, he becomes liable even without express notice. The Illustration to S. 130 above makes this position clear.

2. The transferee may sue or institute proceedings for the same (i) in his own name, (ii) without obtaining the transferor's consent to such suit or proceedings, and (iii) without making him a party thereto.

Exception.— Nothing in S. 130 applies to the transfer of a *marine* or *fire* policy of insurance. (It may be noted that a policy of *life* insurance is not covered by the *Exception.*)

Illustration.— *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 sue on it without the concurrence of *A*'s executor, subject to the proviso above and to the provisions of S. 132.

INSURANCE CONTRACTS.— A contract of *life* insurance is *not* exempted from the operation of this section. The *reason* for this is that while *marine* and *fire* insurance are contracts of indemnity, benefiting only the holders of the property at the time of loss, and not available to third persons by assignment, the benefit of a life-policy is enjoyable by anybody to whom it has been assigned. In the case of a marine or fire insurance, the holder of the property is *not* liable to be easily defeated as he is the holder of the policy as well (see S. 135), but the transferee of a life-policy, unless he gives notice to the insuring company, may easily be defeated by a payment made by the company to the transferor.

Notice of transfer of an actionable claim (S. 131)

Every notice of transfer of an actionable claim must be in writing signed by the transferor or his agent duly authorised in this behalf, or in case the transferor refuses to sign, by the transferee or his agent, and must state the name and address of the transferee.

Liability of transferee of an actionable claim (S. 132)

The transferee of an actionable claim takes it subject to all the 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 due to him by *B*, *A* being then indebted to *B*. *C* sues *B* for the debt due by *B* to *A*. *B* is entitled to set off the debt due by *A* to him, although *C* was unaware of it at the date of the transfer.

(ii) *A* executed 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. *C cannot* enforce the bond against *A*.

SUMMARY OF TRANSFEREE'S

RIGHTS	LIABILITIES
1. All the rights and remedies of his transferor vest in him : S. 130(1).	1. He takes the claim subject to all the liabilities and equities to which his transferor was subject : S. 132.
2. He may sue in his own name without his transferor's consent and without making him a party thereto : S. 130(2).	

CASE.—A debt was due by *A* to *B* for work done. *B* gave his creditor, *C*, a power-of attorney, and deposited with him vouchers for the work in order to enable him to get the payment. Before *C* could draw the money, the debt was attached by another creditor. In the circumstances, *C* would have no lien or charge on the money, *for there was no written assignment of the debt.*

Warranty of debtor's solvency (S. 133)

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

Mortgage of an actionable claim (S. 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, (i) *first,* in payment of the costs of such recovery; (ii) *secondly,* in or towards satisfaction of the amount for the time being secured by the transferor, – and *the residue,* if any, belongs to the transferor, or other person entitled to receive the same.

The mortgage of an actionable claim has the same rights to deal with it as any other security. He may realise the debt, but he must credit the amount thus realised to the account of his transferor, and if there is any surplus after his claim has been satisfied, he must pay it to the mortgagor.

Rights of an assignee of marine and fire policies (S. 135)

Every assignee, (and endorsement or other writing) of a policy of *marine* insurance or of a policy of insurance against *fire,* in whom the property in the subject insured is absolutely vested at the date of the assignment, has transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

It may be noted here that S. 130 *exempts* the assignments of marine or fire policies of insurance from its operation. The *reason* for this exception is that a mere assignment of such policy does *not* entitle the assignee to the ownership of the subject-matter of the policy. In an actionable claim, the claim and the subject-matter of the claim, though different, both pass to the assignee on the assignment of the claim. In the case of a policy of marine or fire insurance, that is not so. In fact such a policy cannot be assigned apart from the property insured. Accordingly, S. 135 says that every assignee, by endorsement or other writing, of such policy in whom the property in the subject insured is *absolutely* vested at the date of the assignment, and has transferred and vested in him, all rights of suit as if the contract contained in the policy had been made with himself.

Where, however, a policy of marine insurance has been assigned so as to pass the beneficial interest therein, the assignee of the policy is entitled to sue thereon *in his own name,* and the defendant is entitled to take up any defence arising out of the contract which he would have been entitled to take, if the action had been brought in the name of the person by whom the policy was effected.

Where the insurer pays for a total loss of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured. He is also subrogated to all the rights and remedies of the insured as from the time of the casualty causing the loss : S. 135-A(1) & (2).

Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the insured person as from the time of the casualty causing the loss, in so far as the insured person has been indemnified by such payment for the loss : S. 135(3).

Incapacity of officers connected with Courts of Justice (S. 136)

No *judge, legal practitioner,* or *officer* connected with any Court of Justice can 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 can 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.

Saving of negotiable instruments etc. (S. 137)

The above provisions of this Chapter do *not* apply to stocks, shares and debentures or to instruments which are for the time being by law or custom, negotiable or to any mercantile document of title to goods.

The expression 'mercantile document of title to goods' includes a bill of lading, dock warrant, warehouse-keeper's certificate, railway receipts, warrant 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 authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Certain documents in the nature of negotiable instruments are exempted from the operation of the provisions regarding assignment of actionable claims as contained in the Act. S. 137 says that none of the provisions in Sections 130 to 137 shall apply 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 of goods.

Negotiable instruments are governed by the provisions of the Negotiable Instruments Act. The usual mode of the assignment is endorsement and delivery or mere delivery. (Ss. 27 and 28 of the Negotiable Instuments Act). But a negotiable instrument can also be transferred like any other actionable claim under this Act. The distinction between an assignment under this Act and a transfer by endorsement under the Negotiable Instruments Act is that in the former, the assignee will acquire no more than the right, title and interest of the assignor, while in the latter, the endorsee will have all the rights and advantages of a holder in due course.

10

GENERAL OBSERVATIONS ON HOW TO EXECUTE DIFFERENT KINDS OF TRANSFERS UNDER THE ACT

The following *six* kinds of transfers are recognised by the Transfer of Property Act :

1. *Sale* : Ss. 54-57.
2. *Mortgage* of immovable property : Ss. 58-104.
3. *Lease* of immovable property : Ss. 105-117.
4. *Exchange* : Ss. 118-121.
5. *Gifts* : Ss. 122-129, and
6. Transfer of *actionable claims* : Ss. 130-137.

Formalities necessary to effect each of the above transfers :

A *sale* of tangible immovable property of the value of Rs. 100 and upwards, or a sale of a reversion or other intangible thing, can be made only by a registered instrument. A sale of tangible property of a value less than Rs. 100 may be made either by a registered instrument or by delivery of the property : S. 54.

So far as *mortgages* are concerned, where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses, but such writing and registration is not necessary in the case of a mortgage by deposit of title-deeds.

Where the principal money secured is *less than Rs. 100* a mortgage may be effected—

(1) either by a registered instrument signed by the mortgagor and attested by at least two witnesses, *or*

(2) except in the case of a simple mortgage, by delivery of the property.

A *lease* of immovable property (1) from year to year, or (2) for any term exceeding one year, *or* (3) reserving a yearly rent, can be made only by a registered instrument. All other leases of immovable property may be made *either* (1) by a registered instrument *or* (2) by oral instrument accompanied by delivery of possession : S. 107.

In the case of *exchange*, the mode of transfer is the same as in the case of sales : S. 118.

A *gift* of *immovable* property can only be made by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. A gift of movable property may be effected *either* (1) by a registered instrument signed by *or* on behalf of the donor *or* (2) by delivery : S. 123.

A transfer of an *actionable claim* can be effected only by an instrument in writing signed by the transferor or his duly authorised agent : S. 130.