

Chapter IV

Of Mortgages of Immoveable Property and Charges

~~§ 58.~~ "Mortgage," "mortgagor," "mortgagee," "mortgage-money" and "mortgage-deed" defined. (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

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

① Sample mortgage—(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee. *(Mortgagee to favour a transferee, give favour)*

② Mortgage by conditional sale—(c) Where the mortgagor ostensibly sells the mortgaged property—

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

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

On condition that on such payment being made the buyer shall transfer the property to the seller.

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

¹[Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale;]

⑤ **Usufructuary mortgage**—(d) Where the mortgagor delivers possession ¹[or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property ²[or] any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest ³[or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee. *(7 years) ২০২৫ন চীফ কোর্ট ২০২০ন ৩০/১১/২০২০*

④ **English mortgage**—(e) Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage. *৩১/১০/২০২০*

1. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 19.
 2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 19 for "and to appropriate them."
 3. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 19 for "and".

⑤ **Mortgage by deposit of title-deeds**—¹[(f) Where a person in ²[the town of] ³[Dacca, Narayangonj and Chittagong] ⁴*** and in any other ⁵town which the ⁶[Government] ⁷*** may, by notification in the ⁸[official Gazette], specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

⑥ **Anomalous mortgage**—(g) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.]

Case Law

Section 58—Mortgage, mortgagor, repurchase—difference between a mortgagee, mortgage-money and document as one of sale with a condition mortgage-deed as defined in section 58 of of repurchase and one of mortgage by *Transfer of Property Act, 1882. HBFC vs conditional sale.*
A Mannan 41 DLR (AD).

—Sale with a ~~condition~~ of under reference purports to create a

1. Sub-sections (f) and (g) inserted by the Transfer of Property (Amendment) Act, 1929 (XXX of 1929), section 19.
2. Substituted by AO., 1949 Schedule, for "any of the following towns, namely, the towns of Calcutta, Madras, Bombay [and]". The word in brackets was inserted by AO., 1937.
3. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Karachi" (with effect from the 26th March, 1971).
4. The words "Rangoon, Moulmein, Bassien and Akyab" rep by AO 1937.
5. For notifications relating to the towns of Chittagong, see Gazette of India, 1929, pt 1 p 1260; and Dacca, Narayangonj, see Gazette of India, 1933, pt 1 p 158.
6. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Provincial Government" (with effect from the 26th March, 1971).
7. The word "concerned" was omitted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule, (with effect from the 26th March, 1971).
8. Substituted by AO 137, for "Gazette of India."

mortgage by conditional sale with a condition of repurchase.

In the margin of the document the word "kot kabala" finds place and in the top margin of the document the word 'haba-kabala' occurs. *Md. Affan vs Tazal Haque* 27 DLR 58.

Sale with a condition of repurchase— difference between a document as one of sale with a condition of repurchase and one of mortgage by conditional sale.

The question is, whether the document under reference purports to create a mortgage by conditional sale or with a condition of repurchase

In the margin of the document the word 'kot kabala' finds place and in the top margin of document the word 'haba-kabala' occurs.

But there are no such words in the text of the document and it is further stated in the text that the transferee would be entitled to have name mutated in the landlord's sheresta, would pay rent thereto and would enjoy the properties as his own right of inheritance, etc.

Held : If this clause of reconveyance is read as a whole it will appear that the power to get the property reconveyed was with the transferor and transferor alone because towards the beginning of the reconveyance clause it has been stated clearly that the transferor or his successor-in-interest could pay back the money but the right to have the property reconveyed was to the transferor himself. *Md. Affan vs Tazal Hoque*. 27 DLR 58.

Section 58(c)—Interpretation of deed of mortgage—Court should look at the substance of deed.

Under section 58(c) of the Transfer of Property Act which deals with the definition of a mortgage by conditional sale, there must be a condition that in default of payment of the mortgage money on a certain date the sale shall become absolute. *Chandra Kanta Howlader vs Rama Prasanna Ganguly*, PLD 1954 Dacca 8—PLD 1952 Dacca 414—5 DLR 29.

—English Mortgage—Absolute transfer with stipulation that mortgagor may redeem mortgage.

Where the provision in the indenture mortgage shows that there was an absolute conveyance and transfer of all the interest of the mortgagor in the mortgaged property to the mortgagee only subject to the proviso for redemption, which however is allowed by the very terms of section 58(c) the stipulation in the indenture that the mortgagor would, until he committed default in payment of the principal or the interest, remain in possession of the mortgaged property and the stipulation that the mortgagor would be in receipt of the rents and profits of the mortgaged property and would pay rates and taxes of the property and would not detract from the absolute nature of the transfer and would not make any difference in the position that the mortgage is an English Mortgage within the meaning of section 58(c). *Fozmal Bhutaji vs Shridhar Vithal*. AIR 1946 Bom. 499, Dist: AIR 1935 Cal. 659; Ref: AIR 1927 Cal. 725; AIR 1932 Cal. 775.

—Condition of resale not embodied in document effecting sale—Transaction is not mortgage.

The meaning of the proviso to clause (c) of section 58 of the Transfer of Property Act,

1882, incorporated in the Act by the Amending Act XX of 1929, is that though a transaction may in fact have been a mortgage, yet, when the condition of re-sale is not embodied in the document that effects or purports to effect the sale, then the transaction cannot be treated as a mortgage. *Abdus Sattar vs Yanus Malik, PLD 1961 Dacca. 512—12 DLR 849.*

—The appointment of a partner as managing partner clothes him with all the powers of managing the partnership business including the power to borrow money and acknowledge the borrowing from time to time, and all the partners are bound by the acts of the managing partner and are responsible for the debts contracted by him. *Hari Shankar vs Firm Bansilal Abrachand. AIR 1946 Nagpur. 266.*

—The effect of the proviso added to section 58(c), Transfer of Property Act, by the amending Act of 1929, is that an ostensible sale with a stipulation for purchase shall not be regarded as a mortgage unless the stipulation is contained in the same document which effects the object being to shut out an inquiry whether a sale with a stipulation of retransfer is a mortgage when the stipulation is not embodied in the same document. *Venkata Subbarao vs Veeraswami. AIR 1946 Mad. 466.*

Section 58(e)—Mortgage of property—Claim based on, is a claim to immovable property.

As soon as M. created a mortgage for a sum in the property comprised in the mortgage-deed, the mortgagee secured an interest in this property. (shops). *Moiz-ud-Din*

vs Uttam Chand PLD 1949 Lah. 50—PLR 1949 Lah. 866 Rel. ILR 51 All. 494 (DB) ILR 12 Ran. 370 (FB) ILR 29 Cal. 1 (FB) ILR 44 Mad. 965.

—Transfer of interest takes place at the time of contract and not at the time of payment of consideration.

A mortgage is a transfer of interest which comes into existence, when the contract of mortgage is entered into and not necessarily when the consideration is paid. *Salehon vs Muhammad. PLD 1958 (WP) Lah. 1023, 53 PL 1916 (FB).*

Section 58(c)—Proviso—Mortgage by conditional sale and sale with a condition of repurchase—Distinction between.

The condition of repurchase embodied in the document itself is not a decisive test to determine the nature of the transaction. The effect of the proviso to clause (c) added by the Amending Act 20 of 1929 is that if the condition of repurchase is not embodied in the document which effects or purports to effect the sale, the transaction will not be regarded as a mortgage but it does not follow that if the condition is embodied in the same condition it must necessarily be a mortgage. *Prima facie* it would be a mortgage, but it is open to the other side to show that it was intended to be an out and out sale.

A sale with a condition of a repurchase is not a mortgage, for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is a security. It is not a partial transfer but a transfer of all rights in perpetuity reserving only the personal right of repurchase or pre-emption which is lost if

not exercised within the stipulated time. *Abdul Hafiz Choudhury vs Aziz-ur-Rehman Badiuz. PLD 1953 Dacca 35—PLR 1952 Dacca 62—4 DLR 162(8).*

—Mortgage by conditional sale—Date on which sale becomes absolute must be mentioned.

Under section 58(c) of the Transfer of Property Act which deals with the definition of a mortgage by conditional sale, there must be a condition that in default of payment of the mortgage-money on a certain date the sale shall become absolute. *Chandra Kanta Howladar vs Rama Prasanna Ganguly. PLD 1954 Dacca 8—5 DLR 29, PLR 1952 Dacca 414.*

—Mortgage by conditional sale—Tests.

In order to determine that a document is a mortgage by conditional sale, the following tests, though not exhaustive, should be applied:—

- (1) the existence of debt.
- (2) the period of repayment, a short period being indicative of a sale and a long period of a mortgage.
- (3) the continuance of the grantor in possession indicates a mortgage.
- (4) a stipulation for interest on payment indicates a mortgage.
- (5) a price below the true value indicates a mortgage.
- (6) a contemporaneous deed stipulated for reconveyance indicates a mortgage, but one executed after a lapse of time points to a sale. *Ganu Mia vs Abdul Jabbar. PLD 1959 Dacca 293—10 DLR 638.*

Mortgage by deposit of title deeds—when requires registration.

A mortgage by deposit of title deeds does not require any writing, and being an oral transaction is not affected by the Law of Registration. It is however usual in these transactions that such deposit of title deeds is accompanied by a memorandum in writing. The question which often arises is, whether the writing was of such a character as to require registration. The decision of that question must necessarily turn upon the nature of the document itself though assistance may be had from the consideration of the surrounding circumstances. *Begum vs Fatimabhai. PLD 1961 (WP) Karachi 537.*

—Sale or mortgage—How nature of a transaction may be determined. It is an inviolable rule that in considering the question whether a transaction is a sale or a mortgage the Court must find the substance behind the form. But where the oral evidence is unreliable and contradictory the court cannot safely depart from the written evidence of the documents. *Ramdhandas vs Ramkisonadas. AIR 1946 Privy Council 178.*

Section 58(c)—Deeds of sale and reconveyance—Executed on same date—Both deeds valid.

There is nothing in law to prevent the parties from entering into a simultaneous agreement for sale and resale. The two arrangements in such a case are interdependent in the sense that the agreement upon one part of the bargain may well have promoted agreement as to the rest and so long as they are intended to be effected as a separate independent transaction—outright

sale followed by reconveyance—they are both legal and proveable in law. The option in such cases given to the vendor to have a resale of the property is an undertaking by the purchaser of which the sale by the vendor forms the consideration and therefore, gives rise to a mutually enforceable contract. The vendor in such a case by executing the sale had already performed the part assigned to him and, as such, the vendee having taken the benefit of the performance by the vendor of his part of the contract cannot be allowed to resale from his undertaking.

Where the kabala and the ekrarnama were executed on the same day and at the same sitting, it was held that they formed contemporaneous agreements, and the consideration for the ekrarnama was in part the execution of the kabala and the transfer of the lands, thereby made. *Shyampada Shingha vs Dhirendra Nath. PLD 1957 Dacca 488. Foll. 17 IA 98; 12 All. 387; 15 CLJ 332, PLD 1948, PC 219.*

Sale or mortgage.

Tests to ascertain whether a deed is a sale deed or mortgage by conditional sale.

Question whether a particular document is a mortgage or a sale has to be determined with reference,—

(1) To the terms of the document itself with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to the existing facts;

(2) With reference to another fact viz. time elapsed from the time when the bargain was made between the parties to the time when the present suit was instituted.

(3) The tests for determination of the question are not the same in this country as in England.

(4) The applicability of Butler's tests.

(5) The court must find the substance behind the form. *2 DLR 290.*

In constructing a document the following recitals in the document should be taken into consideration :

(i) If within the period fixed the executants do not redeem the kot then the absolute maliki right shall accrue to the recipients.

(ii) If the document begins and also ends with word kot kabala and there is no such word as is found usually in a sale deed "bikray kabala" or kabala.

(iii) The mere fact that the period mentioned is a short one is not conclusive to show that the transaction is a sale.

(a) The fact that the recipients of the documents bear the cost of registration is not sufficient alone to convert a transaction to a sale.

(b) The fact that there is no stipulation for payment of interest is also of no avail to convert the transaction to a sale. *2 DLR 290.*

Section 58(b)—Simple and usufructuary mortgage—

Mortgage—Difference between simple and usufructuary mortgage—delivery of possession being an essential condition in case of usufructuary mortgage—Subsequent delivery of possession where the mortgage is a simple mortgage will not convert it into an usufructuary mortgage. *8 DLR 599.*

Section 58(c)—Sale or mortgage.

A sale with a condition of repurchase is not a mortgage. The distinction between a sale and a mortgage is one of intention. 4 DLR 126.

—Various tests which have been devised for determining whether the intention is to mortgage or to sell are:

(i) the existence of a debt, (ii) the period of repayment—a short period being indicative of a sale and a long period of a mortgage; (iii) possession of the property—the continuance of the grantor in possession indicating a mortgage (iv) existence or otherwise of a stipulation for payment of interest or reconveyance, a stipulation for interest or re-payment indicating a mortgage. (v) adequacy or inadequacy of the consideration, a price below the true value indicating mortgage, (vi) Presence or otherwise of the stipulation of conveyance embodied in the deed *prima facie* indicating that the transaction is a mortgage; and (vii) purchase of stamps and payment of registration costs, the same if done by the transferee being indicative of a sale. 4 DLR 126.

Section 58—The adequacy or inadequacy of the price is a test which must be cautiously applied. In deciding a question whether a transaction is a sale or a mortgage, the court must find the substance behind the form. 4 DLR 126.

The adequacy or inadequacy of the price on transfer is a test which must be cautiously applied for in ascertaining the amount of the consideration, the right of the repurchase, which must necessarily fetter the ownership of the buyer, is never left out of consideration

and mere inadequacy of the price unless it is very great, is not, therefore a safe test. It is also now well-established from decided cases that a longer period for reconveyance indicates a mortgage, while a short period indicates a sale. 4 DLR 478 (485 1-h. col.)

In absence of a stipulation that the recipient will have to reconvey the disputed property in the same state and condition as it was taken from the vendors at the date of the sale, the agreement is a mere personal conveyance and cannot convert a sale to one of mortgage by conditional sale. 4 DLR 478.

Embodiment in the document of sale of the condition of repurchase as provided for in the new proviso to clause (c) of section 58 is not a decisive test. The effect of the proviso is that if the condition of repurchase is not embodied in the document, the transaction will not be regarded as a mortgage but it does not follow that if the condition is embodied in the document the transaction must necessarily be a mortgage. 4 DLR 126.

If a document *prima facie* appears to be a mortgage, it is nevertheless open to the other side to show that it was intended to be an out and out sale.

Two documents, one a sale-deed followed by an agreement to retransfer the property, do not constitute a mortgage unless it appears from the documents in the light of the surrounding circumstances that the parties intended the transaction to be a mortgage and in a suit for redemption intentions are necessary. The fact that there are two documents instead of one does not make any difference. 5 DLR 29 (32 rt.-h. col.).

Though the transaction may, in fact, have been a mortgage, yet when the condition of re-sale is not embodied in the document that effects or purports to effect the sale, transaction cannot be treated as a mortgage.

The rule laid down in the proviso to clause (c) of section 58 is a rigid one and unless the stipulation regarding reconveyance is embodied in the document of sale, the transaction (entered into after the date on which the proviso was incorporated by the Amending Act of 1929) will not be treated as a mortgage; the intention of parties or the fact that the condition of repurchase was embodied in a separate document will be irrelevant. Principle laid down in the case of *Chandra Kanta Howladar* 5 DLR 29 held not applicable after the incorporation of the proviso. 12 DLR 849.

Condition embodied in the same document—*prima facie* mortgage by conditional sale.

Proviso to section 58(c) of the Transfer of Property Act does not lay down any rule that if the condition is embodied in the same document, mortgage by conditional sale, shifting the onus on the other side to show that the transaction is an out and out sale.

The most important tests by which to judge whether a transaction is a mortgage or out and out sale are (a) existence of debt. (b) the period of payment, (c) the continuance of the grantor in possession, (d) stipulation for interest on repayment, (e) the value of the property in question. (1952) 2 PLR (Dac.) 443.

Condition of repurchase or conditional sale.

In order to determine whether the documents constituted are absolute sale with a condition of repurchase or a mortgage by conditional sale subsequent conduct of the parties can be taken into consideration when some of them are not representative-in-interest of the parties to the documents. Section 92 of the Evidence Act does not stand as bar to that 5 DLR 29.

The expression "such payment" in section 58(c) means payment on a certain date. 5 DLR 29.

Sale—out and out sale with another deed for reconveyance within a certain period of time executed simultaneously—enforceable in law—Consideration is the mutually enforceable contract. 9 DLR 439.

Where the kabala and the ekrarnama were executed on the same day and at the same sitting, they formed contemporaneous agreements and the consideration for the ekrarnama was in part the execution of the kabala and the transfer of the lands thereby made. 9 DLR 439.

Section 58(d)—Mortgage—Difference between simple and usufructuary mortgage—delivery of possession being an essential condition in the case of usufructuary mortgage subsequent delivery of possession where the mortgage is a simple mortgage will not convert it into usufructuary mortgage. 8 DLR 599.

Under section 58(d), Transfer of Property Act a usufructuary mortgage creates a liability. 2 DLR 55.

Mortgage security (by deposit of title deeds) furnished for advance of loans already

made as well as for those to be made afterwards—All advances on this security shall be on the basis of the single mortgage already made and for limitation the time will run from the date of last advance. *M/s. Tripura Modern Bank Ltd. vs Islam Khan* 23 DLR 22.

Section 58(c)—Mortgage by conditional sale—Test to differentiate between mortgage and sale.

It appears that at the top of the document Ext. 3(a) there is mention of kot-kabala although in the body of the document it has been described as a deed of out and out sale of land. It has also been stated in the document that the transferee would be entitled to mutata his name in the Sherista of the landlord and to enjoy the properties as his own with the right of inheritance and that he would be entitled to possess, settle, etc. In the last part of the document it was stated that in case the transferor or his heirs repay the consideration money, the sold land would be released.

Thereafter again, it has stated that the document was a kabala.

The word "khalash" is also quite prominent in the document.

By reason of the confusion created as a result of use of the expressions like "khalash, kabala, kot-kabala, sale", it became essential to enter into the intention of the parties.

In the instant case before us we find that the following elements are in favour of the plaintiff:

1. inadequacy of price.
2. no time limit.

3. purchase of stamps and payment of registration costs by mortgagor (should be taken as indicative of mortgage);
4. use of the expression "kot-kabala" in the very body of the document and not merely in the margin as the other case.

There are again certain other additional features, namely, that the transferor continued to pay rents. Then again, mukti patra executed by the transferee shows that the document was a kot-kabala.

In these circumstances, it must be held that the present is a case of mortgage by conditional sale.

When the integrity of the mortgage has been split up by redemption of a part of it, partial redemption of the remaining part can be allowed. *Tazel Hoque vs Md. Affan*, 20 DLR 582.

Mortgage by deposit of title deeds—Memorandum of deposit of title deeds purporting to create in present interest in property in favour of plaintiff—Such writing constitutes contract of mortgage and not mere record of completed transaction, and is compulsorily registerable—Such writing, in absence of registration, held, not only inadmissible in evidence but also does not create any mortgage—Deposit of title deeds not independent of such writing—No right or interest, in circumstances, held, could be created in property even by deposit of title deeds. *Messrs. Eagle Star Insurance Co. Ltd. vs Messrs. Usman Sons Ltd.* (1969) 21 PLD (Kar) 123.

Equitable mortgage—Extract from record-of-rights—Not a title deed—Cannot create equitable mortgage.

The extract from the record-of-rights cannot at all be treated as a title deed, because on conveyance of the land no property in the extract, which can be payment of requisite fee, can be said to pass to the purchaser. *Ibid.*

—Equitable mortgage—Mortgage not proved in favour of plaintiff for want of registration of memorandum of deposit of title deeds—Advance of loan and receipt thereof, however not denied by defendant-plaintiff, in circumstances, held, entitled to money decree. *Ibid.*

Clause (c) of section 58 applicable to a mortgage by conditional sale or similar mortgages—Suit for redemption of mortgage maintainable when money has been tendered and refused.

The terms of section 58(c) of the Transfer of Property Act apply only to a mortgage by conditional sale or a mortgage of a similar nature and not to a sale or to a mortgage of any other kind, namely, a usufructuary mortgage.

Held : that the aforesaid mortgages are not hit by the provisions of section 58(c) of the Transfer of Property Act.

A person interested in the equity of redemption tendered the dues within stipulated period but on refusal by the defendant to accept the same, they were sent by money orders, which again were refused by the latter. In this context, there has been a valid tender so as to give rise to a right to institute a suit for redemption by the plaintiffs.

If the mortgage debt is paid, or a tender thereof is made, by any person interested in the equity of redemption, a mortgage suit can be instituted by any other person who has a right to the equity of redemption. *Nabin Chandra Moral vs Lalit Mohan Das 19 DLR 338.*

—Sale or mortgage—Tests for determining.—The following tests have been devised to determine whether the intention was to mortgage or to sell.

- (i) the existence of a debt;
- (ii) the period of repayment—a short period being indicative of a sale and a long period of a mortgage;
- (iii) possession of the property, the continuance of the possession indicating a mortgage;
- (iv) existence or otherwise of a stipulation for interest on repayment indicating a mortgage;
- (v) presence or otherwise of the stipulation, as inadequate price indicating a mortgage;
- (vi) presence or otherwise of the stipulation of reconveyance in the document itself, the stipulation of reconveyance embodied in the deed being *prima facie* an indication that the transaction is a mortgage; and
- (vii) purchase of stamps and payment of registration costs of the same, if done by the transferee, being indicative of sale. *Tazal Hossain vs Md. Affan, 17 DLR 613.*

—Covenant for repurchase—suit by heirs.

Where the covenant for repurchase is personal the suit for re-conveyance at the

instance of the heirs of the transferor is not maintainable. *Ibid.*

Equitable mortgage by deposit of title deeds—ingredients which have to be established—No such mortgage is created with mere deposit of title deeds for advances to be made in future.

It is well-settled that in the case of a mortgage by delivery of title deeds, the debt must be proved, the deposit of title deeds has to be established and the intention that the title deeds deposited was as a security for the rent should be made out. It is also established on authorities that a mortgage by delivery of title deeds is not created when the deeds are deposited before any money is advanced with a view to preparing a future mortgage, and there is no express agreement that they shall stand as security for future advances.

Title deeds may be deposited under an oral agreement to cover present and future advance. *Subha Karam vs State Bank of Pakistan 14 DLR 193.*

Mortgage by deposit of title deeds with intent to create a security thereon—Letters showing deposit of title deeds unless create a relationship between the parties in present do not require registration. Where it is found that letters showed the deposit of title-deed in the past registration not necessary and are admissible in evidence. *United Bank of India Ltd. vs Azirannessa Bewa. 17 DLR (SC) 169.*

Section 58—Mere inadequacy of consideration is no ground to treat a document to be a mortgage. *Somedullah vs Mahmud Ali 44 DLR (AD) 83.*

Section 58—It is contended on behalf of the plaintiff respondents that Md Putan

transferred the suit land to one Sultan Ahmed Bahaddar by a registered Kot mortgage deed in mortgage right, who subsequently sold the said mortgage right to Elahadad Chowdhury, father of the defendant-appellant, who acquired only the Kot mortgage interest of Md Putan in the suit land by registered kabala dated 9-7-1926, the Ext 6 when the RS Khatian clearly proves that Md Putan transferred the suit land to Sultan Ahmed Bahaddar in kot mortgage right and Elahadad Chowdhury purchased the said right by registered kabala, the Ext 6 and as such his name was recorded in RS Khatian as a mortgagee and it also appears that the Khas Mohal Estate filed Certificate Case No. 214 of 1930-31 against Elahadad Chowdhury for realisation of arrear of rent in respect of the suit land. The basis of the claim of the appellant is that Elahadad Chowdhury acquired right, title, interest and possession in the suit land by deed of partition dated 27-9-1933 with Jinnat Ali and others in which Elahadad Chowdhury had no title whatsoever. This deed of partition has rightly been found to be a fraudulent and collusive one created for the purpose of the suit when the finding of possession by the learned trial Court in favour of the plaintiff is well supported by the evidence on record. *Nurul Islam Chowdhury vs Mvi Fazal Ahmed and others 4 BLC 490*

Section 58(c)—The mortgagee, the predecessor-in-interest of the plaintiff, having failed to bring a suit for auction in respect of mortgaged land in his favour no title passed to him and no title accrued to the plaintiff too as has been wrongly found by the trial Court as in the Kot Kabala it was clearly stipulated that in the event of their failure to repay the

mortgage money the Kot Kabala will be treated as Saf Kabala and the title of the mortgaged property will be absolutely vested in the mortgagee which leave no scope for any contrary interpretation necessitating going to Court with a suit for auction sale. *Rokeya Begum vs Mozammel Hoque and ors* 4 BLC 362

Section 58—Period of limitation for redemption in respect of evacuee mortgagee—Computation of limitation period—Mortgagee of land in question, having migrated to India in the wake of Independence, period of limitation by that time when counted from 5-7-1895 had not expired—Period of limitation stopped running with effect from 15-8-1947 against evacuee mortgagee on basis of provision of section 13, Limitation Act, 1908 whereby in computing period of limitation prescribed for any suit, time during which defendant had been absent from Pakistan and from territories beyond Pakistan under administration of Central Government would be excluded. *Allah Ditta vs Sardar Khan*, PLD 1997 Lah. 716.

Section 58—Novation of contract—What does and what does not constitute—Receipt of mere additional charge on mortgage would not necessarily amount to novation of contract but if parties intended to do so with their mutual agreement or when circumstances gave clear indication thereof, same would be novation of contract—Principles relating to novation of contract stated. *Abdul Haq vs Ali Akbar* 1998 CLC 129.

Section 58—Acknowledgment giving fresh time of limitation—Essentials—Where

mortgaged land was in possession of mortgagee, receipt of rent or produce of such land would be deemed to be payment on account of debt or of interest which would amount to acknowledgment on the part of mortgagee, giving fresh time of limitation to mortgagor; provided that such receipt of rent or produce was before the expiration of prescribed period of limitation—Where mortgage was created and continued throughout under the conditions that squarely fell within parameters contemplated by section 20(2), Limitation Act, 1908, such acknowledgment was repeated with every crop every year, if not twice a year—No period of limitation would, thus, run against mortgagor at all beyond one year—Property under mortgage in such case, could be redeemed at any stage without mischief of law of limitation barring redemption after passage of sixty years. *Abdul Haq vs Ali Akbar* 1998 CLC 129.

Section 58—Suit for declaration, injunction and redemption of mortgage—Subject-matter of suit which were three immovable properties was located within territorial limits of Court at Karachi—Since a part of cause of action accrued to plaintiff at Karachi, court at Karachi had jurisdiction to try and adjudicate suits to the extent of relief for the redemption of mortgage. *Muhammad Shahid Murtaza vs Habib Bank Limited* 1999 MLD 1091.

Section 58—Mortgage by deposit of title deeds—Said mortgage is accepted as equivalent to a simple mortgage—Mortgage being transfer of an interest in specific immovable property as security for repayment of a debt, right which the

mortgagor possessed after executing the mortgage was only a right to redeem the mortgage. *Industrial Development Bank of Pakistan vs Saadi Asmatullah 1999 SCMR 2874.*

Section 58—Mortgage deed—Prerequisites—All the mortgages, under section 58 of Transfer of Property Act, 1882, can be made of a specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability—Where all such ingredients of mortgage are missing in a document, such document cannot be termed as a mortgage deed. *Eidoo Khan vs Abdul Majeed 2001 YLR 2634.*

Sections 58 & 60—Mortgage of property—Extinguishing rights of true owner of mortgaged property—Trial Court as well as appellate Court below had observed that suit land having been mortgaged for more than sixty years at time of institution of suit, right of true owners had extinguished and defendants mortgages had become its owners—Evidence on record had proved that land which remained in possession of mortgages upto 1981, its possession was obtained by mortgagors—Findings recorded by two Courts below were set aside on that point holding that right of plaintiff/mortgagor as one of the owners of suit land was not extinguished. *Boota vs Muhammad Sadig 2001 MLD 265.*

Sections 58 & 60—Right of mortgagor to redeem—Receipt of usufruct by mortgagor—Effect—When mortgagor was

in possession of mortgaged property and in receipt of usufruct, such receipt would be treated as payments to mortgagee for purpose of limitations regardless of what the intention of the party receiving the produce might have been—Simple possession of mortgagee and receipt of rent or produce by him were sufficient ingredients to constitute absolute acknowledgment. *Abdul Haq vs Ali Akbar 1998 CLC 129.*

Sections 58 & 60—Right of mortgagor to redeem—Transaction concerning mortgage—Construction—Mode—Mortgage, subsistence thereof and acquisition of title by prescription by mortgagee, were conditions that were to militate against rights of rightful owners, therefore, Courts of law which were also Courts of equity, should construe various transactions concerning mortgage in such liberal way that the right of rightful owner survived and one who had enjoyed possession and produce for nearly sixty years and had recovered amount manifold, should not be allowed to get away with the land as well. *Abdul Haq vs Ali Akbar CLC 129.*

Abstract

1. Section 58(a)
2. Specific Immovable Property
3. Section 58, clause (b)
4. Rights of Parties
5. Section 58, (b) and (c) Simple mortgage and English mortgage
6. Section 58, clause (c)
7. Payment of Interest
8. Effect of lapse of time fixed

9. Section 58, cl (d)
10. Rights of Parties
11. Section 58(d) and (g) Mortgage deed—Construction.
12. Section 58(c)
13. Section 58 (f); General
14. Place where property is situate and place of execution of deed
15. Title-deeds
16. Written Memorandum
17. Section 58(g)
18. Sections 58 and 100
19. Sections 58 and 105—Description as lease but really a mortgage.

1. Section 58(a)

The definition of a "mortgage deed" in the Stamp Act is very wide and more general than that in the Transfer of Property Act. 27 C 587. The sub-sections deal only with how the mortgages may be expressed. But the legal effect is the same as indicated in clause (a). 41 C. 770—1917 MWN 794. Where a partner of a firm on entering into the partnership redeemed a mortgage and kept with him the title-deeds, but there was no entry in the account books as to the creation of a mortgage from that date, the transaction must be treated as merely an advance by one partner and not a mortgage. 45 MLJ 776—1 R 545—1923 PC 87 (PC). A mortgage can be created by a decree. 56 PR 1918—46 IC 440. See also 14 IC 213. A hypothecation to secure a contingent liability is a mortgage. 1925 P 288. A hypothecation of movables without possession though not provided for either in the Contract Act or in the Transfer of

Property Act, is nevertheless a valid transaction and enforceable at law. 10 Mys. LJ 16. A charge is not exactly identical with a mortgage, and although a similar remedy is available a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage. One obvious distinction in that a mortgage is for a fixed term whereas a charge may be in perpetuity.

In the case of a mortgage it can be ultimately redeemed, whereas a charge in perpetuity cannot be redeemed at all. There is therefore no question of redeeming a charge but only paying up the arrears of the amount charged and preventing the sale of the property in execution of decree. 147 IC 302—1933 A 934. See also 42 C 625—19 CWN 37 (See also section 100). A mortgage is a transfer of an interest in property: in a charge, the person in whose favour the charge exists is only entitled to have his claim satisfied out of the particular property. There is no transfer of any interest as such. See 35 C 834; 1 P 387; 26 IC 601; 4 PLT 6—1922 P 529; 9 IC 828; 1922 P 36; 42 A 158—38 MLJ 302—55 IC 550 (PC). There can be no mortgage of profits that would accrue from immovable property from year to year because such profits are not an interest in the immovable property. Such profits also cannot be pledged as pledge can be of movable property or goods and such profits are neither movable property nor goods. 41 PLR 239—1939 Lah. 15. As to creation of equitable charge on an insurance policy, see 37 B 198—24 MLJ 60(PC) See also 44 IC 734; 14 LW 99—66 IC 554(2); 51 IC 963—36 MLJ 618; 38 IC 813; 26 IC 601; 60 IC 611; 18 IC 461 (Oudh). Writing is essential to the creation of an equitable charge over moneys due under an

insurance policy. 37 B 198—24 MLJ 60 (PC).

Security bond executed to Court by defendants over some property to account for mesne profits creates only charge. 42 A 158—38 MLJ 302 (PC); 29 IC 605; 1936 Rang. 303. A *Kootchit deed* executed by stake holder falls within definition of a mortgage. 103 IC 814—1927 M 773—53 MLJ 550; (1916) 2 MWN 263—38 IC 813. For distinction between a mortgage and sale, 1933 L 155—148 IC 234. *Distinction between lease and mortgage*, see 2 P 217—3 PLT 797; 2 Pat. LJ 195. A mortgage of an interest under a lease is not an absolute assignment under the Indian law and does not create privity of estate between the lessor and the mortgagee and hence the mortgagee is not liable by the privity of the estate for the burdens of the lease. 66 IA. 50—ILR (1939) 1 Cal. 283—43 CWN 281 1939 PC 14—(1939) 1 MLJ 544 (PC). A mortgage is complete when the contract is entered into and not when the money is paid. 33 IC 474—53 PR 1916 (FB); 47 IC 563 (M.); 78 IC 457—1925 P 288; 60 IC 611—12 LW 674; 1 P 281—3 Pat. LT 307. Even though the debt secured is a future debt, the mortgage will have a priority over any intermediate mortgage subsequently created, though at the time the future debt had not come into existence. 12 LW 674—60 IC 611; 1922 P 299. A mortgage is not void or voidable because of non-payment of consideration 42 M 20—35 MLJ 740; 22 OC 112—52 IC 91; 2 Pat. LJ 168—38 IC. 887; 1924 L 387. Neither a formal transfer of an interest nor the express mention of a power of bringing the properties to sale is essential for a mortgage. 1 LW 1025—26 IC 274. See also 16 MLT 444—26 IC 71; 23

MLJ 131—16 IC 209; 27 MLJ 58—24 IC 24. Delivery of possession of land as security for money in absence of writing or registration is not mortgage. 1923 R 51. In all mortgages except where there is a right of sale, a personal covenant to pay is implied. 5 NLJ 49—18 NLR 145—1922 N.98; 1924 N.97. Where a mortgagor having already mortgaged his lands with possession to the mortgagee, takes a further advance from him in a later year on the security of the land already mortgaged, on the same conditions as on the original mortgage, such a transaction does not amount to a new mortgage. 13 L 660—1932 L 465 (FB). Similarly, if the new transaction raises the aggregate mortgage-money to a figure in excess of the value of the land, it will really be a sale, though ostensibly given in the form of a mere advance of the security. 13 L 660. Transferee of simple mortgaged property takes it subject to mortgage but is not personally liable to pay mortgage-money. In the case of transferee of usufructuary mortgaged land it is even so. But if usufructuary mortgagee is dispossessed by such transferee then transferee is liable to repay the mortgage debt. 148 IC 23—1934 P 1.

Agreement to Create A Mortgage, whether amounts in itself to equitable mortgage. See 2 Luck. 299—1927 O. 55. An agreement to mortgage cannot constitute a mortgage or charge within the meaning of sections 58 and 100. 123 IC 157—1930 PC 76—58 MLJ 453 (PC). A mere agreement does not confer a title on a usufructuary mortgagee. 38 A 494—43 IA 264 (PC). But where the mortgagee is put in possession on the basis of the agreement, it is specifically enforceable and can be set up as defence to a

suit for redemption. *1930 P 479*. Where the mortgagee knows already that the mortgagor is not in possession of the mortgaged properties and that he has only a doubtful and disputed title to them, and when in spite of such knowledge he takes a mortgage, the transaction does not amount to a mortgage within the definition of section 58. *176 IC 913—1938 Cal. 48*.

2. Specific Immovable Property

A property can be specific so long as it is identifiable though it may not be in existence on the date of the transfer. *47 IC 563 (M)*. Turn of worship is immovable property. *42 C 455—20 CLJ 183*. See *contra 39 C 227—14 CLJ 369*. Malikana rights of a superior proprietor in a village can be mortgaged. *10 NLR 185—27 IC 498*. Mortgage of future crops is valid and operates as an agreement to assign. *5 IC 373 (A)*. See also *1939 Lah. 15—41 PLR 239*. A mortgage of a charge is perfectly valid in law. *75 IC 579—1924 O 209*. A mere right to specific performance cannot be the subject of a mortgage. *33 IC 696*.

Under the Hindu Law as under the English Law a mortgage debt is only treated as movable property, the land being considered only as a pledge or security for money lent. *31 IC 983—20 CWN 142*. Where only a part payment of the consideration is made, the mortgage is valid to the extent. *50 IC 952; 43 IC 871; 25 CWN 942—66 IC 694; 1 Pat. LJ 138—35 IC 35; 47 IC 563(M); 7 LW 36—43 IC 871*. A decree for foreclosure may be passed in a suit by a mortgage by conditional sale even if full consideration has not been paid by him. *34 A 273—13 IC 573*. But a mortgage is unenforceable where there is an

absolute failure of consideration. *11 IC 4; 1924 L 381; 23 IC 805*. Combinations of different kinds of mortgages and creations of mortgages other than the four specified ones would be dealt with only according to the terms of the contract, *43 M 589—28 MLJ 56; 2 Pat. LJ 293—39 IC 564*. See section 98.

Mortgage money includes interest along with the principal. *119 IC 439—1929 A 411; 9 LBR 106—43 IC 921*. But see *1 Pat. LT 544—58 IC 216; 1923 M 71—16 LW 743*.

3. Section 58, Clause (b) : Simple Mortgages

The term 'mortgage' includes instruments which create no actual transfer of interest or confer express power of sale. Such an instrument may be a simple mortgage. *1914 MWN 501—27 MLJ 58—24 IC 24*. Mere omission to use words like 'mortgage' does not prevent the transaction from being a mortgage if the intention from the document as a whole is clear. *36 A 201—22 IC 973*. The intention that the property was to be sold in default is essential in a simple mortgage. *19 IC 658—11 ALJ 570; 20 IC 870*. For essentials of a simple mortgage, see *34 A. 446—15 IC 435; 11 IC 629—21 MLJ 562; 1929 L 289; 26 IC 274—1915 MWN 21*. It is not necessary for a simple mortgage that there should be an express provision giving the mortgagees power of sale.

Where a mortgage deed contains a personal covenant under which the mortgagor undertakes to pay the mortgage money on the due date, the personal covenant carries with it by necessary implication a power of sale. *148 IC 1197—11 OWN 760—1934 Order 255*. The mere fact that the mortgagee is entitled to

take possession in default of payment of the principal does not convert an otherwise simple into an usufructuary mortgage. Where a mortgage is simple, it must be held to carry with it a personal covenant to pay the principal and interest. *13 L 508—1952 L 630.*

Such a mortgage is not an anomalous mortgage within the meaning of section 98 of the Act. *1934 O 255. A covenant to pay is essential. 24 IC 372—26 MLJ 514.* See also *24 IC 127—1914 MWN 618; 6 LW 296—33 MLJ 679—42 IC 349;* personal covenant explained. *47 IC 852—1918 MWN 672; 1914 MWN 618—24 IC 127.* Where there is nothing in the terms of a mortgage-deed to exclude the personal liability of the mortgagor, but on the other hand it is emphasised that this liability would subsist even after the property mortgaged has been sold if the sale-proceeds are found to be insufficient to discharge the amount due as principal and interest, the transaction is a simple mortgage. *42 PLR 660—1940 Lah. 486.* see also *1939 Pesh. 41.* Where in a usufructuary mortgage it is provided that if the mortgagee did not obtain possession or if he lost possession he could recover his money and interest by sale of the mortgaged or any other property of the mortgagor, this amounts to an implied agreement that the mortgagor will give possession to the mortgagee and whether the deed is considered an usufructuary or an anomalous mortgagee there is no reason why effect should not be given to the agreement. It is open to the mortgagee to sue either for possession or for the mortgage-money. *1941 OWN 1220—1942 Oudh 172.* A simple mortgagee has merely the right to sue upon the personal covenant or to bring the property

to sale; he cannot satisfy his claim out of the rents and profits of the mortgaged property nor can he acquire the absolute ownership of the estate by foreclosure. *13 Pat. LT 525—1932 P 360.* The assignee of the equity of redemption is not personally liable. *1930 N.139 (2).* Mere covenant against alienation will not create a mortgage. *39 A 244—39 IC 18 (FB).* Property secured for maintenance allowance is not mortgage. *19 IC 661—11 ALJ 580.*

A promise to redeem at a certain time cannot be construed as implying a personal covenant to pay. *47 IC 852—1918 MWN 672.* A mortgagee cannot sue for a simple money decree in the absence of a personal covenant. *58 IC 30. How possession affects nature of mortgage. 1922 A 232; 10 IC 272—21 MLJ 1147 (PC).* But see *63 IC 533; 1923 N 161; 31 IC 473.* But when the mortgagee was originally placed in possession of the property to be enjoyed in lieu of interest the mortgage cannot be a simple one. *16 LW 743—1923 M 71.* In upper Burma, the usual form of mortgage is not simple but usufructuary. If an exception is set up to it, it should be proved. *15 IC 919—(1912) 1 UBR 125.*

4. Rights of Parties

The mortgagor continues to be owner before and after default of payment. *32 IC 901—3 LW 341; 44 C 425—21 CWN 177.* The right of simple mortgage is only to have the property sold. *44 C 425—21 CWN 177.* Where there was a registered simple mortgage of land and a subsequent transfer of possession of the land to the mortgagees without document by the mortgagors, and the latter asserted that this was under the original

mortgage whilst the former pleaded it was a fresh transaction amounting to an outright but invalid sale to them, the mortgagees in a suit by the mortgagors for redemption of the mortgage can plead and prove the invalid sale in equity as a shield. *4 R 368—1927 R 33(FB)*. Mortgagee can enforce the whole claim against any portion of the property. *64 IC 451—44 A 146—1922 A 352*. As to right to have receiver appointed, see *56 M 945—145 IC 449—1933 M 570—65 MLJ 222 (FB)*; see also *34 PLR 950(1)*. But see *13 Pat. LT 525—1932 P 360; 54 M 565—61 MLJ 111*.

5. Section 58(b) and (c)—Simple Mortgage and English Mortgage—Difference Between

In the case of a simple mortgage, the security which the mortgagee obtains before making an advance is that of the land itself; if the mortgagor makes default the mortgagee has the right to cause it to be sold. This does not mean he can sell it himself without the intervention of the Court; the right to bring the land to sale must be worked out in execution proceedings under the supervision of the Court. There may be, and generally is, a personal obligation not only to repay the loan but also to pay interest upon it, but in the absence of express provision to the contrary the rents and profits from the land belong to the mortgagor and do not form part of the security for the payment of the mortgage money or the interest on the loan. But in an English mortgage there is a transfer of the ownership of the property with a promise to repay the debt on a certain date. If the money is duly paid the mortgagor has a right to have the property re-transferred to him by

the mortgagee. *1939 Rang. 403—1939 Rang. 321 (FB)*.

6. Section 58, Clause (c)

The definition is not self-sufficient. It is necessary to determine whether there is a mortgage at all before this clause is applied. *1929 A 174—116 IC 807; 36 IC 991 (All)*. See also *16 IC 638; 40 B. 378*. In a province in which the Bengal Regulation (XVII of 1806) is in force, a suit for possession cannot be maintained by a mortgagee in a mortgage by conditional sale if he has not taken foreclosure proceedings under the Regulation. *1933 L. 174—145 IC 159*. Meaning of "ostensible" explained. See *116 IC 807—1929 A. 174; 1929 A 864*. A mortgage by conditional sale is a form of voluntary alienation. *1929 A. 864*. In the case of a mortgage by conditional sale there is no future interest in property contemplated to be created, and consequently, there is no scope for the application of the rule against perpetuities. *106 IC 168—54 MLJ 96*. See also *1937 ALJ 849—1937 All 724*. There is no presumption in favour of mortgage by conditional sale. *47 MLJ 385—84 IC 505—1925 M 37; 1921 MWN 519*. It lies on the party who contends that a document *prima facie* connoting an absolute sale is really a mortgage to prove his contention. *129 IC 719—1931 A 113*.

In deciding whether a mortgage is one by conditional sale, the *intention of the parties is the test*. *49 A 405—104 IC 504—1927 A 321; 116 IC 807—1929 A 174; 67 IC 113; 47 MLJ 385—84 IC 505—1925 M 37; 129 IC 719—1931 A 113*. Where the consideration is fair and reasonable and the deed contains a condition for re-transfer within a year

provided that the vendor is able to pay back the amount out of his own pocket the transaction is a sale and not a mortgage. 1939 ALJ 946—1939 All 713. Where a deed of transfer contained a stipulation that if at any time within three years the transferor was to pay back the amount paid to him in respect of the property transferred with interest after deducting the income which the transferee might derive from the property there should be a reconveyance to the transferor, the transaction amounted only to a mortgage by conditional sale and not a sale with a condition for re-purchase. 187 IC 594—1939 NLJ 544—1940 Nag. 84.

The fact that there was no bargaining as to the amount of consideration and the price was inadequate is more in favour of the deed being a mortgage and not a sale than *vice versa*. 13 Luck. 680—1937 OWN 1236—1938 Oudh 57. The proposition, that where a contract of sale and a contract of re-purchase are evidenced by a single document or more or less contemporaneous documents, the transaction is a mortgage by conditional sale and is not a sale out-and-out with the condition of re-purchase, is too broad to be accepted as an accurate statement of the law. Where the original intention of the parties was to execute a sale for particular price, but before it was executed, it was agreed that the consideration should be reduced and that the owner could get back his property on payment of that amount together with interest at Rupees 2 per cent *per mensem* within a time fixed and that the other party should reconvey on such a payment, the transaction is an out-and-out sale and not a mortgage by conditional sale. 1940 ALJ 113—1940 All 227.

Subsequent agreement by vendee to convey property back to vendor on his fulfilling certain conditions—Transactions do not constitute mortgagee by conditional sale. 1937 Rang. 402. "Contract to reconvey", whether runs with the land, 48 A 787—1927 A. 137. *Essential characteristics of a mortgage by conditional sale* explained. 48 A 302—94 IC 849—1926 A 493; 110 IC 392; 1928 C 825; 1933 L 174—145 IC 159. *Sale with stipulation for reconveyance*, nature of. See 96 IC 780—1926 A. 760; 10 IC 630(A); 33 A. 337—9 IC 140; 38 A 570—36 IC 38 (PC). Hindu forms of mortgages by conditional sale are not affected by the Act. 38 M 667—26 MLJ 47. To bring a case under this clause there must be an ostensible sale to begin with. 91 IC 330—1926 B. 107. There is no personal covenant to pay in the case of a pure mortgage by conditional sale. 46 IC 326; 3 IC 871.

The section does not raise a presumption that a sale with an agreement to reconvey is a mortgage by conditional sale. 1921 MWN 519; 42 M 407—36 MLJ 385; 1929 A 174. Where the agreement regarding reconveyance is in the same deed, the terms in the deed ought to be looked into to see whether the transaction was a sale or mortgage. 84 IC 505—1925 M 37; 45 A. 72; 10 IC 630; 21 IC 19; 49 B 378; 35 B. 258; 1929 A.174; 33 Bom. LR 633. Tests for finding out if a transaction is a sale or a mortgage are: relationship of creditor and debtor between the parties; stipulation or provisions in the deed for payment of interest; whether price paid adequate, if the rent reserved by the case is fair; with whom the possession continues, etc. "The transfer of possession is more consistent with a sale

whereas retention of possession by the transferor is an indication of a mortgage", 33. *Bom LR. 633*. See also *149 IC 354 1934 N 18*. If a deed of sale and a contract of re-purchase are by separate and independent transactions and not connected and interdependent parts of one and the same transaction they do not amount to a mortgage by conditional sale. *129 IC 719—1931 A. 113—1931 ALJ 571*. Where a document which was in the margin described as a *kat-kabala*, but in the body purported to be a deed of sale with a condition that "if the said principal amount and an equal amount of profit be paid to you within the period of eight years, then you shall return back the said lands with this kabala."

The deed is an out-and-out sale and not a mortgage by conditional sale. *60 C 167—144 IC 220—1933 C 381*. Where simultaneously with a sale-deed, the vendee executed an agreement by which the vendor was given a right of repurchase of the property for the sale-price at any time after 25 years from the date of sale, time was not the essence to the contract, and the transaction is not an out-and-out sale but only a mortgage by conditional sale and the vendor is entitled to redeem within 60 years after the expiry of the 25 years period fixed in the agreement. *1933 A 443—145 IC 147—1933 ALJ 907*. Mortgage by conditional sale—Failure of mortgagee to take possession after expiry of period—Unregistered acknowledgment of amount due—Effect. *1933 L 174—145 IC 159*.

A single contract, though evidenced by two separate documents, a sale and an agreement, would be a mortgage by conditional sale. See *1930 ALJ 610; 1930 A. 283; 147 IC 1191—35 PLR 337—1934 L 453*.

(But see new proviso). Subsequent conduct is only admissible for the purpose of construing a deed when it is impossible to arrive at a clear finding as to the meaning of the deed from its own terms and from surrounding circumstances. *25 ALJ 849; 48 IC 465 (C)*. Test of surrounding circumstances. *32 IC 192(A)*. See also *1929 A 174*. Effect of *Lohan Gahan* mortgage is same as that of a conditional mortgage. *25 NLR 187 119 IC 684—1929 N 254 (FB)* and cases referred to therein. For cases where the transactions were held to be a mortgage by conditional sale, see *47 MLJ. 809—47 M 729—1924 PC 226 (PC); 46 A 173—79 IC 626 1924 A 444; 130 IC 15—1930 ALJ 1435—1931 A 196* (sale with condition for release); *45 A 72—1923 A 41*. Where the mortgagees are authorised to reconstruct the transferred house "according to their liking at their own cost" and there is a stipulation in the deed that at the time of redemption, if it is found that the amount due to the mortgagees cannot be recovered in full from the mortgaged property, the mortgagors would be liable to make good the deficiency, the transaction is a mortgage and not an out-and-out sale. *148 IC 234—1933 L 155*. For cases where the transaction was not held to be mortgages by conditional sale, see *1924 A 743; 45 A 581—1923 A 586; 21 IC 19(C); 11 IC 124 (C); 2 IC 930 (G); 13 IC 667; 14 NLJ 31 (Rev)* Where the document is one of outright sale with no agreement of re-purchase, and the agreement to re-purchase is contained in a subsequent document, the transaction shall not be deemed to be one of mortgage. *1935 R 212*.

Payment of Rent by debtor to creditor will indicate the mortgage nature of the transaction. *40 B 74—31 IC 338*. Difference

between the value of the property and the money paid is also relevant. 29 IC 898. But the non-mention by the deed of sale that the amount of consideration was the market value of the land is no evidence as to a mortgage being intended by the parties. 47 MLJ 385—84 IC 505—1925 M 537. The fact that profits are to be accounted for may indicate such a circumstance to evidence a mortgage by conditional sale. 42 A 437—58 IC 717; 26 IC 753—16 Bom. Lr. 774; 26 IC 751—39 B. 119.

7. Payment of Interest

Presumption as to, in mortgage by conditional sale after due date. See 93 IC 958—1926 O 378; 8 LLJ 70—1926 L 237.

Time of Execution of the subsequent agreement would be material. If the sale-deed and the agreement to re-convey are executed on the same date an almost irresistible presumption arises that the transaction is a mortgage by conditional sale. 33 A. 585—9 IC 1013; 33 A 122—7 ALJ 998. Possession with vendor is also material. 50 IC 12(C).

The relationship of Debtor and Creditor must be indicated to be maintained 31 MLJ 375—36 IC 393; 34 IC 475—30 MLJ 338; 37 IC 91 9 Bur. LT 177; 15 IC 423—5 Bur. LT 99; 78 IC 547—1925 O 11; 47 MLJ 385—1925 M 37; 67 IC 113 (C); 8 IC 981. Cl. (a) of the section governs Cl. (e) and in spite of the new proviso added by the amending Act of 1929, unless there is a debt and a relationship of creditor and debtor between the parties, there can be no mortgage even if the condition of re-purchase is embodied in one document which effects the sale. 33 Bom. LR. 633—1931 B 371. It is immaterial that prior to the transaction the relationship of

debtor and creditor existed between the parties. 1929 A. 174. Inadequacy of consideration indicates mortgage; absence of time limit does not necessarily indicate sale. 42 CLJ 74—90 IC 100; 106 IC 158—54 MLJ 96; 111 IC 701—1928 A 34. A deed of absolute sale and a subsequent agreement for re-sale to vendor on payment of price do not constitute a mortgage by conditional sale unless it appears from the circumstances of the case that the parties so intended. 38 A 570—43 IA 284—31 MLJ 750 (PC); 26 MLT 291—49 IC 659. See also 45 C 320 (PC); 27 M 848. (See now proviso newly added). When there is a waiver of sale on the happening of the condition, the old terms will be deemed to continue. 8 CLJ 70—1926 L 237; 93 IC 958—1926 O 378.

8. Effect of Lapse of Time Fixed

The equity of redemption in the mortgaged property will subsist all through in spite of the expiration of the period for redemption agreed, until a decree for foreclosure is made in a suit brought by the mortgagee or till the confirmation of the sale in pursuance of a decree for sale obtained by him. 78 IC 547—1925 O. 11; 114 LC 81. But see also 25 IC 93(C). Condition that, if mortgage-money is not paid in two years, mortgagee would take property absolutely is not illegal; it is merely a mortgage by conditional sale. See 1927 L 748—102 JC 283; 114 IC 81 1928 C 825; 25 ALJ 849—1928 A 34; 39 IC 849—13 NLR 69; 39 IC 377—11 Bur. LT 36; 1925 O. 11. But see 27 IC 668—8 Bur. LT 125. Mortgage by conditional sale—Provision for return of documents—Time for payment whether need be fixed. See 106 IC 158—1928 M. 28—54 MLJ 96. In

Sind, time is the essence of the contract of mortgage by conditional sale. On the expiry of the time fixed the mortgage becomes a sale. 19 IC 428—6 SLR 178. The principle of English Law that in mortgages time is not of the essence of contract does not apply to India.

Burden of proof lies on the party who contends that a document *prima facie* connoting absolute sale is really a mortgage by conditional sale. 47 MLJ 385—84 IC 505—1925 M 37.

Proviso—The proviso newly added is of the nature of the law of evidence. The protection afforded to agriculturists by section 10-A of the Dekkhan Agriculturist Relief Act has not been affected or taken away by the proviso. Section 10(a) of the Dekkhan Agriculturists Relief Act would exclude the operation of the proviso and therefore an agriculturist is not precluded from leading or proving that a transaction entered into by him, though apparently a sale, was not really a sale, but a mortgage by way of conditional sale. 30 SLR 196—1936 S 209. See also 1939 NLJ 544—1940 N 84. The effect of the proviso is only that a transaction of mortgage by conditional sale shall not be deemed to be a mortgage unless the condition of reconveyance is embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a mortgage. 17 Luck. 198—1941 O 582.

9. Section 58, clause(d)

There is no distinction between mortgaging land and handing it over as

security for debt, though the word 'mortgage' is not used. 84 IC 468 1925 Rule 102. A condition for the rendition of accounts or an express or implied provision for redemption is not necessary. A mortgage can be so made that nothing remains to be paid at the end of the term specified 1922 N 156. A usufructuary mortgage does not cease to be usufructuary, merely because of a provision for irredeemability within a time fixed. 68 IC 417—41 MLJ 564; 1939 Lah. 235—41 PLR 270; 43 M 589—28 MIL 56; or because of a provision that it is to be redeemed within a certain time: 38 M 667—26 MLJ 47; 12 A 233; 21 M 1; 26 B 252; 17 IC 329; or because the document was described by the mortgagor in his attestation as a 'dostawazark'; 16 RD 16. An oral usufructuary mortgage creates no title. 1937 Rang. 473. The term "Zuripeshgi" is an ambiguous one. The fact that no interest was provided may give rise to an inference that the transaction was only a lease. 28 IC 383—19 CWN 794. See also 14 LR. 226 (Rev)—17 RD 270. Each case of "Zuripeshgi" is to be decided on its own facts. 44 IC 153—4 PLW 146; 8 P 16. Prior to the amendment of 1929 where the whole of rents and profits were not to be appropriated to the mortgage-money but part of it was payable to the mortgagor, it was not an usufructuary but anomalous mortgage. 1931 MWN 595. The amendment of 1929 does not govern transactions entered into and rights and liabilities created before the passing of the amending Act. 9 OWN 1027. As to distinction between lease and mortgage, see 28 MLJ 303—28 IC 842.

Where a person goes into possession of property for the purpose of securing the payment of his debts owing to him and the

language of the document creates a charge and gives a power of a conditional sale, the transaction amounts to an usufructuary mortgage and not a lease or a charge. *1934 P 217*. Whether a person is an usufructuary mortgagee or a lessee must be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. *1934 Pat. 217*. A loan evidenced by a simple money bond and lease of occupancy land in favour of creditor with the understanding that the rent should be appropriated towards interest would not amount to an usufructuary mortgage. *1930 ALJ 332—1930 A 375; 1935 ALJ 275—1935 A 150*. A *lakhammukhi* mortgage is an usufructuary mortgage—*1 L 21—51 IC 956*. Where the deed evidenced a combination of simple and usufructuary mortgages, a suit in ejectment is maintainable by the mortgagee by his right as usufructuary mortgagee. *139 IC 449—1932 M 768—63 MLJ 310*.

10. Right of Parties

45 B 523—59 IC 765. In every contract of usufructuary mortgage, there is an implied covenant for quiet possession which also implies a contract to pay the Government revenue. *45 A 388—21 ALJ 294—1923 A 433 (2)*. As to further advances, see *63 IC 750*. See also *16 IC 982*. Where an usufructuary mortgagee failed to pay off other encumbrances as agreed, a suit for refund of the amount to the mortgagor is not one for specific performance of a mere agreement to lend money and is maintainable. *52 A 761—124 IC 764—1931 A 95*. Nor is the failure of

the mortgagee to obtain possession through no default of the mortgagor any defence to the action. *1931 All. 95*.

Right of sale after time fixed for payment accrues, if there is a covenant to pay, *1 Pat. 350—1922 Pat. 167*. If the profits are to be adjusted only to a portion of the interest, the mortgagee cannot be called on to account generally for profits accrued at the time of redemption. *7 ALJ 787—7 IC 293*. In usufructuary mortgages possession is an essential part of the security and what is kept alive is not the security only, but the rights of the mortgagee in the property under the deed. *4 LW 477—37 IC 456*. Where a mortgagee files a suit for possession *simpliciter* if the Court finds that much of the consideration is paid, the mortgagee is entitled to possession. The exact sum to be paid need not be determined till the time of redemption. *1933 L 193—145 IC 182*. A mortgage executed by A in favour of B was for a term of 10 years, and was in form of a mortgage with possession. Possession was not in fact taken by the mortgagees, but by a second document of even date, the mortgaged land was leased to A for the same term at a rent which may be taken to represent the yearly interest on the mortgage debt. Mutation was duly recorded in the Government records on the basis of the mortgage in the names of the mortgagees. There had been previous transaction between the parties of a similar character. B sued A for possession after ten years in his capacity as mortgagee.

Held : that there was no reason to construe the mortgage as other than a possessory mortgage, as it clearly purported to be, and the term of the lease having expired, the mortgagee was entitled to

possession. Evidence to show that mortgage was in reality a simple mortgage according to the intention of the parties was inadmissible under section 92, Evidence Act, and no presumption could be drawn from the previous transactions. *60 IA 273—14 L 466—65 MLJ 150 (PC)*. In case of an additional mortgage, mortgagee is entitled to retain possession till the additional mortgage is also redeemed. *44 A 37—1922 A 174 (FB)*.

Refusal of Possession gives the mortgagee a right to sue for principal and interest. *17 IC 362—21 PLR 1913*. If in a usufructuary mortgage, the property is secured only for the amount borrowed and not for interest and if the mortgagee does not take steps to get possession, he loses his right to interest. *45 B 523—59 IC 765—22 Bom. LR 1435*. When a due date is fixed for payment of the money in an usufructuary mortgage, the mortgagee can bring the properties to sale after that date. *1 P 350 3 PLT 332*. But see *56 M 892—38 LW 161—1933 M 613—65 MLJ 194; 167 IC 755*, where it was held that the deed contained no personal covenant to pay so as to entitle the plaintiff to sue for sale of the mortgaged property. An usufructuary mortgagee, as such, can only continue to enjoy the mortgaged properties till redemption. He has no right to institute suit for sale of the properties, unless the mortgage deed contains, an express personal covenant to pay the money. (*Ibid*). A suit for sale on what is purely an usufructuary mortgage is incompetent, even though a personal covenant to pay is embodied in the deed. *1933 L 151—34 PLR 245*. A mortgagor will be liable to compensate the usufructuary

mortgagee for interest and improvements at the time of redemption. *57 IC 341 (L)*. If he had not delivered possession, the usufructuary mortgagee is entitled to interest in the shape of damages for non-delivery of possession. *1931 MWN 751*. The claim for such damages is not barred so long as the claim for the principal is not barred. *1931 MWN 751*. In a mortgage with possession, where the mortgagee is bound to render account of rent and profits, the rent can be taken to be equivalent to the interest only in the absence of a definite finding as regards rent. *1933 L 141—145 IC 122*.

11. Section 58(d) and (g) : Mortgage

Deed—Construction—Usufructuary or Anomalous

A deed containing one clause which would make it an usufructuary mortgage with another clause providing explicitly for recovery of the amount due from the mortgaged property is not an usufructuary but anomalous mortgage. *181 IC 620—1938 Lah. 145*.

12. Section 58 (e)

The definition of English mortgage must be read subject to the definition of a mortgage as given in clause (a), and consequently an English mortgage in India can hardly be regarded as the transfer of entire estate by the mortgage of the mortgagee. Some estate (it cannot be correctly an equitable estate) is left in the mortgagor and only an interest therein is transferred to the mortgagee. *59 C 1314—36 CWN 709—1932 C 775*. See also *40 CWN 1270—1936 C 646*. Section 58(e) speaks of

the mortgagor transferring the mortgaged property absolutely to the mortgagee, construed to mean that no interest or legal interest and it adds the proviso that the mortgagee 'will retransfer' the property upon payment of the mortgage-money as agreed. It does not declare an 'English mortgage' to be an absolute transfer of property. It declares only that such a mortgage would be absolute were it not for the proviso for retransfer. 66 IA 50—ILR (1939) 1 Cal. 283—43 CWN 281—1939 PC 14—(1939) 1 MLJ 544 (PC). *Essentials and ingredients of an English mortgage.* 25 M 220; 43 C 653; 23 SLR 97—112 IC 722; 45 C 653—22 CWN 793. See also 62 CLJ 28—1935 C 659.

English mortgages are not generally executed in the mofussil; and when executed there, they are treated as a mortgage by conditional sale between which and the English mortgage there is only very little distinction. 41 IC 770: 1917 MWN 794. Where the deed of mortgage contains all the elements of an English mortgage as defined in section 58(e), the mere fact that there is an undertaking by the mortgagor to pay the rates and taxes of the mortgaged premises, does not make the mortgage other than an English mortgage. 40 CWN 1270—1936 C 646. The fact that under a mortgage which fulfils all the requirements of an English mortgage in a certain event the date of payment is changed and the mortgagor has agreed to pay the cost of insurance and other charges would not detract from the absolute transfer to the mortgagee, and would not make it any the less an English mortgage falling within the definition. (1942) 2 MLJ 406—ILR (1942) M 851. An English mortgagee may be entitled to possession. 1925 C 77—81 IC 1025. The

mortgagor who has created an English mortgage has no power to grant a lease without the concurrence of the mortgagee. 57 C 82—1930 C 335. A subsequent lease by the mortgagor is void and inoperative as against the mortgagee. 28 Bom LR. 1162—1926 B 567. In an English mortgage, the rents and profits arising out of the property mortgaged form part of the mortgage which is created to secure repayment of the loan.

The position of the mortgagee under the Indian law, so far as the right to the rents and arrears of rent is concerned, is the same as that under the English law. If in a suit on the mortgage, the mortgagee has a receiver appointed by the Court, and a decree for foreclosure is passed on the mortgagor making default in payment of the mortgage money on the date finally fixed for redemption, the mortgagee is entitled to the rents collected by the Receiver since the date finally fixed for redemption, and to the arrears of rents which fell due since the appointment of the receiver in the suit ILR (1940) 1 Cal. 197—1940 Cal 429.

Section 58—does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. A lessee in India mortgaging his interest by an English mortgage passes the whole of his interest to the mortgagee, and the latter (certainly when in possession) becomes liable for the rent reserved by the lease. The law has not been altered by the amending Act of 1929, as the legislature took no steps to amend section 58(e) of the Act; nor did it

repeal section 58(e). The Act therefore continues to contemplate an absolute transfer of the mortgaged property. *17 Pat. 499—1939 Pat. 146. Quaere: Whether privity of estate exists or not in Indian Law. 17 Pat. 499—1939 Pat. 146.* As to *limitation* for suit on English mortgage, see (1942) 2 *MLJ* 406—*ILR* 1942 *M* 851. The fact that the mortgagee obtained possession by proceedings which subsequently proved to be a nullity could not stand in his way. 28 *CWN* 920—81 *IC* 1025—1925 *C* 77.

13. Section 58(f) : General

Equitable mortgage is created by deposit of title-deed and by it an interest in the property is transferred. It is a kind of mortgage. *112 IC* 722; *IR* 637—50 *IA* 283—45 *MLJ* 505—51 *IC* 86 (*PC*). A deposit of some of the title deeds relating to property is enough to create a valid equitable mortgage over the entire property if it is the intention of the parties that the mortgage should be in respect of the entire property to which the documents of title relate; it is sufficient if the deeds deposited are material evidences of title and are proved to have been deposited with the intention of creating a mortgage. 48 *LW* 202—1938 *Mad.* 865—(1938) 2 *MLJ* 534.

Section 58(f) as amended in 1929 has not introduced any change in the law. It is not necessary that the debtor giving the security should be in that town personally. The proper construction of the clause is that the debtor should deliver, in any of the towns mentioned, to a creditor or his agent, the documents of title to immovable property with intent to create a security thereon. *ILR* (1937) *Bom.* 763—38 *Bom. LR.* 1222—1937. 39. Principle of this sub-clause applies to the

Punjab. 3 *Lah. LJ* 373; 1935 *L.* 10. Pro-note for debt and deposit of title-deeds may be simultaneous: 1925 *C.* 485; but mere deposit of title deeds and a contemporaneous loan will not be sufficient to prove an equitable mortgage. The intention by such deposit to create an equitable mortgage must also be made out. 38 *B* 372—23 *IC* 140; 11 *IC* 721; 14 *Bom. LR.* 1020—17 *IC* 722; 7 *R* 28—116 *IC* 475—1929 *R* 65. Mortgages by deposit of title-deeds come under one of the following three possibilities:—(i) the title deeds may be passed "without more" or "with nothing said" except that they were to be security; (ii) the delivery may be accompanied with a bargain, which either is not written, or if written, does not constitute a contract; (iii) there may be a written bargain—a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement. Only the third class requires registration. 34 *Bom. LR.* 748—1932 *B* 401(2). As to whether a mere agreement to create a mortgage amounts to an equitable mortgage. Where title-deeds are deposited under an oral agreement to cover present and future advances, as each advance is made, it becomes a charge on the property comprised in the title deeds by the force of the prior oral agreement. Fresh deposit of title-deeds for subsequent advances is not necessary. 40 *CWN* 1277—1936 *C* 412.

The documents must show the mortgagor's title, but that does not mean that they should never be sufficient, unless they actually connect the mortgagor with some predecessor of his whose title the documents show. 59 *C* 781—140 *IC* 662—36 *CWN* 420—1932 *C* 589. A debtor executed pro-notes in favour of the agent of the creditors and also

delivered to him the title-deeds of his property as security for the loan and thus created an equitable mortgage. The agent subsequently endorsed the pro-notes in favour of the creditors, in order to enable the creditors to sue on them.

Held: that the transaction of the equitable mortgage was not affected by such endorsement as it was necessary in the case of the negotiable instruments to enable the endorsee to sue on them. The equitable mortgage created by delivery of title-deeds to the agent was really one in favour of the principal creditors and no formal transfer was necessary by the agent to the principal creditor in the case of the equitable mortgage. *1937 Rang. 303—1937 Rang. 154.*

Where a promissory note secured by a deposit of title-deeds was endorsed to the plaintiff and the title deeds were also delivered over to him, the equitable mortgage passed thereunder to the transferee under section 8 of the Act. Section 54 applies only to transfers by act of parties and does not cover a statutory transfer as that provided in section 8 in respect of transfer of the securities as attendant on the transfer of the debt. *1919 MWN 613—52 IC 879.*

Whether the acceptance of a fresh promissory note in lieu of the loan evidenced by the equitable mortgage amounts to a *novatio* depends on the facts of each case. *105 IC 765—1925 S.17.* Where one partner redeems a mortgage of partnership property entered into by another partner and takes back the title-deeds, it is only an advance from the one to the other to be paid off out of the profits and no equitable charge is created. *45 MLJ 776—1 R 545—1923 PC 87 (PC) An*

equitable sub-mortgage by mere deposit without a registered document can be validly made even of an equitable mortgage particularly when the original mortgage, is by a registered deed. *164 IC 724—1936 Rang. 366.*

Scope of Security—The scope of security is the scope of title-deeds unless the contrary is proved. *43 C 895—43 IA 122—31 MLJ 155 (PC); 1925 R 250.* In the case of a mortgage by deposit of title-deeds, neither the right to possession nor the right to the rents and profits of the property is part of the interest which is transferred to the mortgagee, unless an agreement to that effect is expressly made. The remedy of such mortgagee, on the failure of the mortgagor to fulfil his contract, is to file a suit for sale of the property. *14 Rang. 292—163 IC 850—1936 Rang. 290.* In the case of an equitable mortgage of land, house and godown, machinery and electrical equipments subsequently installed will also pass, if such things could pass as things attached to the earth under section 8, *supra*: otherwise not. *88 IC 1011—1925 R 250.* A subsequent registered mortgage is not entitled to priority over a previous mortgage by deposit of title deeds. *33 C 410.* As to *rights of an equitable mortgagee to ask for the appointment of a receiver* in his mortgage suit, see *54 M 565 1931 M 626—61 MLJ 111.* Where a Receiver is appointed at the instance of an equitable mortgage, the income realised from the mortgaged properties should in law be considered as earmarked for his use and treated as additional security for the amount due to the mortgagee, and the latter is entitled, when he is not able to realise his decree amount by the sale of the mortgaged properties, to proceed against the income in the hands of the Receiver in

preference to the Official Assignee in whom the properties of the mortgagor might have subsequently vested. *61 MLJ 111—1931 Mad. 626.*

14. Place Where Property is Situated and Place of Execution of Deed

Deposit of title-deeds in a town not mentioned in the section gives no right of the mortgagee. It does not even operate as further security. *97 IC 391—8 Pat. LT 85—1927 P 41; 1932 A 451.* It is necessary that the deposit must be in the towns mentioned in the section, no matter where the properties are situated, *38 B 372—16 Bom. LR. 35; 1930 L 920; 166 IC 974—38 Bom. LR. 1222—1937 B 39.* The High Court of Bombay can enforce an equitable mortgage entered into in Bombay of properties situated in Baroda by means of a personal decree for sale in the event of default. *34 Bom. LR. 1384—1932 B 642.* A mortgage of immovable properties in Bangalore effected by a deposit of title-deeds in Madras is valid and operative as the Act is made applicable to the Civil and Military Station of Bangalore by Government of India Notification, dated 16th January, 1917. *35 CWN 1061—61 MLJ 408—1931 PC 239 (PC).* See also *11 IC 721—6 LBR 23; 13 IC 429—38 C 824—48 M 454—48 MLJ 423.* But see also *3 Lah. LJ 373* (principle of section applied to Punjab). Where the Transfer of Property Act has not been extended a valid mortgage can be effected by deposit of title-deeds. *12 Bur LT 217—55 IC 248.* See also *34 IC 937; 3 Lah. LJ 373—31 PR 1916.*

A promissory note and a memorandum of deposit of title-deeds were handed outside the

limits of the presidency-town to the agent of a solicitor who was acting both for the debtor and creditor with instructions to the solicitor to deliver the title-deeds to the creditor. No such delivery was, however, proved.

Held: that the requirements of a valid equitable mortgage were not satisfied as the delivery took place outside the presidency-town and further delivery to the common solicitor was not sufficient, as delivery was not made to him as agent of the creditor. *36 CWN 1028—1932 C 823.*

15. Title-Deeds

Where there is a loan, and document or documents relating to the property alleged to have been mortgaged are deposited, the only other fact that needs be established for the purpose of proving an alleged equitable mortgage is that such document or documents have been deposited with the intention of creating a security on the property mentioned therein. It is not necessary that document or documents should disclose a title in the depositor. *182 IC 564—1939 Rag. 185.* Machinery which has been firmly fastened to the earth and has been continuously worked for several years is immovable property and the deposit of the documents of title to such machinery creates an equitable mortgage. *186 IC. 317—1939 Lah. 398.* Where the documents which were deposited included the "sold notes" by firms from whom machinery of the factory was purchased, the drafts for the purchase price, freight, etc., and the receipts by the firms for the amount paid and also included the insurance certificates, papers relating to the clearance of the goods at the port, and the specifications and other particulars for

various pieces of machinery received and installed in the premises.

Held : that these documents were "documents of title" of the factory as distinct from the building and the site underneath it and by their deposit an equitable mortgage was created. *186 IC 317—1939 Lah. 398*. Map of properties and other documents consisting of unimportant and useless letters cannot be recognised as title-deeds the deposit of which cannot create any equitable mortgage. *186 IC 317—1939 Lah. 398*. Patta of lands in the mofussil is a document of title. *48 M 454—1925 M 723—48 MLJ 423*. But a tax receipt and a copy of a map are not documents of title. *10 R 403—1932 R 185*. Deposit of two title-deeds of a share in an indigo concern can create an equitable mortgage. *7 P 520—1928 P 304*. Deposit of copies will be sufficient when originals are not available. *31 PR 1916—34 IC 937; 36 CWN 420* (attested copy). See also *1935 L 10*. It is not necessary to deposit all the material documents with respect to the property. It is sufficient if the principal documents of title are deposited. *11 L 564—1930 L 920; 2 Pat. LJ 293—39 IC 564; 1929 R 65; 36 CWN 420—59 C 781—1932 C 589; (1938) 2 MLJ 534; 1938 Rang. 316*. But an equitable mortgage is not effected by the deposit of a deed which does not establish the title set up by the mortgagor when there are other documents not deposited, showing such title. *21 MLJ 454—9 IC 309*. Deposit of deed of relinquishment evidencing property obtained in exchange is sufficient. *11 L 694—1930 L 731*. A mortgage deed executed by the owner in favour of a third person cannot be deemed to be title-deed of the mortgagor. *94 IC 427—1926 M 743*. The intention to create a

mortgage operates as a constructive delivery of title-deeds, even though they may have already been in the possession of the mortgagee. *118 IC 407—1929 R 107; 1928 S 179*.

16. Written Memorandum

If there is a written memorandum along with the deposit, the terms of the memorandum are conclusive evidence of the terms of the mortgage. *43 C 895—31 MLJ 155 (PC)* See also *24 Bom. LR. 502—1922 B. 440*; such memorandum must indicate whether an equitable mortgage was intended by such deposit and the extent of the security. See *43 C 895 (PC)*. The memorandum must be registered in order to be admissible in evidence. *138 IC 247; 34 Bom. LR. 748; 163 IC 195—1936 M 256*. As to a memorandum which was held to be only the record of an entirely completed transaction and so not to require registration, see *36 CWN 420—59 C 781*. It is settled law that when a deposit of title-deeds on collateral security for a loan is evidenced by a writing which is not intended to be itself the embodiment of the contract, but is a mere memorandum of a previously completed transaction, that writing is not an instrument affecting immovable property and need not be registered. In deciding whether the writing is such a memorandum of a completed transaction or the embodiment of the actual contract, the use of the past or present tense in reference to the deposit may be an indication of the intention of the parties, but cannot of itself be the sole criterion of the nature of the document. *48 LW 119—1938 Mad. 547*. Where moneys are advanced by the creditor to

the debtor on various dates and the debtor deposits title-deeds with the creditor on different occasions, and after all these are done the debtor executes a memorandum to the effect, "we have pledged with you the following title-deeds, etc."; the equitable mortgage is completed before the memorandum is written and the memorandum does not require registration. *48 LW 292—1938 Mad. 865—(1938) 2 MLJ 534.*

17. Section 58 (g)—Section 54 C. 687

A mortgage for a fixed term without any provision for accounting is in the nature of an anomalous mortgage and it automatically redeems itself at the end of the fixed period. *19 NLR 1—1923 N 60.* In determining whether a mortgage is anomalous or not, it is not merely the language in which the deed is worded, and the name by which it is called is to be taken into consideration; but also the substance of the transaction and the intention of the parties as disclosed in the document. *43 M 589.* An undertaking by the mortgagor contained in the deed of mortgage to redeem the mortgaged property, if the mortgagee requires redemption to be made, imports a personal obligation to pay the mortgage debt. *14 R 685—1937 R 151.*

18. Sections 58 and 100

Where a document simply creates a lien on property for the realisation of a monthly allowance and does not contain words showing either expressly or impliedly that there is a transfer of any interest in the property, and

there is no question of redemption, the document does not constitute a mortgage but merely creates a charge. *1935 OWN 871. 1941 Cal. 436.* Absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage. *38 PLR 8—1936 L 482 and 164 IC 381.* In India a mere agreement to mortgage cannot create an interest in the mortgaged property in favour of the party to whom the property agreed to be, mortgaged, nor does it create any charge. Assuming, that in a decree for specific performance such agreement is properly made in a suit between the parties, it cannot relate back to the date of the agreement so as to confer a right of priority over a mortgage created on the same property subsequent to the agreement and before the suit for specific performance. *40 Bom. LR. 545—1938 Bom. 357.* The question whether a sale-deed and a contemporaneous agreement record is an out-and-out sale with a condition for repurchase or record of a transaction of mortgage, is in the first instance one of construction of the deeds in question. But surrounding circumstances can be taken into consideration by the Court. The crucial test, in such cases, is the intention of the parties. It is not satisfactory to apply the test whether the relationship of debtor and creditor is created by the document. *16 Luck. 789—1941 Oudh. 479.* Where, on the cattle of a judgment-debtor being attached in execution of a decree, a person executes a security bond, which provides that the executant stands as surety on behalf of the judgment-debtor, mortgaging certain properties, and covenants that the attached cattle shall be produced before the Court when required and on failure to do so

binds himself to forfeit sum of Rupees 90, the value of the cattle, the document in question is not a mortgage nor does it create a charge within the meaning of section 100. *164 IC 52—1936 R 303.*

19. Sections 58 and 105—Description as Lease but really a Mortgage

A document which purports to be a lease but fulfils the definition of a usufructuary mortgage, is a mortgage and the mere fact that it describes itself as a lease does not make it a lease. *1939 NLJ 308—1939 Nag. 166—ILR (1941) N. 203.*

59. Mortgage when to be by assurance—Where the principal money secured is one hundred ¹[Taka] or upwards, a mortgage ²[other than a mortgage by deposit of title-deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred ¹[Taka], mortgage may be effected either by ³[a registered instrument] signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

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1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Rs" (with effect from the 26th March 1971).
 2. Inserted by Act XX of 1929, section 20.
 3. Substituted by the Transfer of Property (Amendment) Act, 1904 (VI of 1904) section 3, for "an instrument"
 4. The third paragraph was omitted by Act XX of 1929, section 20.

*Case Law***Abstract**

1. Attestation
2. Kanom, Melkanom and Melcharth
3. Who can Attest
4. Effect of Attestation
5. Invalidly Attested Documents
6. Proof of Attestation
7. Usufructuary mortgage for Rs. 100 unregistered
8. Registration
9. Mortgage by deposit of title-deeds—
Written Memorandum
10. Pleadings and Practice
11. Section 59 (as amended in 1928)
sections 59 and 100 : Scope

Section 59—Whether section 59 applies only if in pursuance of the mortgage possession is delivered. *1941 RD 718 (2)—1941 OA (Supp) 621—(1)—1941 AWR (Rev.) 681 (1)*. "Signed" for definition of "signed" see General Clauses Act, section 3, clause 52. Section 4 properly read means so far as it is applicable to the case of mortgages that if and when a document of mortgage is executed, it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of section 59, which expressly provides that in certain areas a mortgage can be only by means of an instrument in writing. *1933 L 972*.

1. Attestation

Prior to Transfer of Property Act it was enough if someone has signed the mortgage-deed as attester at mortgagor's instance. *75 IC*

931—1924 A 832; 34 C 227. See now the amended definition of "attested" in section 3. A mortgage-deed is admissible in Punjab where the Act is not applicable even without attestation. *1929 L 495-116 IC 610*. Even though it may include properties situate in a place where the Act is in force. *17 L 686—1936 L 946—39 PLR 946*. The provision regarding attestation in section 59 is not applicable to a case of hypothecation of movables and therefore a registered bond hypothecating a fund in Court executed, but not properly attested, would operate as a valid hypothecation. *1941 M 805 (2)—(1941) 2 MLJ 293*.

2. Kanom, Melkanom and Melcharth

Deeds require attestation as mortgage deeds. *40 MLJ 282—44 M 344*. Even an anomalous mortgage requires attestation. (*Ibid*) As to what amounts to attestation, see *62 IC 668; 49 C 438; 46 C 522*. The mere endorsement by the Sub-Registrar of admission of execution and the signature of the witnesses present at that time are not sufficient to satisfy the requirements of section 59, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants, nor any endorsement to that effect. *131 IC 840—60 MLJ 302*. See also *8 OWN 194—132 IC 337; 61 C 525—38 CWN 753—150 IC 762*. But see *1932 ALJ 653—1932 A 527 (FB)*. Signature of the Sub-Registrar affixed in the presence of the executant may be attestation. *1930 C 750*. Attestation is an act done after execution and until the deed has been

executed, there can be no attestation. 68 IC 198—1923 N 45. Two persons must have subscribed as witnesses. 83 IC 170—1925 PC 89 (PC) Where the attestors validly attested a document but did not attest a subsequent addition of a few more properties, the attestation was held sufficient. 43 M 405—38 MLJ 251; 60 IC 736. Where unnecessary interpolation of survey numbers was made after attestation and the attestor did not sign the document once again, the document was not rendered defective. 97 IC 676—1926 M 1060.

3. Who can Attest

A marksman may be an attesting witness. 26 IC 84—12 ALJ 114; 41 B 384—39 IC 61; 1 NLR 14; 131 IC 241—1931 A 101; 18 ALJ. 105—55 IC 230; 91 IC 507—1926) O. 266. The executant himself cannot be an attestor. 15 IC 666—16 CWN 1075; 37 C 526—14 CWN 974. Scribe can also be an attestor. 1940 Rang. LR 199. When a mortgage is executed benami the person who advances the money is actually not a party to the mortgage deed as it stands. If he attests the deed, his attestation is sufficient for purposes of section 59. Per *Curiam*—The old English law in this respect has been modified even in England and is wholly inapplicable to conditions in India. 8. OWN 660 (FB).

4. Effect of Attestation

The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. 42 CLJ 215—90 IC 534. Effect of witnessing execution and attesting. 66 IC 589; 34 IC 397; 1922 P 49. Person signing merely to show approval of

transaction is not necessarily an attesting witness. 26 Bom. LR 737—83 IC 170—1925 PC 89 (PC); 62 IC 668—1922 P 49.

5. Invalidly Attested Documents

Where a mortgage deed is not properly attested, it is not admissible in evidence as a mortgage deed but may be admissible in evidence as a simple bond. 20 IC 364—13 ALJ 553; 66 IC 680; 66 IC 589; 92 IC 948 1926 C. 637; 32 M. 410—19 MLJ 584; 34 IC 397—3 OLJ 164. See contra 35 CLJ 473—27 CWN 134. It is enforceable only against those who are personally liable under it. 20 CWN 989—34 IC 900—31 MLJ 251 (PC). See also 38 IC 932—44 C. 388 (PC); 46 M 64—43 MLJ 745—1923 M. 36. A loan *prima facie* involves a personal liability to pay. The money can be claimed against the mortgagee personally when the mortgage is invalid for want of attestation. 44 C 388—44 IA 87—32 MLJ 39 (PC) See also 1931 M. 124—60 MLJ 309; 54 M 163—1931 M 140—60 MLJ 56. Admission of execution was held not sufficient to validate a mortgage deed which has not been duly attested 104 IC 386—5 R. 561—1927 R 233.

6. Proof of Attestation

"Attesting witness" in section 68 of the Evidence Act means the same thing as "attesting witness" in section 59, when the question is as to the proof of a mortgage. 62 IC 97—58 C 61. The proviso to section 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed under section 59. 11 R. 26—1933 R. 6—141 IC

700. Where a witness states a mortgage bond was executed in the presence of himself and others and that he signed after seeing it executed, it is sufficient proof that he signed as attesting witness. *1924 P 317*. It is sufficient if the attestors saw the hand executing and heard the voice assenting and need not have seen the executant's face. *37 A 474—42 IA 163—29 MLJ 159 (PC)*. Where there is no proper attestation by reason of the execution not having taken place in the presence of the attestors, evidence of the witnessing of the execution by some other person is not sufficient. *34 IC 397*.

The evidence of plaintiff that the executant signed in the presence of the attesting witness was held insufficient. *131 IC 557—1931 ALJ 342*. No proof by an attesting witness is necessary when the executant himself admits a document. *44 C 345—20 CWN 1044; 62 IC 540; 47 B 137 1923 B 90*. Even where a document is admitted to have been executed, Court may require strict proof of valid attestation. See *9 LW 5—49 IC 278*. A document not validly attested as required by law, though its execution is admitted, is altogether of no effect. *52 IA 362—1925 PC 203—49 MLJ 240(PC)*. Proof by one attesting witness is sufficient. *60 IC 554—39 MLJ 463*. He need not depose that the other attestor witnessed the execution *39 A. 109; 39 A 241; 58 IC 801; 39 IC 274*. But if the validity of the mortgage be specifically denied in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses, *1932 ALJ 653 1932 A 527(FB)*. The question of valid attestation cannot be raised for the first time in appeal. *46 MLJ 56; 51 IC 378; 1924 M 513*.

Even though a document has not been registered or attested, the long course of conduct on the part of the executant may prevent him from disputing its validity. *45 A 388—21 ALJ 294*. An allegation of proper attestation of a mortgage in a plaint not denied specifically or by necessary implication by the defendant must be taken to have been admitted by him. Consequently it need not be proved. *39 MLJ 453—58 IC 801*. One of the attestors to a mortgage deed was dead at the time of the suit and the other was unable to say if the deed was the one he attested. Evidence of the scribe was let in to prove execution.

Held : it was sufficient under the circumstances. *90 IC 630—1925 C 318*. Where a person who has signed a deed as a scribe subsequently asserts that he signed, as a witness, the onus of proving this assertion lies heavily on the party so asserting. *4 Pat. LJ 511—53 IC 79*.

Para 2—Delivery of possession is sufficient and necessary in the case of unregistered mortgages below Rs 100. *62 IC 859; 1922 O. 123; 66 IC 360; 31 IC 87 (Bur.)* Where a mortgagor has given possession under an invalid mortgage for above Rs. 100, he can maintain a suit for recovery of possession and the Court will decree the suit conditional on his repaying the money advanced. *98 IC 195—1927 M 92; 2 Rule 313—1925 R. 1*. But see *100 IC 733(1)—1927 A 441*. (See now Section 53A) The delivery of possession is to be contemporaneous with the execution of the bond. *41 IC 455—4 O LJ 446*.



7. Usufructuary Mortgage for Rs. 100 Unregistered

An unregistered deed of usufructuary mortgage for Rs. 100 is invalid and no suit for redemption could lie. Yet there is nothing against the mortgagor claiming a decree for possession, if he could prove his title independently of the mortgage. The mortgage being invalid, the mortgagor is entitled to possession of the property on proof of title, but if the usufructuary mortgagee has been in possession for more than 12 years as such, he must be deemed to have acquired mortgagee's rights and thus there comes into existence a legal operative mortgage which the mortgagor must redeem as a conditional precedent to a decree for possession. *1935 AWR 705.*



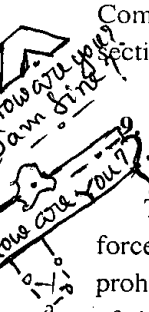
8. Registration

The exception in section 59 of the Act (that there need not be a registered instrument to evidence an equitable mortgage) remains subject to an exception that has a two-fold effect. First, that if the terms of the contract relating to the equitable mortgage have been reduced to the form of a document—if the intended equitable mortgage is created by contract which is reduced to the form of a document—no evidence shall be given in proof of the terms of such contract except the document itself (or secondary evidence of its contents). Secondly, since the object of such a document is to create a security, i.e., to create an interest in immovable property, the document itself shall not affect the property, nor be received as evidence unless it has been registered; Registration Act, sections

17 and 49. *34 B. LR 741—1932 B 401(2).* Mortgage for Rs. 80—Subsequent advance of Rs. 80 on the same security requires registration—*1918 R 242.*

In a suit in ejectment, the defendant can set up even an unregistered mortgage deed to show that he was in possession as mortgagee and not as tenant. *1924 A. 837—78 IC 955.* An agreement to execute an usufructuary mortgage deed need not be registered. It is specifically enforceable and where the mortgagee had been put in possession, it can be set up as a defence to a suit for redemption *1930 P 479—126 IC 854.* Where a transaction was entered into prior to the Transfer of Property Act and a long course of conduct by the mortgagor showed that he treated it on the basis of a mortgage, and where the defendant was in possession, the mortgagor cannot question an unstamped and unregistered document. *45 A 388—1923 A 433(2).* Mortgagee need not advance money before registration and so a creditor of the mortgagor cannot attach the money in the hands of the mortgagee before registration. *1922 A 384.* Where a non-existent property or a property not belonging to the mortgagor is included in the document, with a view to registration in a particular office, the registration is futile and the security unenforceable. *38 CLJ 355—1924 C 348.* Where a deed is invalid for want of registration, the creditor can obtain a money decree on the covenant to repay. *66 IC 680.* See also *1931 M 124—60 MLJ 309.* But see *1926 O. 138; 21 OC 347.* Interest in royalty is not immovable property and no registration is necessary. *1922 P 36.* Registered mortgage deed—Alleged modification by subsequent verbal arrangement—Proof—Not permi-

ssible 61 IA 185—13 P 310—66 MLJ 662(PC) Unregistered mortgage—Notice given to subsequent mortgagee at time of registration—Priority. 1933 L 609—146 IC 40(1). Mortgage of fruit-bearing trees—Compliance with formalities prescribed by section 59 if necessary. See 54 A 437.



**Mortgage by deposit of title-deeds—
Written Memorandum**

The Transfer of Property Act is not in force in the Punjab, and section 59 does not prohibit the creating of a mortgage by deposit of title-deeds in the Punjab. 9 MIA 307 (PC) and 31 PR 1916, Ref. 1 1933 L 972. A mortgage by deposit of title deeds cannot be effected within the limits of a cantonment to which section 59 has been extended. 1933 L 972; 1933 L 1001. Case of mortgage by lessee by deposit of title-deeds of the lease though the lease had expired on the date of mortgage but the lessee continued in possession and lessor had accepted rent. 148 IC 721—1934 R 51. Case of mortgage by deposit of the copy of the partition award, on which a decree had been passed by Court. 1933 L 972.

An endorsee of a negotiable instrument, the payment of which is secured by a mortgage by deposit of title-deeds, can claim to enforce the mortgage, even though there is no registered instrument conveying the mortgage rights to him. 148 IC 721—1934 Rule 51. See also 1937 Rang. LR 303—1937 Rang. 154. A writing evidencing the terms of the equitable mortgage must be registered. Where, however, it was not registered but the title-deeds continue to remain with the mortgagee and later on the mortgagor told the mortgagee orally that the title-deeds would continue as security.

Held: a valid equitable mortgage was created. 109 IC 170—1928 M 919. But see 59 IC 578 (see now the amendment of section 59 in which the words "other than a mortgage by deposit of title-deeds" are newly introduced); 112 IC 491; 117 IC 59. Deposit of title-deeds by *unregistered* letter does not create an equitable mortgage. 112 IC 278—1928 M 909; 24 CWN 599. See also 94 IC 427—1926 M 743; 108 IC 291—54 MLJ 109; 34 Bom. LR 748; 1936 MWN 367—1936 M 256. But when the letter records a previously completed transaction it does not require registration. 29 CWN 784—88 IC 866. See also 61 CLJ 473; 1935 R 333; 67 IC 421.

When the deposit of title-deeds is independent of the memorandum, the deposit creates the mortgage and the memo. need not be registered. 16 LW 936—1923 M 262; 37 IC 117—25 CLJ 160; 47 IC 133; 45 IC 918. See also 24 CWN 599—31 CLJ 375; 3 R 443; 84 IC 629—1924 M 547; 54 MLJ 109—1928 M 972. If such a document which requires registration is not registered, it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either. ILR (1937) 2 Cal. 586 1938 Cal. 308. See also 43 CWN 806 (PC). In a mortgage by deposit of title-deeds if there is a writing it must be considered whether it creates the mortgage or whether the mortgage is complete without the writing, the writing being merely the statement of fact which would evidence the mortgage. If the writing creates the mortgage it must be registered. 176 IC 580—1937 Cal. 741.

A transaction whereby a tax receipt and a certified copy of a survey map relating to land in Rangoon were delivered to a creditor did not give rise to a mortgage by deposit of

title-deeds (History of mortgage by deposit of title-deeds traced). *11 R. 239—1933 R. 299*. Where an award has been filed in Court and a decree has been passed and the debtor filing to get the original award deposits a certified copy of the award as evidence of his title to the property mortgaged by him, the deposit creates a valid equitable mortgage. (*1933 L 972, Foll.*, *1935 L 640*). A letter written by the mortgagor the next day after an agreement to deposit the title-deeds had been concluded ran as follows: "I am sending you the title-deeds with the intention of depositing the same with you as per the memorandum of yesterday executed by me" and then referred to the schedules annexed to the letter.

Held : the two documents must be read together and, so read, they embodied the terms of the transaction and not having been registered, the mortgage was not valid. *129 IC 814—1931 M 124—60 MLJ 309*. An equitable mortgage can be created by the deposit of title-deeds alone, where the title-deeds are handed over accompanied by a bargain, the terms of the bargain must prevail; and where it is reduced to writing, it and it alone must determine the scope and extent of the security. *141 IC 541—1933 Pesh. 35*. The real test is not the exact moment at which the documents are handed over, and if they are handed over merely for purposes of inspection and not for the completion of the contract, then the terms of any subsequent document recording the terms of the contract must be regarded as the contract itself. (*Ibid.*) The debtor wanted a loan from the bank by depositing a mortgage-deed as security. the bank replied in the affirmative and thereupon the debtor wrote a

letter and a pro-note on receipt of which the bank paid the loan.

The letter described itself as one of hypothecation and contained the important terms of the transaction.

Held : that the letter should have been registered. (*Ibid.*) A mere list of documents deposited or any entry in a voucher need not be registered. *1930 L 920*. At the time of making a deposit of title-deeds as security for money lent, the mortgagor gave a memorandum which contained a list of the title-deeds with the introductory words; "As agreed upon in person, I have delivered to you the undermentioned documents as security."

Held : It was only a list of the documents and did not embody the terms of the agreement between the parties and therefore did not require registration, *58 IA 68—54 M 257—60 MLJ 506 (PC)*. See also *11 R 491 1933 R 307*. A mortgagee with deposit of title-deeds was acting as an agent of his mortgagor in arranging a loan for the mortgagor. At the same time he was also acting as agent of the mortgagee; but as agent of the mortgagor he sent a letter to the mortgagor containing the scope of the security and the term.

Held: that the document was not the bargain between the parties to the mortgage subsequently effected but only one sent by agent of the mortgagor; that it did not require registration and the extraneous evidence was admissible to prove the scope of the security. *148 IC 721—1934 R 51*.

Though an agreement embodied in a written document requiring registration under

section 17 and not so registered cannot be proved by the written document or by oral evidence, yet where there is no written agreement, there is no reason why the intent to create a security by deposit of title-deeds under the exception provided for in section 59 should not be evidenced by written as well as by oral evidence. (*Ibid.*) The Act, far from containing any general prohibition of mortgages by deposit of title-deeds, expressly exempts them when made in the specified places from the formalities prescribed for other mortgages. The onus is strongly on him who seeks to impugn the validity of such mortgage. *35 CWN 1901—1931 PC 239—61 MLJ 408 (PC)*.

10. Pleadings and Practice

In an oral mortgage for Rs.100 or upwards a suit for redemption is not sustainable. The mortgagor can sue for possession on the basis of his title and the mortgagee cannot claim to remain in possession on the strength of the oral

mortgage which could not be proved. *1939 Rang. LR 645; 1940 Rang. 11 (FB)*. The fact that a mortgage-deed is not duly proved to have been executed and attested, as required by section 59 is no bar to the Court passing money decree on the personal covenant. *50 LW 524—(1939) 2 MLJ 664*.

11. Section 59 (as amended in 1928), Sections 59 and 100 : Scope

A debenture issued by a Limited company, the loan under it being stated to be on the security of specified immovable property, requires registration under section 100 of the Transfer of Property Act read with section 59 of the Act as amended in 1928, even when the amount of the loan is less than Rs.100. If the debenture is not registered, the holder of a debenture cannot be regarded as a secured creditor, although the debenture has been registered with Registrar of Joint Stock Companies. *ILR (1939) Mad. 199—48 LW 952—1939 Mad. 202—(1939) 1 MLJ 185*.

¹[59A. References to mortgagors and mortgagees to include persons deriving title from them—Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.]

1. Section 59A inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 21.

Case Law

Section 59A—Under section 59A of the Act the heirs of a mortgagee are entitled to recover payment of the mortgage debt and enforce the mortgage in a court of law just as much as the original mortgagee 4 DLR 89.

The Select Committee said : "Whether the words 'mortgagor' and 'mortgagee' as used in the various sections in this Chapter include all persons deriving title from them has given rise to some difficulties. (See 39 IA 7; 27 A 223); in order to make this clear, we propose

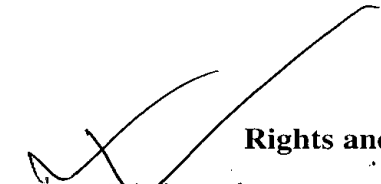
the addition of section 59A. "See 1931 ALJ 273—1931 A 277 (FB). Mortgage by Hindu father—later mortgage by sons—Covenant against redemption without payment of both amounts—Mortgagee's right to consolidate—Redemption of one mortgage alone—Right to. 11 OWN. 1601—1935 O. 213. Section 59-A does not control section 92—Purchaser of mortgaged property at sale in execution of money-decree—Payment of prior mortgage by—Right of subrogation. See 44 Bom. LR. 20.

Rights and Liabilities of Mortgagor

60. Right of mortgagor to redeem—At any time after the principal money has become ¹[due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver ²[to the mortgagor the mortgage-deed and all documents-relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 21, section 22, for "payable".
2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 21, section 22, for "the mortgage-deed, if any, to the mortgagor".

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Provided that the right conferred by this section has not been extinguished by the act of the parties or by ¹[decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property—Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except ²[only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Case Law

Section 60—A co-mortgagor by redeeming the mortgage in full cannot be held by his own action to have split up the integrity of the mortgage giving a right of piece-meal redemption to the other mortgagors. There is only one condition in which the integrity of the mortgage can be said to be split up and that is provided for under section 60 of the Act, and that case is where a mortgagee has acquired the share of the mortgagor. *55 CWN 3 (DLR) 15.*

—Redemption, equity of—

Rights available to the holder of the equity of redemption, when such equity of redemption is entirely unrepresented in a suit. (i) in the case of simple mortgage, and (ii) in the case of a puisne mortgage. *9 DLR 294.*

—Where the equity of redemption was entirely unrepresented, in other words, where the holder of the equity of redemption was not made a party in a mortgage suit, neither

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 21, section 22, for "order".

2. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 21, section 22.

the decree nor the sale in execution of the decree in such a suit would affect the rights of the holder of the equity of redemption. Rights which are available to the holder of an equity of redemption :

Right of redemption—extension of time.

In the case of a simple mortgage, the mortgagor even after the mortgage retains in himself (a) right to redeem the mortgage property and (b) a right to the physical possession and enjoyment of the property;

If the equity of redemption is unrepresented in a suit, then these two rights remain vested in the holder of such equity of redemption and his right to redeem the property and to remain in physical possession thereof remains unaffected. Where there is nothing left to redeem, as for example, where the enforcement of the mortgage has become barred by limitation, the right to remain in possession must necessarily remain absolutely unaffected and free from the right of redemption.

In the case of a puisne mortgagee, it is wrong to think that he has as such puisne mortgagee any right to possession, for, as a puisne mortgagee, his rights are (a) to redeem a prior mortgage and (b) to foreclose against the mortgagor and, unless such foreclosure has taken place in accordance with law, the equity of redemption which includes the right to possession remains with the mortgagor. 9 DLR 294.

—Until and unless preliminary decree is followed by an appropriate final decree, defendants are not debarred from redeeming the mortgage, if the court extends time limited in the preliminary decree, which the

court is entitled to do under the law. 6 DLR 612.

—The right of redemption is governed by the principle of indivisibility of the mortgage security. Neither the mortgagor nor the mortgagee can have any relief inconsistent with this principle unless there is any special stipulation in the mortgage bond or any subsequent arrangement between all the parties concerned, authorising a departure. In the absence of such stipulations or arrangements the owner of a fragment of the right of redemption cannot redeem his share unless the mortgagee or all the mortgagees, where there are more mortgagees than one, has or have acquired in whole or in part the share of a mortgagor. His right is a right to redeem the entire mortgage and he can enforce this right even though the mortgagee is willing to allow him to redeem his share only. 5 DLR 57.

—Court's power to set aside the order for delivery of possession.

—Where after the delivery of possession was taken by the mortgagee in executing a final decree for foreclosure, the mortgagor files objections to the execution under section 47 CPC and asked the court, in exercise of its equitable jurisdiction, to set aside the order for delivery of possession and give sufficient time for payment of the money due under the decree.

Held : The court had no power within its equitable jurisdiction to grant relief sought. The proviso to section 60 and the provisions of section 91, Transfer of Property Act in themselves may not be conclusive, but the provisions of Order XXXIV, rr. 2(c) and 3 of

the Code of Civil Procedure put the question beyond doubt. 3 DLR 366.

—Principle of indivisibility of mortgage.

Mortgagee's right in regard to whole mortgage debt—property sold for arrears of revenue. Lands referred to in sale papers constituting only portion of the mortgage lands—Original mortgagee cannot claim any mortgage rights in the remaining lands.

By a deed dated 25th May, 1921, A mortgaged with possession certain land in village S along with his other lands to B for Rs 23,000. In 1935 the land revenue in respect of the mortgaged land being in arrears the mortgage rights of value of Rs. 23,000 in respect of the land in village S were put to sale by auction and the said rights were purchased by C. The sale was confirmed under section 92 of the Land Revenue Act, 1887 and a certificate to that effect was issued to C. Subsequently, on 23rd August, 1939, B. transferred his mortgage rights in the mortgage dated 25th May, 1921 to D who sued to enforce his rights.

Held : As result of revenues sale in 1935 the rights of B in the full sum of Rs. 23,000 were transferred to C and nothing was left in B that could pass to D by transfer on 23rd August, 1939. It could not be contended that because the mortgage rights in respect of lands in village S only were referred to in the revenue sale, the rights of the mortgagee B in respect of other lands were still outstanding in B, as B could not part with his mortgage rights in respect of the whole of the mortgage debt and yet retain any part of his rights in respect of some part of the mortgage land. The position is the same whether the

mortgagee sells himself or as here his rights are sold by paramount authority. 3 DLR (PC) 41.

Sections 60 & 61—Plaintiff mortgagors must sue to redeem the entire mortgage and not their own share only—One of the mortgagors alone subsequently mortgaging property to mortgagee—Plaintiff mortgagors not bound to redeem such subsequent mortgage along with the firms. (1952) PLR (Lah.) 509.

—Tenancy right not affected because of a mortgage between the landlord (as mortgagor) and the tenant on the security of the tenanted land.

The original tenancy right, between landlord and tenant does not cease to exist merely on the ground that the landlord mortgages the same property rented to the tenant, if the mortgage money is later on paid off by the landlord or a transferee of the landlord.

The disappearance of mortgage with the payment of mortgage-money by the mortgagor can in no way affect the tenancy right inasmuch as the tenancy right is an independent transaction which has no relationship with the part transaction. *Noor Ahmed vs Md Safi* 22 DLR (WP) 39.

—All persons interested in the equity of redemption need not be impleaded in a suit.

Section 60 of the Transfer of Property Act does not require that all persons who have a right to the equity of redemption must be joined in a suit.

In this case the suits were instituted by the original mortgagors against the original

mortgagee, namely, the defendant. The original mortgagors also impleaded their transferee of a fraction of the mortgaged property as a co-plaintiff, the transfer having been made by the plaintiffs themselves. If a decree is given in favour of the plaintiffs, the mortgaged property would stand transferred to the plaintiffs. *Nabin Chandra Moral vs Lalit Mohan Das* 19 DLR 338.

—Purchase of a share in the equity of redemption whether in Court sale or by a private treaty cannot discharge mortgage debt fully. *State Bank of Pakistan Vs Khaledar Ma* 14 DLR 734.

Conditions imposed on redemption in mortgage deed—Void.

Any condition imposed in the deed of mortgage itself which places any restrictions on the right of redeeming the mortgage is a clog in the equity of redemption and, as such, repugnant to law and void. *Mir Zaman vs Asharaf Khan*, PLD 1959 Azad J & K 73.

—Condition that redemption should be only during fallow season—Not a clog on equity of redemption.

A deed of usufructuary mortgage dated 30-1-1929 provided that the mortgagor should have the right of redemption after the expiry of the period of 3 years and 3 months from the date of the deed. The deed further provided that if the mortgagor did not redeem on the date contemplated by the deed he should have the right to redeem by paying the secured amount on the 30th Ponguni, (12th April of any subsequent years). The plaintiff who as a purchaser of the equity of redemption gave notice to the mortgagee but the mortgage amount was actually deposited

in Court under section 83, Transfer of Property Act, served on the mortgagee on 9-10-1943. The mortgagee refused to accept the deposit on the ground that cultivation season had then commenced. The plaintiff thereupon sued for possession and mesne profits from 9-10-1943.

Held : that by providing that there should be redemption only on the 30th Ponguni the parties themselves decided what should be regarded as reasonable notice to which mortgagee was entitled under section 60. The provision for redemption on payment on 30th Ponguni which was intended to exclude the right of redemption during the cultivating season was perfectly reasonable and did not amount to a clog on the equity of redemption and consequently the plaintiff was not entitled to a decree for mesne profits prior to the date of the plaint. *Kadir Bibi vs MV Mailappa Millai*. AIR 1946 Mad. 542.

Sections 60, 62—Distinction between sections.

Section 60 can only refer to a case in which a mortgagor under a subsisting mortgage approaches the Court to establish his right to redeem and to have that redemption carried out by the process of the various declarations and orders of the Court by which it effects redemptions. In other words, section 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain the return of his property on repayment of what is still due. Section 62, on the other hand, is in marked contrast to section 60. It says that in the case of a usufructuary mortgage the mortgagor has a right to "recover possession" of the property when the

principal money is paid off. That is not a case of redemption at all. At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor "to recover possession of the property". *Ram Prasad vs Bishambar Singh AIR 1946 All. 400.*

—Redemption—Party may redeem at any time before final decree is passed. Until and unless preliminary decree is followed by an appropriate final decree, defendants are not debarred from redeeming the mortgage, if the court extends time limited in the preliminary decree, which the court is entitled to do under the law. *Yad Ali Shah vs Hazrat Ali 6 DLR 612 Rel. 40 CWB 83.*

Sections 60, 61—Redemption of mortgage—whole mortgage must be redeemed—Individual shares cannot be redeemed.

If the plaintiffs wish to redeem the first two mortgages they must redeem them entirely and cannot ask for their own share only. They must pay the entire mortgage money and if that is so, they must obtain the entire property under mortgage. *Muhammad Hussain vs Inayat Ali PLD 1952 Lah. 372—PLR 1952 Lah. 509.*

The right of redemption is governed by the principle of indivisibility of the mortgage security. Neither the mortgagor nor the mortgagee can have any relief inconsistent with this principle unless there is any special stipulation in the mortgage bond or any subsequent arrangement between all the parties concerned, authorising a departure. In

the absence of such stipulation or arrangements the owner of a fragment of the right of redemption cannot redeem his share unless the mortgagee or all the mortgagees where there are more mortgagees than one, has or have acquired in whole or in part the share of a mortgagor. High right is a right to redeem the entire mortgage and he can enforce this right even though the mortgagee is willing to allow him to redeem his share only. *Sm Sabeda Khatun vs Nayeb Ali 5 DLR 31.*

Section 60—Redemption of mortgage—Limitation—Original mortgage deed was scribed and became effective on 15-12-1922—Original mortgagees executing subsequent mortgage with effect from 6-2-1933—Suit for possession by redemption filed on 25-1-1993 whether within limitation—Creation of sub-mortgage being in writing, signed by mortgagors (original mortgagees) and having been registered and proved in Court of law, would amount to acknowledgment within meaning of section 19, Limitation Act, 1908—Time for redemption would, thus, start from subsequent date of mortgage deed dated 6-2-1933—Suit for possession through redemption filed on 25-1-1993 being within statutory period of sixty years was thus, within time. *Bilqees Malik vs Muhammad Iftikharuddin PLD 1997 Lah 733.*

Section 60—Redemption of property from co-mortgagors—Entitlement—Factum of mortgage having been admitted by defendants (co-mortgagors) plaintiffs had inherent right to get the same redeemed from co-mortgagors who having redeemed mortgage earlier had subrogated rights of

mortgagees—Right of mortgagors to redeem mortgaged property could not be extinguished by changing hands and mortgagor would have right to redeem mortgage in 60 years—Changing hands of mortgagee's rights would constitute acknowledgment of liability to equity of redemption of mortgage and time for redemption in such cases would start from change of mortgagee rights—Courts below after proper appraisal of evidence having come to correct conclusions, no interference was warranted in such finding—Preliminary decree of redemption of land from co-mortgagors was maintained in circumstances. *Muhammad Akram vs Arsalla Khan 1997 MLD 138.*

Section 60—Jurisdiction of Civil Court—Scope—Acquisition of title—Civil Court being Court of universal jurisdiction, its decision with regard to matters falling within its exclusive jurisdiction would be final and binding upon all other forums—Acquisition of title by prescription or otherwise, being pure question of title, any finding thereon given by civil Court having become final, no Revenue Court how high so ever in its hierarchy, would have authority to ignore such finding—Collector, Additional Commissioner and Board of Revenue, thus, acted without jurisdiction in bypassing finding of civil Court—Findings of Revenue forums were, thus, rightly set aside by trial Court in circumstances. *Abdul Haq vs Ali Akbar 1998 CLC 129.*

Section 60—Redemption of equitable mortgage—Grant of interim injunction—Requirements—For obtaining interim injunction in respect of suit property, plaintiff was required to show presence of all

ingredients as envisaged in section 60 of Transfer of Property Act, 1882 and Order XXXIX, rules 1 & 2 CPC. *Tajuddin Khan vs Habib Bank Ltd 1998 CLC 563.*

Section 60—Action of property for non-payment of debt—Owner of property got redeemed her property meanwhile—Auction-purchaser's suit for declaration was infructuous for she had not asked for relief of possession—Auction-purchaser was not found entitled to declaration on account of changed circumstances, therefore, she could not claim consequential relief of permanent injunction, especially when auction proceedings in her favour were declared to be illegal and without jurisdiction by Court of competent jurisdiction. *Saeeda Khatoon vs House Building Finance Corporation PLD 1998 Kar 99.*

Section 60—*De facto* guardian—Power to transfer any right or interest in immovable property of minor—*De facto* guardian of minor would have no power to transfer any right or interest in immovable property of minor—Such transfer was not merely voidable but void—Period of limitation for redemption was sixty years from date of mortgage which had expired long before—Deed of redemption purportedly executed by *de facto* guardian of minor in 1947 was, thus, void—Sale-deed executed by mortgagee on attaining majority (long after period of limitation) for redemption had expired was, thus, valid—Plaintiff's suit for declaration that defendant's right of redemption in land in question had extinguished was rightly decreed by Appellate Court wherein no interference was warranted in circumstances. *Taj Din vs Karim Bukhsh 1999 MLD1216.*

Section 60—Redemption of mortgaged property—Period of limitation—Mortgage changed hands and mortgage rights were transferred in new mortgagee—Held, fresh period of limitation accrued in favour of mortgagor. *Faqir Gul vs Abdur Rehman* 1999 CLC 346.

Section 60—Redemption of mortgaged property—Period of limitation—Where mortgagee had transferred mortgage right to new mortgagee before expiry of period of limitation, period of limitation would start from transfer of mortgage and not from original mortgage. *Faqir Gul vs Abdur Rehman* 1999 CLC 346.

Section 60—Redemption of mortgaged property—Limitation—Acknowledgment—Lease rights were originally mortgaged in 1908—Mortgagee rights went on re-transferring till the year 1934 by acknowledging mortgage with acceptance of liability and right of redemption of mortgagor—Effect—Where mortgagee changed hands acknowledging the mortgage and accepting liability and right of redemption of mortgagor, period of limitation would be reckoned from last date and not from date of original mortgage—Suit filed in 1990 within sixty years was held within time. *Faqir Gul vs Abdur Rehman* 1999 CLC 346.

Sections 60 & 58—Mortgage of property—Redemption—Suit for declaration and permanent injunction—Non-impleading of co-sharers of property—Effect—Suit for declaration seeking permanent injunction was filed by plaintiff mortgagor restraining defendants/mortgagees from interfering in possession of plaintiff over suit land for the reason that suit land was redeemed in 1955

and since then was in possession of the mortgagors—Co-sharers had not been impleaded by plaintiff as a party in suit which would mean that plaintiff wanted to deprive the left out co-sharers from ownership of suit land if suit was decreed—Left out co-sharers being necessary parties, suit could not have been decreed without them. *Boota vs Muhammad Sadiq* 2001 MLD 265.

Sections 60 & 58—Mortgage of property—Redemption—Suit for declaration and permanent injunction—Non-impleading of co-sharers of property—Effect—Suit for declaration seeking permanent injunction was filed by plaintiff mortgagor restraining defendants/mortgages from interfering in possession of plaintiff over suit land for the reason that suit land was redeemed in 1955 and since then was in possession of the mortgagors—Co-sharers had not been impleaded by plaintiff as a party in suit which would mean that plaintiff wanted to deprive the left-out co-sharers from ownership of suit land if suit was decreed—Left-out co-sharers being necessary parties, suit could not have been decreed without them. *Boota vs Muhammad Sadiq* 2001 MLD 265.

Abstract

1. Scope of section
2. "Mortgage-money"—meaning of
3. When mortgagor can redeem
4. Indivisibility of mortgage
5. Act of mortgagee in dividing security
6. Purchase by mortgagee of part of mortgaged property
7. Release by mortgagee of part of mortgaged property

8. Miscellaneous
9. Subsequent contract
10. Clog on redemption
11. When and against whom can be relieved
12. Examples of clogs—Onerous conditions
13. Long period before redemption
14. Further period in default of redemption
15. Absolute sale in default of redemption
16. Stipulation for permanent lease
17. Tacking and consolidation
18. High rate of interest
19. Redemption suits—Notice
20. Tender
21. Deposit of amount
22. Proof of right to redeem
23. Defences
24. Second suit
25. Limitation

1. Section 60—Scope of Section

The rule in this section is to be applied even where the Act is not in force, as a rule of justice, equity and good conscience. *1 R 419—1924 R 83*. It is not necessary for the application of section 60, that the mortgage should be based upon a contract. It applies also to mortgage created by operation of law under section 171, Bengal Tenancy Act. *15 P 481—17 Pat. LT 726—1936 P 629*. Under section 60 the integrity of a mortgage is not broken except where the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged. Hence, where the mortgagee has allowed the owner of one part of the mortgaged property to redeem his part any separate owner of a

portion of what remains cannot redeem his part on payment of its proportion of the debt. *1942 ALJ 463; 1942 PC 50—(1942) 2 MLJ 390 (PC)*.

2. "Mortgage-Money"—Meaning of

The expression "mortgage-money" is to be construed as the principal money and interest of which payment is secured for the time being. *1929 A. 411; 5 L. 425—1924 PC 183; 113 IC 750*. (See also S 58, supra). Sums received by mortgagee have to be credited in favour of mortgagor. *1931 ALJ 421*. A mortgagee remaining in possession of the property and receiving profits in lieu of interest is in the absence of covenant by the mortgagor to add the deficiency in the profits to the principal or to pay it up at the time of redemption, entitled to redeem on paying the principal sum only. *14 ALJ 986—37 IC 95; also 98 PR 1917—41 IC 59*. See also *53 CLI 380*, where there was express covenant for payment of principal and interest apart from rents and profits received by the mortgagee. The expression "mortgage-money" includes costs properly incurred by the mortgagee, such as costs of litigation which are allowed under the law of mortgage in England. *25 Bom LR 839—1924 B 264; 28 IC 184—16 MLT 365*.

In a redemption suit the mortgagee could not claim compensation for improvements made by him during the term of his tenancy, prior to the mortgage. *54 PR 1912—14 IC 78*. See also *17A. 282*. Where certain properties were usufructuarly mortgaged but a portion was sold in execution of a prior mortgage and the mortgagee without taking any steps in respect of the property sold, remained in possession of the remaining property, in a suit for redemption by the mortgagor, the

mortgagee is not entitled to claim loss of interest sustained by the deprivation of a portion of the properties and the mortgagor is not entitled to a reduction of the principal money because the mortgagee failed to deliver the entire properties. *13 IC 156.*

A mortgage bond executed on 12th May, 1912, provided that interest would be paid yearly and that the principal would be paid within five years. It further provided as follows : "In the case of default of payment at the time fixed or on the discovery taking place within the stipulated period of any act of bad faith, then the creditor would be entitled to recover his money, principal and interest, in any way by filing a suit. "The mortgagor failed to pay interest in May, 1913, but the suit was not brought till April, 1929:

Held : that the act of bad faith which the parties had in contemplation was not the mere default in the payment of the annual interest, that there was no default by the mortgagor which would entitle the mortgagee to realise the whole of the mortgage-money within the period of five years and that the suit having been brought before 12 years from the expiry of the period of five years was within time. *131 IC 547—1931 A 537.*

Mortgage-money includes all moneys which may be properly allowed on taking account : *26 IC 184—16 MLT 365*; but not arrears of rent and interest for which a decree was obtained but allowed to get barred. *41 M 1043—35 MLJ 414; 56 IC 743.* The mortgagor is liable to pay at the time of redemption *gilandazi* expenses provided to be paid in the mortgage as such provision is not clog on redemption. *16 PLT 21—1935 P 157.* An apportionment of a mortgage-debt

cannot be made without the consent of all the parties interested. *1933 L 129—143 IC 364.*

3. When Mortgagor can redeem

A stipulation in the mortgage-deed that the mortgage will be foreclosed if the mortgage-money is not paid does not extinguish the mortgage on failure to pay the mortgage-money and the right of redemption is not lost. The equity of redemption can only be lost either by a fresh agreement between the parties or by foreclosure proceedings. In the absence of either, the entry recording mutation in the name of the mortgagee as owner is of very little help in the determination of the point. *11 OWN 559—1934 O. 246.* Where at the time the mortgage was entered into, there was no law of limitation for redemption existing, the right to redeem cannot be lost by lapse of time. *78 IC 358—1925 L 105.* If a person being a party to a suit on a mortgage prior to his own omits to claim his right to redeem such prior mortgage, he cannot afterwards sue on the mortgage. *79 IC 654—1924 O. 56.*

Until a mortgage has been extinguished, there is a repeated cause of the action to sue for its redemption. It is only when it was been extinguished by a final decree in redemption suit or when the mortgagor fails to redeem and the property is sold that the rights of a mortgagor to redeem come to an end. *114 IC 186—1929 A 231; 104 IC 358(2)—1927 N 345.* See contra *70 IC 152—26 CWN 532; 10 CLJ 115—1 IC 71.* Even after it is extinguished by sale of the mortgaged property purchased by the mortgagee himself, it may be revived where a subsequent mortgagee who was not a party of the previous suit redeems the prior mortgagee

purchaser under a decree of Court, the consequence of such redemption being that the prior mortgage was satisfied and the decree and sale were vacated. 1930 P 570. See also 28 NLR 247—1932 N 154. A preliminary decree for foreclosure does not extinguish the right of the mortgagor to redeem the mortgage. 130 IC 196—1931 ALJ 265—1931 A 223. Adverse possession against a mortgagee does not bar the mortgagor's right of redemption 38 A 411—34 IC 171.

In the mortgage-deed no period was mentioned for the mortgage, but it was provided that the principal amount of Rs. 1,400 "shall by 15 years' time be discharged by the seven instalments of not less than Rs. 200 each."

Held : that "by 15 years' time" in the document means before the expiry of 15 years and hence a suit for redemption brought before the expiry of 15 years since the date of the mortgage was not premature. 1929 N 339. See also 134 IC 459(A). A *kat kobala* provided that the lands were to be kept in *kat* for a period of 9 years and that during that time the mortgagees will be entitled on paying the rent to the landlord to appropriate the profits in lieu of the annual rent payable. It further provided that, on the expiry of 9 years, the mortgagors shall redeem the *kat kabala* after paying the entire amount due for principal and interest.

It said "if we cannot pay the entire amount according to the stipulation then after the term this *kat kobala* itself will be regarded as an out-and-out sale and we shall cease to have any right. "A suit having been filed for redemption, held (1) that the plaintiff could not redeem without paying the amount due

for principal and interest, apart altogether from the amounts of rents and profits received by the mortgagees from the land; (2) that there was no case for rectification or cancellation on the ground of mistake, and (3) the mortgagors could not ask for an account under sections 76 and 77. 134 IC 95—53 CLJ 380. (See also the new amendment of this section.)

Where a mortgagee brings a suit for possession in pursuance of a condition in the mortgage-deed, that if principal and interest are not paid off in a certain period the mortgagee can take possession of the mortgaged property, the mortgagor or persons claiming through him cannot claim to redeem in such suit. 111 IC 519—1928 L 668. The mortgagor cannot insist on redemption before the day fixed for payment as the right of redemption and foreclosure are co-extensive. 8 IC 707 (C). See also 16 M 486; 1928 A 131; 42 C 1146—19 CWN 389—28 IC 450; 64 IC 780—17 NLR 202; 79 IC 870—1925 N 11; 43 MLJ 368; 1925 M 825; 1929 M 339; 8 P 243—113 IC 106; even though the period may be long. 80 IC 728—1925 A 42; 116 IC 609—1929 L 523 (and cases referred to therein), or even if the terms of the mortgage were unconscionable. 94 PR 1919—52 IC 542. See also 1929 L 523; 4 Luck. 203—1929 O. 54 (Redemption rendered impossible owing to onerous condition in mortgage-deed. If condition is enforceable). (See also the Statement of Objects and Reasons to the new amending Act XX of 1929): Contract to the contrary. See 25 ALJ 1051; 36 A 195—41 IA 84—26 MLJ 474 (PC).

Where mortgage was by conditional sale and no proceedings were taken to foreclose it,

mortgage could be redeemed. *149 IC 969—1934 I 242*. On the breach of the condition of repayment, in a mortgage by conditional sale, the contract executes itself, and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them. *97 IC 725—1927 section 46*. An usufructuary mortgagee has no right to remain in possession of the mortgaged property after mortgage-money is satisfied from the usufruct though the parties may have miscalculated that the liquidation of the mortgage-money from the usufruct shall take a longer period. *5 O LJ 263—47 IC 161*.

When the parties to a mortgage agree to certain terms it is the duty of both parties to adhere to the terms of the mortgage but if the mortgagee commits breach, the mortgagor would be entitled to redeem the mortgage even before the expiration of the period fixed as the term thereof. *48 MLJ 338—1925 M 825*. See also *25 ALJ 658*. If the parties agree that the mortgage-money should be paid in Jeth in a year and the property redeemed payment in any other month is not a good and valid tender. *1 O LJ 263—24 IC 874*. See also *4 O LJ. 334—40 IC 381*. Where a mortgage-deed in respect of houses or groves provides for redemption in the fallow season, such limitation has no significance and it is not necessary that a suit for redemption of such mortgage should be filed in the fallow season. *51 IC 880(O)*. Where on the same date when the mortgage was executed, a *varthamanam* was entered into which provided for extinguishment of the debt out of the rents, the sub-mortgagees holding under the

mortgagee are bound by the *varthamanam*. *107 IC 808—1928 M 382*.

A transferee from the heirs of a benamidar mortgagor can maintain a suit for redemption. *29 CLJ 434* and *45 C 909 (PC)*, Rel. on *38 LW 266—1933 M 635*. A raiyati holding was mortgaged and the mortgagee undertook to redeem a prior mortgage and pay the rent of the holding, but he neither redeemed the mortgage nor paid the rent, and when the holding was sold for arrears of rent, including the rent for two years prior to the mortgage, he bought it in the name of another person. In a suit for redemption.:

Held : that the fact that another person, who was not the mortgagor, shared responsibility with the mortgagee for a wrongful omission would not in the circumstances of the case give him a right to derive benefit from the omission at the expense of the mortgagor and the sale was no bar to the redemption. *151 IC. 255—1934 P 307*. In order that the integrity of a mortgage may be broken, it is necessary that all the mortgagees should have purchased a share in the mortgaged property. Where a suit is brought for redemption by an heir who is interested only in a portion of the mortgaged property and though all the heirs were made parties, the suit as against one is found to be not maintainable, it is not open to the plaintiff to claim a decree for redemption of the remaining property by payment of the whole of the mortgage-money. Unless the whole of the mortgage-money is paid to all the mortgagees, the whole money due under the mortgage cannot be deemed to have been paid. *1939 ALJ 590—1939 All. 600*.

Section 60—Equity of redemption—
When extinguished by mortgagor's default.

In this case the mortgagor defaulted to pay the arrear rent and the mortgagee was not under any obligation either in law or in contract to pay the arrear rent for which the land was sold out in the execution of a rent decree and the right of redemption of the mortgagor was extinguished. In *Guari Shankar Sahu vs Sheotahal AIR 1936 Patna 434* it was held that the rent sale extinguished the mortgagor's equity of redemption when it was not proved to be fraudulent. The same view was followed in *Fekua Mahto vs Babu Lal Sabu, AIR Patna 382*. In the present case the plaintiff's equity of redemption was extinguished for his own default to pay arrear rent and there is no evidence to show that the mortgaged property was collusively or fraudulently sold out for any default of the mortgagee.

In the present case the mortgagee or his heirs had not undertaken any obligation to pay arrear rent for which the land was sold in a rent sale and there was no evidence to show that the suit property was sold in the execution of a rent decree because of any default, or any collusion of the mortgagee or their heirs.

Had the mortgaged property been purchased by defendant No. 8 or had defendant No.9 purchased the property in the benami of the heirs of Abdur Rashid or in collusion with them, then, by operation of section 90 of the Trusts Act, defendant Nos. 1 to 8 could be held responsible for holding the property for the benefit of the mortgagor and fiduciary relationship between the mortgagor and mortgagee would have subsisted and the

suit would have been within time under Article 148 of the Limitation Act.

Plaintiff's right of redemption was extinguished long ago when the mortgaged property was sold in execution of a rent decree. *Sukhendu Bikash De vs Nurul Islam. 31 DLR 71.*

4. Indivisibility of Mortgage-(A) General

The integrity of mortgage cannot be broken without the consent of the mortgagee. A person interested in a portion only of the mortgaged property is not entitled to redeem that portion alone. *102 IC 708; 2 IC 662 (C)*. See on appeal *42 C 801—28 IC 930 (PC)*. A mortgagor is entitled to redeem a portion of the mortgaged property on payment of the entire mortgage-money even though his claim against the remaining portion is time barred. Doctrine of indivisibility of mortgages discussed. *54 B 625; 1930 A 416*. See also *43 PLR 705—1941 Lah. 421*. Exceptions to the doctrine stated. *59 C 1374*. A person who has any right at all to redeem has a right to redeem the whole of the mortgaged property and cannot be compelled to redeem only the part in which he may be interested. See also *57 C 872—129 IC 310—1930 C 810; 1933 R 392*. The property, which was subject to two mortgages, was taken on lease by a Hindu father and a stranger.

In a decree on one of the mortgages the father redeemed the mortgage with joint family funds the stranger contributing nothing. In suit on the other mortgage the son is entitled to redeem whole, and, not only one-fourth, although father declined to redeem. *29 NLR 77—1933 N 44(2)*. So long as the integrity of a mortgage remains

intact, each item of the property mortgaged, when there are distinct and separate items, is liable for the whole amount due under the mortgage. *164 IC 613—1936 ALJ 1116—1936 AWR 788—1936 A 595*. See also *15 Pat. 481—1936 Pat. 621*. Section 60 cannot be read subject to section 82 and the fact of the purchase of several items piecemeal by different persons will not give them a right to redeem the properties piecemeal. there must be a redemption of all the items at once. *26 IC 194 (M)* But see *11 PLT 595—1930 P 579* a mortgagee can, however, allow redemption by a co-mortgagor of his share of the mortgaged property. *50 PR 1912—13 C 539*.

5. Act of Mortgagee in Dividing Security

The proposition that a mortgage is indivisible is one for the benefit of the mortgagee and it may be waived by him. *1928 L 792*. See also *10 CLJ 150—1 IC 264*. Where the mortgagee has dealt with one of those entitled to the equity of redemption, persons entitle to the equity of redemption in the remainder may claim to redeem their shares. *38 M 310—23 MLJ 576—17 IC 837; 1927 M 1039(2); 22 Bom LR 1431—59 IC 762; 50 PR 1912—13 IC 539; 27 Bom. LR 1449—1926 B 31; 59 IC 762—22 Bom LR 1431*. But see contra *45 A 524—1923 A 499*. Where two of three mortgagors sold their interests in the equity of redemption and the purchasers executed a fresh mortgage-deed in favour of the mortgagee, the mortgage is split up and the third mortgagor is entitled to redeem his undivided one-third share. *1915 MWN 189—28 IC 248; 1926 P 94*. The mortgagee's taking in lieu of his whole mortgage a portion of the mortgaged property

does not affect the principle of indivisibility and does not entitle a party to redeem the portion so taken by paying a proportionate part of the mortgage-debt. *20 NLR 115—1924 N 266*. See also *91 IC 978—1926 B 31*. A zamindar makes an usufructuary mortgage of his zamindari without *sir in* 1867. Subsequently in 1895 he executed an usufructuary mortgage of his *sir*. Plaintiff took an assignment of his first mortgage in 1900 and the defendant of the second mortgage in 1910. In 1913 plaintiff purchased the equity of redemption in the property covered by both the mortgages and instituted a suit against the defendant for redemption of the mortgage of 1895 relating to *sir*.

Held, that the plaintiff was entitled to redeem. *1931 ALJ 162—1931 A 238*.

6. Purchase by Mortgagee of part of Mortgaged Property

The integrity of a mortgage can only be broken up in the case of a mortgagee acquiring a portion of the mortgaged property by purchase, inheritance or otherwise. *31 A 335; 1925 O 150(2); 21 OC 172—47 IC 200; 53 IC 587 (C); 43 M 372—38 MLJ 239 (FB) 8 MLT 409—8 IC 153; 57 C 872—1930 C 810; 1926 A 601—1923 R 61; 5 PLT 312—75 IC 821; 62 PR 1911—11 IC 100; 7 OLJ 585—58 IC 983*. Where a mortgagor sells to a third person, a portion of the mortgaged property and then sells an item of the mortgaged property to the mortgagee, the result is to break up the integrity of the mortgage, and such third person can redeem his share in the mortgaged property on payment of a proportionate part of the amount due not in proportion to the value of different items of the property but in proportion to the liabilities

of the parties under the sale-deed. 1937 ALJ 113—1937 A 44.

It is not open to the purchaser from some of the mortgagors to redeem more than the share purchased by him. 55 A 359—142 IC 410—1933 ALJ 151—1933 A 257 (FB). In spite of the integrity of the mortgage being broken by mortgagee, one of several mortgagors or a purchaser of a portion of the equity of redemption is entitled to redeem the whole of the property subject to the equities which other persons may have, due provision being made for their rights. 1936 MWN 1005; 1937 M 136. As to whether one mortgagor must redeem the whole of the remaining shares, see 1929 A 409; 50 B 331—28 Bom. LR 588—96 IC 361; 59 C 1372. "Share of the mortgagor" in the last clause of section 60, can in the context only mean the interest of the mortgagor outstanding after the creation of the mortgage, (i.e.) the equity of redemption. The clause will apply only to cases where the mortgaged property is opened or becomes absolutely owned by several co-sharers or owned in distinct and separate ownership by more than one mortgagor. When a mortgagee purchases the property free of his mortgage and pays the full value of the property, the substance of the transaction is that the mortgagee gives up his mortgage right and purchases the property as if it were an unencumbered property, paying the full value therefor. The acquisition by the mortgagee in such a case would be not as a mortgagee. To such a case the last clause of section 60 cannot apply 51 LW 239—1940 Mad. 498—(1940) 2 MLJ 1003.

See also (1941) 2 MLJ 520. One of two co-mortgagors sold his equity of redemption

to five others, one of whom subsequently obtained an assignment of the entire mortgage rights from the mortgagee. The other mortgagor having sued to redeem his half share, alleging that the integrity of the mortgage had been broken up, held that section 60 applied to the case, and that the plaintiff could be given a decree for redemption of his share in the mortgaged property. 11 OWN 933—1943 O 348. Where the first mortgagee obtained a decree on his mortgage without impleading the second mortgagee and purchased properties in execution including the one mortgaged to the latter and on failure to get possession, brought a suit against the second mortgagee, who claimed to redeem all the properties:

Held : that the integrity of the mortgage security having been broken up by the purchase of the mortgaged properties by the plaintiff he could not be compulsorily redeemed in toto and that the second mortgagee could not redeem the property mortgaged to him. 12 PLT 769—1931 P 434. Where a mortgage has been split up by reason of the mortgagee having become the owner of two of the mortgaged properties, he is entitled to claim only a proportionate amount of the mortgage money from the other remaining property. 1931 MWN 891; 151 IC 627—1934 R. 372.

The passing of the *rajinama and kabuliyat* does not necessarily by itself amount to a transfer of the property so as to extinguish the equity of redemption. Each case depends on its own facts. 49 B 847—27 Bom LR 1253—1926 B 40. Where without acquiring any interest himself the mortgagee merely allows some of the mortgagors to redeem their share without the consent of the other mortgagors, the

integrity of the mortgage is not broken up and the remaining mortgagors can still redeem the whole of the unredeemed portion of the mortgaged property. *89 IC 574—1926 A 136(2)*. A purchase by some mortgagors of the interest of a mortgagee does not entitle the other mortgagors to claim apportionment of their debt for redemption of their share of the property. *27 CLJ, 110—41 IC 269*. Where the mortgagee purchases in Court auction the equity of redemption and afterwards the sale is held partly invalid, the security is discharged only to the extent to which the sale is valid. *45 MLJ 719—1924 M 364*.

7. Release by Mortgagee of part of Mortgaged Property

It is not competent to a mortgagee to release the share of an individual mortgagor by receiving from him what he may conceive to be his rateable share and any payment made by an individual mortgagor can only be properly treated as made for the whole body of mortgagors and should be credited in reduction of their joint debt. *59 C 1372*. If the mortgagee, with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt against such purchaser. *59 C. 1372*. Where a mortgagee releases certain of the items of properties mortgaged to him a transferee of certain other items, who has no knowledge of the release on the date of the transfer, can apply for redemption of his items on payment of a proportionate part of the debt. Such a transferee is entitled to urge on equitable grounds that when he took the

transfer, there was one indivisible mortgage and when after he got the transfer the integrity of the mortgage was broken behind his back, he was entitled to claim partial redemption. *37 CWN 424—1933 C 588*. But notice or knowledge to the mortgagee of the transfer of equity of redemption is necessary; otherwise a release by the mortgagee will not give rise to any equities in favour of the transferee entitling him to partial redemption. *28 CWN 833*. See also *14 R 198—1936 R 266*.

8. Miscellaneous

The purchase of the equity of redemption by one of several co-mortgagees does not extinguish the right of the others. *9 IC 1026*. Where one of the mortgagees has purchased a part of the mortgaged property, it cannot be said that the mortgage over that portion has merged in the sale and the purchaser-mortgagee cannot insist that the mortgagor should redeem only that part of the property which has not been purchased. *27 OC 360—86 IC 621*. If the decrees for redemption of portions of property have to be maintained and cannot be touched, and the mortgagors have to be called upon to pay only the proportionate amount of the mortgage-money due on the portions, the case must be treated as if redemption is sought on the footing of the integrity of the mortgage being broken. *27 ALJ 217—114 IC 876; 20 ALJ 583—44 A 708*.

9. Subsequent Contract

The doctrine as to clog on redemption relates only to dealings which take place between the parties at the time when the

original contract of mortgage is entered into and they are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had. *9 O LJ 511—1923 O 143*. A mortgagor can sell the mortgaged premises to the mortgagee provided the sale is separate from the actual mortgage itself, i.e., is not part and parcel of the mortgage contract. *1924 R 89*. See also *17 ALJ 117—49 IC 353*. Though a mortgagee is not entitled to acquire absolute ownership under a forfeiture clause in the mortgage deed, if the clause is given effect to and acted upon with knowledge of mortgagor for over 12 years, a suit for redemption under the mortgage is then barred. *82 IC 829—1924 R 290*. Under the amendment of section 60, Transfer of Property Act, in 1929, the insertion of the word "only" after the word "except", in the last paragraph of the section, makes it clear that there can be a proportionate abatement of the mortgage debt only where the mortgagee has acquired an interest in the equity of redemption. *38 CWN 833*.

10. Clog on Redemption—Rule of Justice, Equity and Good Conscience

In all mortgages except anomalous mortgages, clauses which take away the right of the mortgagor to redeem after stipulated period should be deemed to be clogs on the equity of redemption and, as such, not enforceable, even in those parts of India to which the Transfer of Property Act has not been extended. *1 R 419—1924 R 83; 1925 M 366*. The provisions of this section are imperative and the right of redemption cannot be lost even in the case of an anomalous mortgage. *82 IC 809; 1925 M 366; 39 IC*

377—11 Bur LT 36. As to what is a clog, see *25 ALJ 1086—108 IC 149; 53 A 580—1031 ALJ 324*.

Where at the time when the transaction was entered into, there was no covenant which could necessarily postpone the mortgagor's right of redemption to a very indefinite period or which would create an insuperable difficulty in his way for redemption there is no clog on redemption. *90 IC 787—1926. A 171*. But where subsequent to the mortgage, the mortgagor executed a permanent lease in favour of the mortgagee and it appeared that the terms of the lease were unfair as regards the heirs of the mortgagor; the permanent lease is a clog on the equity of redemption and consequently unenforceable. *53 B 360—31 Bom. LR 229*. Where the mortgagor stipulates that he would not be entitled to get possession of the property mortgaged under an earlier usufructuary mortgage unless he paid the sum due under the later mortgage-deed, the second mortgage, in effect, amounts to a usufructuary mortgage though the deed does not say so, and does not constitute a clog on equity of redemption. *1939 ALJ 1056—1940 All. 101*.

11. When and against whom can be relieved

Relief against an agreement forming a clog on the equity of redemption can only be obtained if it is challenged within a reasonable time. It is an equitable relief which cannot be granted as a matter of course. *19 NLR 1—1923 Nag. 60*. Subsequent mortgagees with notice of previous mortgage in favour of the plaintiff are not entitled to resist the suit upon the ground that the

conditions entered in the plaintiff's mortgage operated as a clog. : 75 IC 877—1925 L 45; nor subsequent vendees : 20 ALJ 607—1923 A 123 (1).

12. Examples of Clogs—(1) Onerous Conditions

Redemption rendered impossible owing to onerous condition in mortgage deed would be a clog on redemption. 114 IC 811—1929 O 54. The restriction in a mortgage by conditional sale that the money should be procured otherwise than by sale or mortgage of the property is a clog on the equity of redemption and is not enforceable. But a provision that there should be no redemption except in the month of *Jeth* is not a clog on the equity of redemption, inasmuch as the intention of the party obviously is to permit redemption at time, when the crops are not standing. 1930 ALJ 610—1930 A 283. Provisions in a mortgage conferring on the mortgagee on redemption an interest on the mortgaged premises are a clog on the equity of redemption and are void not only against mortgagor but also against purchaser of his interest. 57 IA 168—11 L 251—58 MLJ 714 (PC).

13. Long Period before Redemption

A stipulation for a long period before which redemption is not allowed is not by itself a clog, but coupled with other collateral covenants, may show an intention to make redemption extremely difficult, if not impossible, so as to make it a clog. 61 IC 962—8 OLJ 136. The true test to see whether a clause in a mortgage-deed amounts to a clog on the equity of redemption is not to look to the events as

they have happened but to see whether such events might have happened. Where a mortgage deed postponed redemption for 55 years and fixed the value at the time of redemption at a figure far in excess of the then probable value of the property and the deed was full of onerous covenants for the mortgagor : there is a clog on the redemption and the mortgagor is entitled to redeem before the expiry of the period fixed. 10 OWN 973—1933 O 460. Even 25 years would under certain circumstances be long. 88 IC 201—1925 O 406; but for a case where the period was 99 years was held not to be a clog, see 5 OWN 1091; also 5 OWN 974; 9 MLT 462—8 IC 1068. What has to be seen is whether the effect of such a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor, stipulation postponing redemption for 50 years may not be clog. 1933 L 373—34 PLR 902. Period such as forty years for redeeming a mortgage cannot be reduced by the Court where otherwise there is nothing unconscionable in the agreement. 130 IC 57—1930 L 1060. Where a mortgage-deed of 1898 provided that the mortgagors could redeem only on one day during the sixtieth year and if they failed to do so their right should be extinguished and the assignee from the mortgagors sued for redemption.

Held: the condition amounted to a clog, suit for redemption was not premature. 53 A 580—1931 ALJ 324.

14. Further Period in Default of Redemption

Where, under the terms of a mortgage if the amount was not paid at a certain time, the

right to redeem was to be suspended for a further period; it offended against the statutory right of redemption 42 *MLJ* 584—44 *A* 185—49 *IA* 60 (*PC*); 87 *IC* 909—1925 *O* 720; 13 *OLJ* 476—1926 *O* 38. But see contra 27 *ALJ* 606—1929 *A* 388.

15. Absolute sale in Default of Redemption

A provision in a mortgage with possession that the mortgage should not be redeemable for five years and that if the mortgage is not redeemed within a period of 20 years, the mortgagee should have the land absolutely as on a sale, is a clog on the equity of redemption and unenforceable and no bar to redemption even after 20 years. 41 *MLJ* 563—68 *IC* 717. See also 12 *OLJ* 105—86 *IC* 68; 80 *IC* 944—1925 *A* 34.

16. Stipulation for Permanent Lease

A stipulation in the mortgage-deed that the *raiya* lands which formed part of the mortgaged property would remain in the possession of the mortgagee and would not be restored to the mortgagor on the redemption of the mortgage is a clog on the equity of redemption. 148 *IC* 429—1934 *P* 397. Contemporaneous agreement to lease the land on permanent tenure and a mortgage of the property make the agreement of lease void as a clog on redemption. 46 *B* 409—64 *IC* 612—23 *Bom. LR* 1268. See 1923 *N* 115(1); 47 *A* 582—1925 *A* 497; 1910 *MWN* 708—7 *IC* 698—; 5 *Pat. LJ* 423—57 *IC* 337; 11 *NLR* 180—31 *IC* 869; 35 *M* 744; 21 *MLJ* 1910. See also 33 *Bom LR* 755; 53 *B* 360. (Even a subsequent permanent lease would be a clog.) The mortgagee is not entitled to enforce a permanent lease executed in his

favour by the mortgagor, where the terms of the lease were unfair and the bargain unconscionable or oppressive. 33 *Bom LR* 755. But see 16 *Pat LT* 119, where it was held that a permanent lease by mortgagor to mortgagee was not necessarily or always void but on the contrary, the proviso to section 60, Transfer of Property Act, contemplated that the equity of redemption might be extinguished without limiting the method of extinguishing it by sale of the equity of redemption to the mortgagee.

17. Tacking and Consolidation

Where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the earlier deed without redeeming the latter one is valid and enforceable, even against a subsequent transferee of the equity of redemption. 86 *IC* 932—1925 *O* 458; 29 *OC* 118—92 *IC* 675; 25 *OC* 134—1922 *O* 58; 65 *IC* 642—3 *LLJ* 432; 25 *ALJ* 1086—108 *IC* 149; 125 *IC* 27—1930 *A* 651; 75 *IC* 931—1924 *A* 832; 9 *OLJ* 484—1923 *O* 24; 12 *OLJ* 382—1925 *O* 505; 85 *IC* 328—1925 *O* 593; 1 *Luck.* 92; 29 *OC* 15; 1925 *O* 451. See also 96 *IC* 844—1926 *L* 633; 96 *IC* 197; 7 *L* 297—1926 *L* 494; 48 *A* 292—1926 *A* 506; 20 *ALJ* 86—65 *IC* 819; 1933 *L* 864. But see also 1923 *A* 454; 1930 *ALJ* 156—1930 *A* 136 (*FB*). A mere undertaking by the mortgagor to pay money advanced on a later security between the same parties along with the former is not a consolidation of the debts, 16 *OC* 267—22 *IC* 132. Where in a subsequent document there is a stipulation that without payment of the two sums the property previously mortgaged is not to be redeemed, the effect of the clause is

to create a further charge on the property. 90 IC 787—1926 A 171. See also 5 Luck 365—57 IA 173—59 MLJ 342 (PC).

A simple money bond subsequent to the mortgage-deed is not a deed of further charge. 3 O LJ 402—36 IC 709. In a suit by a mortgagor for redemption of his possessory mortgage the mortgagee is entitled to insist on the payment of the sum due under the tacking bond, if he is otherwise entitled to it, regardless of the question whether his suit on foot of that bond if brought at the time of the redemption suit would be barred by limitation. 1932 ALJ 595—1932 A 558.

18. High Rate of Interest

In no circumstances can a high rate of interest in the mortgage be construed as a clog on the equity of redemption, provided that the parties entered into the contract with eyes open and on equal terms, if the terms of the mortgage were clear and not equivocal. 1923 A 411; 7 O LJ 389—58 C 115.

Other Cases—Usufructuary mortgage—Usufruct not sufficient for interest on the whole amount—Provision for interest on remaining amount at rate fixed in the deed—Not a clog, when profits of mortgaged property not sufficient to cover interest on that portion of mortgage-money. 1929 O 30. See also 1927 O 595—100 IC 180—4 OWN 147. Where a mortgage-deed provided that it should not be redeemed until the expiry of 9 years and that the property should not be sold to a stranger unless the mortgagee is unwilling to purchase, such an agreement was not a clog on the equity of redemption or contrary to public policy and the same could be enforced against a purchaser with notice of

the covenant. 9 PLT 747—1928 P. 637. A provision in a mortgage-deed for the payment of "deorha" does not constitute a clog on the equity of redemption. 96 IC 538—1926 O 502.

A clause to the effect that the mortgagee would be free to build or rebuild the house and that in case of redemption, the mortgagor would pay the amount spent over the building or rebuilding with interest at 2 percent per annum does not amount to a clog on the equity of redemption. 1932 ALJ 1021. A provision that the property could be redeemed only when the entire mortgage-money is paid up by the appropriation of the profits is a clog and property could be redeemed at any time the mortgagor finds convenient. 13 OC 128—6 IC 997. See also as to a condition in a compromise amounting to a clog on redemption. 5 PLJ 644—58 IC 129. Where a compromise decree in a mortgage suit provided the relationship of mortgagor and mortgagee to continue and the remedy of the parties was to have recourse to execution of the decree:

Held: that the provision as to remedy was a clog since it fettered the right of redemption with a larger period of limitation. 53 M 805—1930 M 305. See also 14 NLR 184—48 IC 368. The English law regarding clog on redemption does not obtain in India, a provision that a mortgage shall not be deemed so long as there are fruit trees planted by the mortgagee standing on the mortgaged land is not a clog, and a suit for redemption is premature if brought while such trees are standing. 45 B 117—22 Bom. LR 1147. A condition in a mortgage of a house by a mother for her infant son, as to the liability of

the minor for improvements, does not justify the demolition and reconstruction of the house and the condition for interest on the sum expended on improvements is most inequitable and unconscionable. *59 IC 764—43 PWR 1921.*

19. Redemption Suits—Notice

In England a mortgagee ordinarily has a right to six calendar months' notice of intention to pay off the mortgage or in default thereof is entitled to six months' interest in advance in lieu of notice; but if the mortgagee has given notice calling in the debt, the mortgagor even though he is a few days late in complying with the notice and tendering the money is not bound to give six months' notice before redeeming. *25 Bom. LR 839—1924 B. 294.* This rule has no application to India or to cases under Transfer of Property Act.

20. Tender

Tender of mortgage-money is a condition precedent to institution of a suit for redemption *38 A 148—14 ALJ 55—34 IC 183.* See also *97 IC 348—1926 P 512.* Where the mortgage-money is stated to have been satisfied out of the usufruct, a tender would obviously be out of question. *43 A 95—59 IC 92—18 ALJ 947.* A suit for redemption cannot be dismissed merely because the amount tendered falls short of the amount actually payable or there is no tender owing to the existence of disputes about the amount. *92 IC 665—13 OLJ 330.* Redemption will not be allowed unless the amount found due is paid or tendered within the time fixed by the Court. *43 A 638—61 IC 812—19 ALJ 573 (FB).*

21. Deposit of Amount

In a suit for redemption deposit of mortgage amount is not a condition precedent. *6 P 102.*

22. Proof of Right to Redeem

Where, in a suit to redeem occupancy lands, the defendant in possession alleges that he has been in possession for a long period of time as owner, the Court need not enquire as to when the defendant's possession became adverse; the plaintiff must prove he has a subsisting right to redeem. *89 IC 788—1925 L 632.* Plaintiff must prove subsistence of mortgage on date of suit—Defendant recorded as mortgagee in partition papers is not sufficient. *96 IC 253(2)—1926 O 546.* No suit is maintainable for the redemption of a mortgage unless the plaintiff produces *prima facie* evidence of that right. *34 IC 207(A); 12 ALJ 102—22 IC 574.*

23. Defences

Where there is only a partial failure of the consideration payable for a mortgage, the loss occasioned in consequence of the failure can only be recovered by a separate suit, and cannot be set off in a suit for redemption. *6 OLJ 519—54 IC 313.* A suit under this section, which is absolute in its terms and applicable to all mortgages and which gives an absolute right to redeem, cannot be met by an agreement of preemption. *46 MLJ 389—1924 M 57.* In India, as in England, a mortgagor is entitled to compensation from his mortgagee for the loss of title deeds. He will have his remedy by way of a separate suit for damages, or even under the mortgage decree where the latter contains provision for it. *42 MLJ 356—1922 M 299.*

24. Second Suit

There can be no second suit for redemption when once a decree has been passed, though it does not fix time for payment and the consequences of non-payment. *5 O LJ 698—48 IC 922*. But see *33 Bom. LR 844*. If the decree in a redemption suit departs from the form required by section 92 Transfer of Property Act, and simply provides that in case of default by the plaintiff in payment "his case will stand dismissed" and no payment of the mortgage-money is made, the decree cannot be construed to be an order of a Court extinguishing the right to redeem within the meaning of the proviso to section 60, and a second suit for redemption is properly maintainable. *61 IA 362—56 A 461—67 MLJ 813 (PC)*. A mere dismissal of a redemption suit for default without going in any way into the merits of the case or perhaps even appreciating that the suit was one for redemption could not be said to be an order extinguishing the right of redemption. *52 B 111—30 Bom LR 34—1928 B 67*. See also *16 Bom. LR 687; 22 Bom LR 939; 30 Bom LR 1089*.

25. Limitation

Where a mortgage provided for redemption after a period of two years and further provided that in default the mortgagee could enter into possession of the property and retain it until the money was paid and appropriate the profits first towards interest and the balance, if any, towards principal and the mortgagee enters into possession when there was the default in payment, the limitation of 60 years for the purposes of redemption of such mortgage would run from the expiry of the two years period fixed in the deed. *1940 Oudh 428*.

Sections 60, 65(a) and 82

Suit to enforce subsequent mortgage—Duty to redeem prior mortgage on whom lies—Loss of mortgaged property in respect of prior mortgage—Apportionment of liability. *1942 NLJ 389*.

Sections 60 and 81

Under section 60 when a person having a second mortgage on part of the property covered by the first mortgage acquires the mortgagor's right in that part, he may redeem that part from the first mortgagee on payment of a proportionate part of the amount due to the first mortgagee. The second mortgagee is entitled to a marshalling of the securities by virtue of section 81, *1937 Rang. LR 13—1937 Rang. 220*.

Sections 60 and 82

A purchase by a mortgagee of a part of the mortgaged property has the effect of discharging and extinguishing that portion of the mortgage debt which is chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. The entire mortgage is not extinguished in such a case. *19 Pat. 524—21 Pat. LT 227—1940 Pat. 420*. A suit for partial redemption under section 60 of the Transfer of Property Act is a combination of a suit for redemption and one for contribution under section 82 of the Act. Under section 60 a person entitled to a share only of the mortgaged property cannot redeem his share only on payment of his proportionate share of the mortgage money except in the only case

where the mortgagee or where there are more mortgagees than one, all of them has or have acquired in whole or in part the share of a mortgagor. this is a special privilege conferred in that limited class of cases to avoid multiplicity of suits. Section 60 applies

equally in suits for sale or foreclosure also. Once a case falls within the above exception then in order to determine the price of redemption it is necessary to have recourse to the principles of section 82. *1942 NLJ* 289.

¹[60A.] **Obligation to transfer to third party instead of retransference to mortgagor**—(1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-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 shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

1. Sections 60A and 60B inserted by the Transfer of Property (Amendment) Act 1929 (XX of 1929), section 23.

60B. Right to inspection and production of documents —A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in his behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.]

¹[**61. Right to redeem separately or simultaneously**—A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.]

Case Law

Section 61—Law before and after Amendment

Under section 61 as it existed prior to the Act of 1929, where property is mortgaged again under a second mortgage with other properties to the same mortgagee, the mortgagee has a right to consolidate the mortgages. 15 P 742—1937 P 156. The effect of section 61 as substituted by Act XX of 1929 is to abolish the consolidation of mortgages whether in respect of the same property or different properties. This must now be considered to be the general rule subject, of course, to a contract to the

contrary. *168 IC 40—1937 OWN 337—1937 Oudh 321.*

Scope of Section

The doctrine of consolidation can only apply where a mortgagee holds a mortgage on property A and also a separate mortgage on property B belonging to the same mortgagor. In such a case after the expiry of the legal right of redemption the mortgagor in cases whether the right of consolidation is still applicable, is only allowed to exercise his equitable right of redemption of the one property on the terms of redeeming the other.

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 24, for the original section.

In the case, however, of a mortgagee holding a first mortgage on property A and a second mortgage on the same property, the mortgagor cannot on payment of the first mortgage redeem the property, unless he repays what is due on the second mortgage. But this is not because of the doctrine of consolidation but by reason of the fact that he had a second mortgage on the property. *67 IA 82—ILR (1940) 1 Cal 291—1940 PC 38—(1940) 1 MLJ 446 (PC)*.

Redemption of every separate mortgage should be permitted unless there is clear and unequivocal evidence to prove a contract between the parties to the contrary. *90 IC 613—1926 O 59(2)*. See also *44 M 301; 27 A 301; 3 P 829—1925 P 59; 14 NLR 184—48 IC 368; 40 MLJ 236*. [The following cases in which the contrary rule was laid down are not now good law. *54 IA 68—50 M 180—52 MLJ 338 (PC); 3 Luck. 459—1928 O 273; 112 IC 481*. See also *23 MLJ 475; 15 IC 605; 1927 M 1039; 52 B 111—1928 B 67*] Where there is no specific contract on behalf of the parties with regard to consolidation, the consolidation of several mortgages and amounts due under them in the same decree is illegal. *3 P 829—1925 P 59*. Both under the old section 61 and the law prior to its enactment, it was necessary for the consolidation of mortgages, that the two mortgages to be consolidated should have become united in title or come into the same hand, *23 MLJ 475—15 IC 605*. The expression "mortgagor" includes also his heirs and survivors. *11 OWN 559—1934 O 246*. The English doctrine that a right of consolidation can only arise when all the mortgages are made by the same mortgagor cannot be applied to India. *11 OWN 1601—1935 O 213*.

The mortgagors as a body could not be precluded from exercising their right to redeem the entire property mortgaged just because some of the mortgagors had executed deeds of further charge in favour of the mortgagee. The mortgagee has no case for making the plaintiffs pay off the deeds of further charge in that suit but he should enforce them by separate proceedings. *1936 OWN 230—1936 O 202*. Where the father of a Hindu joint family executed a mortgage of family property by way of conditional sale and after his death, his sons, one of them being the manager, executes another mortgage expressly stipulating that they will have no power to redeem the property without payment of the previous mortgage-money and the amount of the latter in a lump sum, the mortgagee has a right to consolidate the two mortgages and insist on payment of both before redemption, as the stipulation for simultaneous redemption amounts to a contract for consolidation. The fact that a suit on one of the mortgages could be barred by limitation on the date does not defeat the mortgagee's claim to consolidation, because there is no limitation to a claim pleaded in defence, and because the mortgagee's claim cannot be extinguished so long as his lien by possession exists. *11 OWN 1601—1935 O 213*.

A contract that, of two mortgagees in favour of the same party, the later one should be redeemed first is not to consolidate both. *38 A 393; 1926 P 59*. In such a case if the later becomes barred and irredeemable, the former can be redeemed. *37 A 634; 52 IC 622 (M); 32 MLJ 317; 19 A 496; 33 MLJ. 581; 40 IC 404*. Where a mortgagor subsequent to the execution of the mortgage deed takes a further loan on a simple money bond or on a

subsequent mortgage and agrees that he will not redeem the mortgage without discharging the subsequent loan, such an agreement can be enforced by the mortgagee. See *26 A 559; 18 M 368; 1925 O 593; 31 A 482; 1925 O 506; 3 L 459; 92 IC 772; 48 A 292; 1928 P 582; 3 ALJ 768; 25 IC 905; 5 Luck. 365—59 MLJ 342—1930 PC 176; 1922 A 403 (1); 18 IC 718; 9 IC 52; 55 IC 509; 64 IC 830; 1926 O 59; 55 A 359 1933 A 257 (FB); 47 LW 686—1938 Mad. 862*. Consolidation in the same decree of amounts due under several mortgages in the absence of a contract to that effect is illegal. *1925 P 59*. The contract should be clearly made out. *90 IC 613—2 OWN 753*.

The rule of consolidation is not applicable against purchasers of the equity of

redemption. *44 M 301—40 MLJ 236*, but see *24 OC 240—64 IC 83; 51 IC 897*. It is applicable only where the equity of redemption is not severed. *58 IC 129—5 Pat. LJ 644; 50 IC 897*. A provision in a mortgage bond that the money would be paid along with the money due under an earlier mortgage without any words restraining the mortgagor from redeeming the earlier mortgage without payment of the money under the later mortgage, is not sufficient to constitute a contract to the contrary within the meaning of section 61, and the deed is, therefore, governed by the general rule contained in the section. *168 IC 40—1937 OWN 337*. (See also *under section 60*).

62. Right of usufructuary mortgagor to recover possession—In the case of an usufructuary mortgage, the mortgagor has a right to recover possession of the property ¹[together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],

- (a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;
- (b) where the mortgagee is authorised to pay himself from such rents and profits ²[or any part thereof a part only of the mortgage-money]—when the term, if any, prescribed for the

1. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 25.

2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 25 for "the interest of the principal money".

payment of the mortgage-money had expired and the mortgagor pays or tenders to the mortgagee¹[the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided.

Case Law

Section 62—This section is to be read as supplemental to and along with section 60; see *43 A 95*. Section 62 applies only to usufructuary mortgages, pure and simple, and not to anomalous mortgages; and is not in any way inconsistent with the provisions of section 61. *54 IA 68—50 M 180—52 MLJ 338 (PC)*; *3 Luck. 459*. Though the Act does not apply in terms to a transaction prior to the passing of the Act, the rules in section 62 might be applied in a proper case as the general law in force before the Act was passed. *86 IC 353—1925 C 862*. Usufructuary mortgagee of a house cannot claim sums spent by him for ordinary repairs, because he is bound to pay all normal expenses for rents and profits. *1929 A. 348*. The section cannot apply to a case, where from the conditions of the mortgage, accounts have to be taken between the parties *27 IC 427—17 OC 388*. When the right to possession has automatically been determined by the terms of the mortgage, the mortgagor can maintain a suit in ejectment. *46 IC 743—15 NLR 101*. Section does not apply to a case where there is a usufructuary mortgage and also a simple mortgage on the property sought to be redeemed. *1928 O 273—3 Luck. 459*.

Section 62, Clause (a)—Clause (a) applies where mortgagee is to pay himself the principal and interest out of the rents and profits of the mortgaged property and the mortgage-debt is discharged from such rents and profits; until the discharge of the debt the mortgagee can remain in possession. *48 MLJ 363—1925 M 825*. See also *16 M 486*; *6 CPLR 43*. (Even if the deed fixes a time for redemption, time is not of the essence of the contract; and if the debt is discharged before that time out of rents and profits mortgagor would be entitled to redeem and get possession. See also *35 M 744*; *5 OLJ 263*).

Section 62(b)—A mortgagor can redeem an usufructuary mortgage and get possession without redeeming a prior simple mortgage. *44 M 301—40 MLJ 236*. Section 62 does not limit the right of the mortgagor to proceed only against the mortgagee in a redemption suit, and to avoid multiplicity of proceedings; the Court is not debarred from giving a decree in a redemption suit against persons who have derived title from the mortgagee. *101 IC 728—1927 M 703*. The word 'term' in section 62(b) must be read to mean a reasonable term or a term which does not amount to a denial of the right to redeem. *131 IC 520—1931 ALJ 324*. On this clause, see also *24 A 521 (PC)*; *48 MLJ 363*.

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929); section 25, for "the principal money".

63. Accession to mortgaged property—Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired by virtue of transferred ownership—Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money,¹[with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum].

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

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

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 26, for "at the same rate of interest."

Case Law

Section 63—Accession to mortgaged property—Principle governing rights of mortgagor and mortgagee.

Section 63 of the Transfer of Property Act refers to the mortgagor's rights to accession made by the mortgagee. Accessions are treated as accession to the mortgaged property. The section does not make it a condition that the mortgagee should have made the acquisition by availing himself of his position as such mortgagee.

The important question is, whether the mortgagee by availing himself of his position, as such, gained an advantage in derogation of the rights of the other persons interested in the property. If it is made not in derogation of the mortgagor's right then the mortgagees are entitled to the accession, otherwise not. *Abdul Malek vs Sahar Ali Gazi. PLD 1956 Dacca 114—PLR 1953 Dacca 483.*

—Mortgagee liable to pay rent—Property sold for arrears of rent and purchased by mortgagee enures for benefit of mortgagor.

Where a usufructuary mortgagee takes upon himself the burden of paying off the rent of the property under mortgage and makes the stipulation that if for any default in payment of rent, the mortgage property is lost on account of sale for arrears of rent and purchased by the mortgagee or his successor in interest, that purchase will ensure to the benefit of the mortgagor, specially where the purchase takes place in relation to a decree for arrears of rent for the period under mortgage. *Mvi. Safayat Ali Shah vs Annada Prosad Roy 7 DLR 222.*

Mortgagor liable to pay cost for improvement when any of the tests under the section is fulfilled. *State Bank of Pakistan vs Khaledar Ma 14 DLR 735.*

Section 63 : Scope

Where an accession is capable of severance, upon redemption a mortgagor is entitled to take over the accession to the mortgaged property on payment of the cost of the acquisition but he is not obliged to take them. *163 PWR 1917—42 IC 468.* See also *10 CLJ 83; 4 IC 357.* For the purpose of this section the accession should have taken place before the mortgage becomes extinguished *41 MLJ 490—70 IC 367; 10 CLJ 83.* See also *1935 P 360.* *Accession by alluvion* is a natural accession under this section and can be redeemed by the mortgagor along with the other property without payment of any additional moneys. *11 Bom. HRC 32.* It is doubtful whether the planting of trees can come under any circumstances within the phrase '*any accession*' except it may be in those cases in which the planting of trees is a step taken to preserve the property, e.g., to prevent erosion by water. *113 IC 405—1929 A. 330.* See also *92 IC 262—13 OLJ 243; 48 A 70—1926 A 67; 22 A 83.*

Fruit trees planted on land by mortgagee are not capable of separate enjoyment and mortgagor is not liable for compensation if they are not planted with his assent nor for preservation of land. *8 R 233—1930 R 63.* Planting of groves by mortgagee without mortgagor's consent. *1225 A 748; 92 IC 268.* Rebuilding fallen house is not accession. *1929 A 348; 37 A 81; 20 ALJ. 887.* See also

AWN (1883) 201 (construction of building by mortgagee without consent of mortgagor); *26 IC 712*. Digging a well on the mortgaged property.) Where only a temporary structure is put up to the land it would be difficult to call it an accession to the mortgaged property within the meaning of section 63 or section 70. *1931 ALJ 273 1931 A 277 (FB)*. Where the *kachcha* house which stood on the site mortgaged fell and the mortgagees put up a valuable building on the land, held the accession was capable of separate enjoyment without detriment to the principal property. *26 ALJ 887—1928 A 381*. As to machinery in the building. See *1933 Rang. 195; 1939 Mad. 684—(1939) 1 MLJ 692 cited under section 70*.

Where a stable was built on the mortgaged property by the possessory mortgagee the mortgagee could remove the materials of the stable without injuriously affecting the other property. *1932 ALJ 493—1932 A 500*. Where it appeared that the rebuilding was within the contemplation of the parties when the mortgage was executed the mortgagee can recover the value of the improvements. *7 OWN 488—1930 O. 337*. An extension into adjoining Government waste land made by the mortgagee is not an accession to the mortgaged property. *76 IC 816—1924 R 131; 1 Bur LJ 262—1923 R 127; 162 IC 383—1936 R 127* (But see *4 Bur LT 167—11 IC 808*, where a recent extension of a small area was treated as an accession) See also *1 LW 102—22 IC 609*. Where the mortgagee had been in possession of extra land, not as if it were an accretion to the property in the original mortgage, but as a substitution through mistake, the mortgagor in a suit for possession would be entitled to recover that property. *1923 B 42(1)*.

Though the general rule is that accretions to the mortgaged properties are subject to redemption, mortgagee may, if he chooses, keep them for his benefit and distinct from the mortgaged property (i.e.) in cases where the accession is separable from the main property. *2 Pat. LT 225—60 IC 308*. Section 63 cannot be read as entitling the mortgagor to recover on redemption acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within section 90 of the Trusts Act. The mortgagor is not entitled on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property, without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. *34 LR 1310—63 MLJ 116 (PC)* As to what amounts to accession to mortgaged property, see *118 IC 314*. New area covered up by extensions is not an accession. *11 IC 808—41 Bur LT 167*. See also *85 IC 690—1925 A 794; 86 IC 929—1925 A 748; 47 A 307—1925 A 427*.

A mortgagee in possession has a right to the value of any additions reasonably made for the benefit of the property and which added to the selling value of the property. *16 IC 635—10 ALJ 124*. See also *47 IC 751—5 O LJ 513; 26 IC 712—10 NLR 166*. New shares purchased out of dividends of old shares mortgaged are accessions to which the mortgagor is entitled. *23 Bom. LR. 1279*. See *87 IC 269—1922 B 370*. The mortgagor is entitled to only so much of the acquisitions as were made as mortgagee. *44 IC 266*. Where a mortgagee executed on

behalf of a minor by the certificated guardian without the permission of the District Court was declared void, there is *ab initio* no relationship of mortgagor and mortgagee. Sections 63 and 72 are not therefore applicable and the so-called mortgagee is not entitled to add the cost of any improvements made by him to the mortgage-money. 124 IC 731—1931 A 201. See 19 IC 90—17 CWN 586; 63 PR 1918—44 IC 266; 23 ALJ 915—1926 A 67; 56 IC 193. Where the mortgagee allows mortgagor to remain in possession of the accession as occupancy tenant a subsequent mortgagor cannot claim it as accession. 8 Pat. LT 23—1926 P 572.

Co-sharer—Some holding mortgage in respect of sharers of rest and in possession—Eviction of tenants and bringing holding under own cultivation. Holdings recorded as *sir* and *khudkasht*—If

accretion—Right of the other co-sharers. 1937 A 321. During the currency of a mortgage of *khoti* lands, the mortgagee purchased *khoti nizbat* lands in the village from the occupancy tenants without the permission of the mortgagor, the mortgagors sold the equity of redemption to the mortgagee and two years later sold a share in the *khoti nizbat* lands, purchased by the mortgagee, to the plaintiff:

Held: that, whether the lands are regarded as *khoti khasgi* land or as *khoti nizbat*, they should be treated as an accretion to the mortgaged property which vested in the mortgagors on redemption and were included in the sale of all the "privileges and rights" of the mortgagor to the mortgagee and that the plaintiff acquired no right to the same by his subsequent purchase. (20. LR 681, Foll.) 34 Bom.LR 855.

¹[63A. Improvements to mortgaged property—(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the

1. Section 63A, inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 27.

security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.]

Case Law

Section 63A—[NB—This section has no retrospective operation. (See Section 63 of Act XX of 1929).] Mortgagee is not entitled to compensation for the "kacha" kotha built by him on the mortgaged property. He can only remove the material. 149 IC 969—1934 L 242.

Sections 63 and 63A. Rents and Profits

The property is mortgaged only as a security for the mortgage-debt and rents and profits received, must be applied towards the mortgage-debt. If the mortgagee has incurred the cost of improvements which have yielded

the rents and profits, he is of course entitled to claim the cost with interest, but there is no justification for allowing the mortgagee to retain anything more out of the profits over and above his outlay on the improvements and interest thereon. 42 PLR: 196—1940 Lah. 199. Under sections 63A(2) and 72 a mortgagee can add to the principal the cost of improvements only where they have been necessary to preserve the property from destruction or deterioration, or to prevent the security from becoming insufficient. 41 PLR 80; 1939 Lah. 129.

64. Renewal of mortgaged lease—Where the mortgaged property is a lease^{1*} * * and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

1. The words "for a term of years" were omitted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), sections 28 and 29.

Case Law

Section 64—The principle of this section is that where trustees, mortgagees and other persons get a renewal of a lease the benefit of such renewal would accrue to the benefit of the beneficiary or mortgagee 6 CWN 372. The presumption is that the renewal of a lease by the mortgagee is made for the purpose of keeping alive the security. 5 C 198.

Section 64—A property can be transferred by a deed of conveyance—

Contract of sale does not pass title to the property. *Ashutosh Mali vs Shamsunnaha*. 33 DLR 254.

—Transfer does not date back to the date of agreement for sale

Date on which registration of the kabala takes place would be date for determining the status of tenancy 33 DLR 254.

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

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;
- (b) that the mortgagor will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;
- (c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;
- (d) and, where the mortgaged property is a lease^{1*} * *, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the

1. The words "for a term of years" were omitted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), sections 28 and 29.

security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

- (e) and, where the mortgage is second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance.

¹[* * * * *]

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

Case Law

Sections 65 and 66—Mortgagor in possession entitled to create leases.

A mortgagor in possession being the owner of his property is not only entitled to create leases like patni and permanent leases but may do so irrespective of their effect upon the mortgage security, provided only that they are not wasteful or destructive within the meaning of section 66 of the Transfer of Property Act.

The principle limiting the right of the mortgagor to alienate or create any interest with respect to the mortgaged property which is peculiar to English Law has no application to the mortgages in this country.

Since the mortgage money in a mortgage without possession can never be fixed the right of the mortgagor property to create interest in the mortgaged property must

1. Certain words were omitted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 29..

depend on the state of the mortgage account at the moment of the creation of such interest. *4 DLR 15.*

Section 65

Section enumerates implied contracts by mortgagor and does not cast any duty upon him to make any disclosure of previous encumbrances. *30 NLF. 303—150 IC 20—1934 N 149.* Section applies only "in the absence of a contract to the contrary". See *1 B 45.* And it may be either express or implied. *4 MLT 437.* A mortgage-deed executed by manager appointed under the Guardian and Wards Act limits the ordinary rights of a mortgagor in possession. *1 Pat LJ 563.*

Section 65(a)

The estoppel referred to in section 65(a) operates not only personally against the mortgagor but also against a subsequent transferee of the mortgagor. *1929 M 483.* See also *1925 R 130—85 IC 223* (Covenant for title runs with the land).

A mortgagee can sue on his mortgage to enforce his charge on lands belonging to mortgagor who had by mistake included in the deed some lands which he had no power to charge. *19 IC 423 (C); 73 IC 902—1923 A 584.* (See *25 PWR. 51* for case where subsequent mortgagee was not informed of the existence of prior mortgage.) The mortgagee is not entitled to compensation when he is aware of a defect in title of mortgagor. *35 A 48—40 IA 31—25 MLJ. 91 (PC).* The right of compensation for breach of covenant could not be taken away except by express release or an implied acquiescence. *28 MLJ 184—27 IC 989.* Mortgagee purchasing property at Court-sale can sue for

refund of excess price paid if mortgagor had no title as to portion of property. *85 IC 223—1925 R 130.*

The interest of both the mortgagor and mortgagee passes to the purchaser at the sale of the mortgaged property in execution of a decree obtained by the mortgagee against the mortgagor on the mortgage. The mortgagor must consequently make good to the mortgagee, where he is the purchaser at the execution sale, loss sustained by him for breach of the covenant of title involved in the contract of mortgage. *43 LW 627—1936 M 433.* A purchaser of mortgaged property at a sale in execution of a decree is estopped from denying the validity of the mortgage. *139 IC 695(A).*

Section 65(b)

A mortgagee in possession must give notice to the mortgagor to enable him defend his rights if he is threatened or obstructed by any person claiming as true owner. *36 B 185—12 IC 913—13 Bom LR 1200;* see also *9 B 435;* where mortgagee is deprived of a portion of the security by act of the mortgagor, he is entitled to get additional security or to sue for the mortgage-money; see *54 IC 785.*

Section 65(c)

The mortgagor is bound to pay the land revenue on the mortgaged property and the mortgagor's heirs are also bound by the implied terms as well as by the express terms of the mortgaged deed. *1937 Nag. 225.* Duty to pay public charges is in the nature of a personal covenant not running with the land. *39 M 959—30 MLJ 331; 30 M 67.* The liability extends to the purchaser of the equity of redemption. *17 IC 878—5 Bur. LT 268; 39*

M 959. Where the mortgaged land is sold for arrears of revenue and repurchased by the mortgagor, the mortgage is not extinguished. *51 IC 574—12 Bur. LT 41; 17 IC 878—5 Bur. LT 268.* See also *26 M 385.* Prior to amendment of 1929, where only part of the rents and profits were to be adjusted towards the mortgage-money and the balance to be paid to the mortgagor, it is not an usufructuary mortgage but an anomalous mortgage. Where, service inam was enfranchised and converted into ryotwari land assessed to revenue, the assessment should properly be paid by the mortgagor. *1931 MWN 595.*

Section 65(d)

Where the mortgagee enters into possession, he becomes liable to pay the rent. *29 B 391.* (See *2 CLR 323*) where the mortgagee was deemed to be in possession having collected rents from the subordinate holders); it would be otherwise if the mortgagee is not in possession. *13 M 193.*

Section 65(e)

Where the mortgagor does not pay off a prior mortgage debt on its becoming due, there is a breach of the implied covenant contained in clause (e); and if on that account the subsequent mortgagee is deprived of his security, the mortgagee would be entitled to a personal decree against the mortgagor on

account of the breach of this covenant, although there was no personal covenant to pay in the deed of mortgage. *13 M 92; 25 WR 51.* A prior mortgagee can add the necessary expenses of repairs to the amount of his mortgage as against the second mortgagee. *16 IC 877—38 M 18.*

Sections 65 and 82

A subsequent mortgagee is given an opportunity to redeem a prior mortgage but he is not bound to avail himself of it. If he does, he steps into the shoes of the prior mortgagee and himself forecloses. He thus recovers the property freed from his own mortgage and still has the privilege of placing the whole burden of the debt due on his own mortgage on the rest of the property. Section 65(e) recognises this and so places the duty of redemption on the mortgagor. If he fails in this duty such loss as may ensue would fall on the mortgagor or those who represent him and not on the mortgagee, the mortgagee's position cannot be worsened by anything done by the mortgagor behind his back and subsequent to his mortgage. In such cases the whole of the debt after deducting the subsequent mortgagee's share should be spread over the remaining items of property and this share should be determined by taking the whole of the mortgaged property as existing at the date of the mortgage into consideration. *1942 NLJ 289.*

¹[65A. Mortgagor's power to lease—(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.]

1. Section 65A, inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 30.

Case Law

Section 65A—[This section has no retrospective operation.] 1936 M 942—71 MLJ 638. See 10 P 332—12 Pat. LT 206; 1940 Mad. 669—(1940) 1 MLJ 601 (see notes under section 66). As to lease granted by a mortgagor who has created an English or anomalous mortgage without the concurrence of the mortgagee, see 128 IC 655—1930 PC 290 (PC). A lease by a mortgagor in possession subsequent to a decree on the mortgage and pending execution cannot bind the mortgagee or the auction-purchaser who stand in his shoes. 33 Bom. LR 1123—1931 B 539.

Sections 65A and 66—Principle of the section also applies to Punjab and places where the Act is not in force. 124 PLR 1902, the mortgagor in possession may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. This view is now embodied in section 65A. 10 R 210—1932 R 113. So a lease by mortgagor for three years is not binding on the mortgagee 10 R 210.

Conditions for the exercise of the right to lease by the mortgagor. 1933 M 876—65 MLJ 826. Mortgagor in possession can *prima facie* exercise the ordinary rights of an owner in possession. 34 IC 24. See also 1938 Pat. 189. Where a mortgagor in possession commuted the produce rents due from his tenants into cash rents, the mortgagee cannot impeach the

commutation or set it aside at least so long as it was an honest conversion at a fair and reasonable rate. 12 PLT 121—1931 P 193. The onus of proof of waste or prejudice under section 66 lies on the mortgagee. 24 IC 758—16 Bom. LR 178. But see 124 PLR 1902. A simple mortgagor can create a lease but not so as to impair its value or impede the operation of the mortgage. 32 IC 195—20 CWN 350; 88 IC 947—1925 O 542; 15 OC 239—16 IC 476; 17 IC 1—17 CLJ 384. (See now section 65A) Prior to the introduction of section 65A in 1929 the mortgagor in possession of the property in the case of a simple mortgage was entitled to transfer or deal with the property in any way he liked provided the mortgagee's security was not rendered insufficient. He could grant permanent leases subject to the same condition and so the mortgagee who purchases the property in execution of his own decree is not entitled to eject the *mokarrari* lessee without showing that his security was prejudicially affected. 10 P 332—12 PLT 206. See also 8 OWN 131—1931 O 256; 1935 ALJ 360—1935 A 511.

Section 65A has no application to a lease executed prior to its enactment. Such a lease is governed by section 66. Where the mortgage security becomes insufficient ultimately on account of the lease, though not at the time of its execution, the lease cannot be enforced against the mortgagee auction-purchaser, especially when its terms are so prejudicial to the interests of the mortgagor himself that it is impossible to consider it as given in the ordinary course of management. 162 IC 225—1936 OWN 399—1937 Oudh

146. Mortgage by *jenmi* of equity of redemption—Subsequent renewal of *kanom* demise by *jenmi*—Not binding on mortgagee. 1933 M 876—65 MLJ 826.

A mortgagor who has created an English mortgage or anomalous mortgage cannot grant a lease without the concurrence of the mortgagee. 128 IC 655—1930 PC 290(PC) See also 57 C 82—1930 C 335. Tenants who are settled on the land by the mortgagor after the mortgage can keep their land against the mortgagee upon proof, that the leases were granted on the usual terms in the ordinary

course of management. 7 P 349—1928 P 372; 12 CLJ 384—17 IC 1; 1 PLT 392—56 IC 805; 1 PLJ 563—38 IC 37. The test by which the mortgagor's lease should be judged is that stated in section 66, i.e., whether they were destructive or permanently injurious to the property, likely to render the mortgagee's security insufficient and a permanent lease of *bakasht* lands to a tenant may not be outside the scope of the authority of the mortgagor in possession. 107 IC 156—1928 P 238. See also 12 OJL 276—30 IC 258. See now section 65A).

66. Waste by mortgagor in possession—A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

Case Law

Section 66—Lease by mortgagor—Mortgagee bound by lease when security is not rendered insufficient.

Chakravarty vs Jitendra Narayan Chowdhury, PLD 1952 Dacca 409—PLR 1951 Dacca 829—4 DLR 15.

A mortgagor in a simple mortgage can permanently lease out mortgaged property provided by such act the mortgage security is not rendered insufficient. *Kali Prasad*

—A mortgagor creating a simple mortgage does not part with possession, and the right of the mortgagee is only to cause the mortgaged property to be sold for the

payment of his debt. Where lease executed by the mortgagor are questioned by the mortgagee, the burden is not on the lessees to prove that the leases were usual and given in the ordinary course of management, especially where the mortgagee's dues are satisfied by sale of the mortgaged property. A lease granted by the mortgagor cannot be presumed to be bad under section 66 of the

Transfer of Property Act. Section 66 is intended to apply generally to all cases where a mortgagor has done acts which either destroyed or injured the property in his possession, and if by such act on his part the security is rendered insufficient and applies to a lease granted by a mortgagor in possession. *1938 PWN 177—19 Pat. LT 95—1938 Pat. 189.*

Rights and Liabilities of Mortgagee

⊗ **67. Right to foreclosure or sale**—In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become ¹[due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court ²[a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property, or ²[a decree] that the property be sold.

A suit to obtain ²[a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

³[(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 31, for "payable".
 2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 31, for "an order".
 3. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 31, for the original clause.

institute a suit for foreclosure, or an usufructuary mortgagee, as such, or a mortgagee by conditional sale, as such, to institute a suit for sale; or]

- (b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or
- (c) to authorise the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- (d) to authorise a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Case Law

Section 67—Mortgagor—when he is barred to redeem the mortgaged property.

Even in the case of mortgage by a conditional sale the mortgage does not automatically mature into a sale. Section 67 of the Transfer of Property Act confers upon the mortgagee, any time after the mortgage-money has become due to him and before a decree has been made for redemption of the mortgaged property, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property or a decree that the property be sold. *Hasina Begum vs Haji Md Ekramullah 34 DLR 116.*

—Right to redeem, in case of Mortgage by conditional sale.

If the mortgage is not foreclosed and the mortgagor's right to redemption is not

debarred. So far as the right to redeem is concerned, a mortgage by a conditional sale like other mortgages will be governed by provisions of the Transfer of Property Act. *Hasina Begum vs Haji Md Ekramullah 34 DLR 116.*

—Stipulation that if money is not paid within 15 years the purchaser shall have right to foreclose—section 67 applies. *Moulvi Ruhul Amin vs Bazal Huq 31 DLR 165.*

Section 67—The amendment of 1929 did not import new principles. It was introduced not to alter the law but to make it more clear. *161 IC 155—1936 Pesh. 48.* Section 67 does not apply to securities created by operation of law, and thus the owners of such securities cannot avail themselves of the benefit of the section. But the Act is not exhaustive and

does not deal with a charge under section 205, Calcutta Municipal Act. That will be governed by rules of English law, and the holder of a statutory charge is entitled to a decree for sale. 38 CWN 917—1934 C 862. Section is mandatory. 112 IC 501—1928 M 933. A mortgage cannot be enforced nor can the lands attached be brought to sale otherwise than in accordance with section 67. 6 MLT 154—2 IC 980. Where the mortgage deed provided that if the interest for two instalments be not paid in full, the mortgagees will have the option before the expiration of the period fixed to recover the whole of the amount due through Court, the mortgagee could exercise the option. 8 Luck. 488—1933 O 237.

The option given to the mortgagee did not contravene the provisions of section 67. 11 OWN 1141—1934 O 473. A mortgagee can sell the property as it stands at the date of his mortgage. A decree based on a *puisne* mortgage is subject to prior encumbrances existing at the date of the second mortgage. 8 OWN 179—1931 O 157. Even though a *puisne* mortgagee is not a party to a decree obtained by the prior mortgagee, yet it is open to the prior mortgagee, when he has obtained possession under a sale in execution of a decree in his favour in a mortgage suit to set up his rights under the prior mortgagee as a shield against a *puisne* mortgagee. 1931 Oudh 157. A decree for sale cannot be passed on a mortgage by *conditional sale*. 27 ALJ 448—1929 A 421. The only decree that can be made is one for foreclosure. 11 M 88. A usufructuary mortgagee cannot, as such, sue for sale, but he can do so if the document allows him to do so. 33 CWN 279—1929 C 304; 56 M 892—1933 M 613—65 MLJ 194.

See also 11 PLT 74—1930 P 152; 63 IC 297—2 PLJ 229; 34 PLR 245—1933 L 151; 19 OWN 1027.

Usufructuary mortgagee looks to the rents and profits for the satisfaction of his advance and inasmuch as no time is fixed for payment there can be no forfeiture, which alone gives right to the remedies of closure and sale and in its absence the mortgagee is not entitled to the remedies that spring out of it. 181 IC 620—1938 Lah 145. See also 161 IC 155—1936 Pesh. 48. Usufructuary mortgagee empowered to sue for mortgage-money if possession interfered with—Initial failure of mortgagor to deliver possession of part of mortgaged property—Mortgagee entitled to sue only for recovery of possession *plus* mesne profits, for three years and not for sale. 1932 ALJ 1092—1933 A 97. Where in combination of a simple and a usufructuary mortgage, the mortgagors failed to make over possession to the mortgagee and thereby deprived the mortgagee of part of his security, the money becomes payable and the mortgagees are entitled to a money decree for the same and under section 67 a decree for sale can be made. 58 MLJ 401—33 CWN 693; 56 IA 299 (PC) See also 34 Bom. LR 984—1932 B 558; 20 NLJ 145. (Anomalous mortgage—Remedy by way of sale). Mortgage can be foreclosed even if fraction of debt remains unpaid. 1930 N 166. It is the duty of the mortgagees who take possession to keep clear, full and accurate account of all amounts received as mortgagees. Mere oral evidence would be wholly inconclusive. 115 IC 137—1929 A 384.

The stipulation in a mortgage-deed that, if the profits of the property mortgaged be found to be insufficient, the mortgagor shall

pay the deficiency in interest from year to year, cannot apply to a case where the profits have not in fact decreased, but the mortgagees have, owing to their own default, failed to recover them. *114 IC 876—1929 A 260(2)*. Where a mortgagee holds several mortgages from the same person and is paid out of the sale proceeds of one security, he must apply the amount in reduction of the amount under that security and cannot apply it to unsecured debt or debts secured on other securities so as to affect other mortgagees. *40 MLJ 126—62 IC 833*. In a decree for foreclosure after expiration of the period of grace, property passes to the mortgagee. In a decree for sale the mortgagor has time till the sale is held and afterwards confirmed by the Court. *46 A 864—1924 A 818(2)*. The Court has the power to appoint a receiver even in a suit by a simple mortgagee if the property is insufficient to meet the decretal amount. *34 PLR 950(1)*. But where there is no personal covenant to pay, or the covenant has become barred or the simple mortgagee has deliberately given it up and the decree does not and cannot contemplate a personal decree for any deficiency the Court has no power to appoint a receiver. *1933 MWN 29—1933 M 447*. A sub-mortgagee may sue his mortgagor or mortgagor's mortgagor, whether it is a simple debt or mortgage debt. *14 CWN 1653; IC 311*.

Where the mortgagee assigns his interest for a lesser amount than that due to him, the assignee cannot recover from the mortgagor more than what he paid and reasonable interest thereon. *8 MLT 420—7 IC 841*. Properties covered by security bond given for stay of execution of a decree can be proceeded against in execution without instituting a suit under

section 67. *51 C 150—81 IC 734*. There need be no assignment to the person for whose benefit the bond is intended. *60 C 1298—37 CWN 973*. Decree-holder can proceed against the properties secured by a surety, when the original party makes default. *38 A 327*. The mortgagee has always a personal remedy against the mortgagor. *10 IC 975*. Mortgagee can bring properties to sale in any order he pleases. *22 LW 389—1925 M 1214; 92 IC 593*. The right of suit in mortgagee is not lost by a third party claiming title by adverse possession against the mortgagor. *44 C 425—21 CWN 177; 27 CLJ 212—37 IC 277*. Maintenance decree-holder with a charge on the property can enforce the charge in execution of the decree. *59 IC 282—1 Pat. LT 647*. The mortgagee may release his rights over any one of the mortgagors claiming only proportionate share of the mortgage debt. *36 IC 530; 10 P 341—12 Pat. LT 28—1931 P 164*. But the mortgagee is not bound to abate a proportionate part of the debt and is entitled to recover the whole amount against any portion of the mortgaged property. *130 IC 809—1931 N. 44*. See also *1929 A 380* and cases cited under section 82. But the released mortgagor is a necessary party to a suit. *36 IC 530*.

Though the principal may be payable at some date, for payment of interest shorter dates may be fixed and suits for interest alone can be maintained. *31 MLJ 437*. See also *35 IC 104; 26 B 241; 27 C 938*. The enforcement of the right to foreclose is controlled by any contract to the contrary. If the effect of the deed be that neither the mortgagor had the right to repay and redeem the mortgaged property nor the mortgagees had the right to recall the money and to sue for foreclosure before the expiry of five

years, limitation for a suit for foreclosure runs from the first date after the expiry of five years and not earlier even if the mortgagees had bargained for possession and never got it. *9 OWN 280—1932 O 178*. As to right of suit for sale under section 67 where mortgage in respect of properties in Burma and British India executed prior to separation of Burma. See *1939 Ran LR 372—1938 Ran. 459*.

Section 67(a), clause (a) newly substituted in 1929 is not retrospective. A decree for sale can be passed on an English mortgage. *26 CWN 318—1922 C 52*. A simple mortgagee is always entitled to decree for sale even though he has a right of possession on failure to pay interest. *15 CN 441—10 IC 272—21 MLJ 1147 (PC)*. See also *19 M 239*. There is nothing to prevent the parties agreeing to allow a foreclosure for interest only or for part of the mortgage-money. *48 A 171—24 ALJ 88—1926 A 46*. Even an usufructuary mortgagee can bring a suit for sale when a time for payment has been fixed and there is a personal covenant to pay. *1 P 350—3 PLT 332*.

But if there is a further stipulation that, if the mortgage amount is not paid, mortgagee would continue in possession, the mortgagee is not entitled to sue the mortgagor for sale of the property on failure to pay the mortgage-money on the fixed day. *120 IC 308—1930 P 152*. This would be so even where it was further provided that, if the mortgagor did not exercise his right to redeem during the 16th year, he would have to pay certain interest on the principal sum from the date of the mortgage up to the date of redemption, in addition to repaying the principal and costs of improvement. *161 IC 155—1936 Pesh. 48*.

Where a mortgage is a *combination of usufructuary and simple* ones, the two rights are independent, and the mortgagee may sue for sale, though he may have given up possession. *6 IC 153(C)*. See also *14 M 232; 26 M 526; 34 B 462; 26 MLJ 514; 1 P 350*. In such a case, it was held that the mortgagee can bring the property to sale only according to the conditions set out in the deed. *6 NLR 20—5 IC 701*.

A usufructuary mortgagee cannot sue either for sale or foreclosure. *41 M 259; 12 M 109; 63 IC 297—2 PLT 229; 27 IC 800*. A suit for sale can however be maintained if the mortgagor fails to deliver possession of the mortgagee, *41 M 259*. The effect of section 31(c), read with section 63, of Act XX of 1929 if that so far as English mortgages executed prior to the 1st April, 1930, are concerned, they must be deemed to be outside the scope of the amendment made by substitution of the new clause(a) in section 67 of the Transfer of Property Act. This being so, suits on such mortgages must be held to be governed by Article 147 and not by Article 132 of the Limitation Act. *1942 C 153—46 CWN 33*. See also *41 IC 406; 1929 C 304; 30 A 162*.

Clause (b)—The remedy of the mortgagee of a railway, etc., is to apply for the appointment of a receiver.

Clause (d)—Where a property is mortgaged to two persons as tenants in common and there is no covenant to repay each separately a moiety of the amount, the right of either mortgagee who desires to realise, failing the consent of the co-mortgagee, is to sue for a mortgage-decree *in respect of the whole sum* secured, joining his

co-mortgagee as a defendant. In such a case the decree should provide for all necessary accounts and payment, except that there can be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. *46 IA 272—37 MLJ 483—53 IC 131 (PC); 1930 M 985—59 MLJ 928.*

He cannot get a decree for his share of the mortgage-debt or a sale of a part of the mortgaged property. The same principle applies even where one of the mortgagees chooses to abandon the security, *1935 ALJ 198—1935 A 263.* But if the mortgage deed itself states that specified sums have been borrowed from each of the mortgagees, then a suit by any one of the mortgagees may be laid *for his share* of the mortgage-money alone. *154 IC 537—1935 AWR 169—1935 A. 391.* Where the plaintiffs sue for their proportion of the mortgage-money, the other persons who could have any possible interest in the mortgage security being added as party defendants, there is nothing in section 67(d), which prevents the passing of a decree in favour of the plaintiffs. *1932 C 34—54 CLJ 113.*

Where one of two co-mortgagees accepted in full satisfaction of the debt an amount less than the actual amount due on the mortgage, and the other co-mortgagee did not consent to such arrangement, and the latter filed a suit to enforce his share of the debts against the whole of the mortgaged property, there is no severance of the mortgage within the meaning of section 67(d) and the suit is maintainable did not offend against section 67(d). Section 67 is not mandatory. *1928 M 933—112 IC 501.* Where one of two mortgagees took a further mortgage in supersession of his right under

the prior one, the right of the other mortgagee is unaffected. *41 A 631—17 ALJ 731.* One of two mortgagees can bring a suit to recover his share when the other mortgagee was allowed to obtain a decree on his share alone. *25 IC 91—39 M 17; 1928 M 933.*

Where the parties are Mohammedans the share of each of the heirs of the original mortgagor is defined by law and the mortgagee can, in such a case, give up his mortgage lien on the share of any one of the mortgagors by making a proportionate reduction and enforce his mortgage for the balance against the shares of the other heirs. *10 P 341—1931 P 164.* and cases cited therein.

Section 67—Mortgagees (respondents) for the last more than 60 years claimed prescribed title to land in question and their suit to that effect was decreed up to the High Court—Validity—Defendants (petitioners) claimed that section 28, Limitation Act, 1908 having been declared to be repugnant to Injunctions of Islam, there was no reason why limitation regarding law of mortgage should be kept intact notwithstanding the fact that same was also against Injunctions of Islam as per decision of Supreme Court in *Maqbool Ahmad's case (1991 SCMR 2063)*—Effect—Decision rendered by Supreme Court in the said case, had to take effect from 31st August, 1991 and on that date section 28, Limitation Act, 1908 had ceased to have effect while the suit was instituted on 27-4-1976 and decree was passed on 9-4-1986, therefore, law laid down in *1991 SCMR 2063*, was not applicable to facts of case—Defendant's plea that mortgage never extinguished for mortgagees because they, from time to time, had remained in

possession and receipt of rent/produce of such land of mortgagees would be taken to be the payment, therefore, acknowledgment of debt within contemplation of section 20, Limitation Act, 1908, was of no substance—High Court was right in holding that such plea having never been taken in written statement, no presumption could, therefore, be made with respect to such mixed question of law and fact in terms of section 20, Limitation Act, 1908—High Court was, thus, justified in not exercising its revisional jurisdiction under section 115, CPC, in favour of defendant as concurrent findings recorded by such subordinate Courts did not suffer from any jurisdictional error—Leave to appeal was refused in circumstances. *Abdur Rehman vs Muhammad Akram 1999 SCMR 100.*

Sections 67 and 68—If a person mortgages with possession his own land and fails to deliver possession of the mortgaged property to the mortgagee the mortgage-money becomes payable under section 68 and the mortgagee is entitled to a money decree for the same. But if the time stipulated for redemption expires, the mortgage-money becomes due to the mortgagee under section 67 and a decree for sale can be made under that section *157 IC 657—1935 OWN 924.* Where a mortgage comprises the features of simple and usufructuary mortgages and the mortgagor deprives the mortgagee of part of his security by failing to deliver up possession, the mortgagee has a right to sue

for the money under section 68(c) and also for sale of the mortgaged property under section 67. *ILR (1938) All. 714—1938 ALJ 746—1038 All. 418 (FB).* A mere covenant to repay does not take what would otherwise have been a usufructuary mortgage out of that category. The mortgagee could not be allowed in his suit to claim a decree for sale on the ground that he had been deprived of his security or possession of the property. *1942 AWR (HC) 158—1942 ALW 370.*

Sections 67 and 100—Where the future maintenance accruing to a widow was declared by the decree a charge upon a house, the house is not made security for the repayment of money of the widow 'by any act of parties' or 'by operation of law' within the meaning of Section 100. It is only by virtue of a decree that a charge is created on certain specified immovable property. Where the house is sold in execution of the maintenance decree subject to the right of future maintenance and there is subsequently default in payment of the maintenance instalments, it is not necessary for the widow to bring a suit under section 67. Order XXXIV, rule 14, CPC, cannot be a bar for the enforcement of the decree otherwise than by suit. The effect of the change in the provisions of Order XXXIV rule 14 is that a mortgagee can have the mortgaged property sold in execution of the decree on a claim which is not connected with the mortgage. *1939 ALJ 542—1939 All 579.*

¹[67A. Mortgagee when bound to bring one suit on several mortgages—A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.]

Case Law

Section 67A—The section came into force on 1st April, 1930, and therefore is not applicable to a mortgage executed before that date. *1036 L 1920; 131 IC 725(R); 1933 R 377; 1940 Pat. 65; 1938 Bom 196—40 Bom LR 109*. The intention of section 67A is to compel a mortgagee who is entitled to the same kind of decree in respect of several mortgages over the property of the same mortgagor to consolidate the mortgages and enforce them in a single suit provided he has not contracted out of his obligation. The same obligation is placed upon a charge-holder under section 100; and the words "so far as may be" are inserted there, because the Legislature realised that some of the provisions dealing with mortgages may be inapplicable to charges. The proviso that there may be a contract to the contrary is applicable to a charge by act of parties, though it is inapplicable to a charge by operation of law. *60 C 1470—38 CWN 153—1934 C 325*.

The principle of section 67A cannot be applied unless there are either two mortgages

or two separate portions of the same mortgage which are payable. Where under a mortgage bond the amount is made payable in instalments with a provision that in case of default of payment of two consecutive instalments, the mortgagee might treat the whole of his mortgage as payable, if he chooses to waive the penalty and sue merely on those instalments which are due, the mortgagor cannot be heard to say that the mortgagee is bound to sue for the whole amount of the mortgage and to enforce a penalty against himself. *1940 Mad. 296—(1939) 2 MLJ 924*. The section does not apply when the parties to the mortgages are not the same. *1937 N.99; 1933 R 377; 1938 Bom.196—40 Bom. 196—40 Bom LR 109*.

Where there were two successive mortgages in favour of the same mortgagee, but the money of the second became due earlier than that on the first and hence a suit was brought on the second mortgage and decree obtained and property sold subject to the first mortgage (on which by that time a

1. Section 67A inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 32.

decree had also been obtained) Section 67A did not apply and that what was sold in the suit on the second mortgage was the equity of redemption and there could be no objection to the property being sold again in the suit on the first mortgage. *1940 NLJ 568—ILR (1942) Nag. 172—1941 Nag. 3*, nor to securities created by operation of law, such as statutory charges under section 205, Calcutta Municipal Act. The Corporation of Calcutta is not therefore bound to enforce all such charges which it has for the consolidated rates due from the same person in respect of different properties in one suit. *38 CWN 917—1934 C 862*.

The words "all the mortgages in respect of which the mortgage money has become

due" must be limited to those mortgages which the Court, in which the mortgagee sues has jurisdiction to enforce. *41 CWN 854; 1939 Rang. LR 207—1939 Rang. 247*. The section restricts the rights of mortgagees and therefore must be construed strictly. *38 CWN 917. 1934 C 862*. A person who hold two mortgages of different dates must file a consolidated suit for both and omission to sue precludes filing of a second suit. *1933 N.171—144 IC 326*. Where a suit is filed in respect of more than one mortgage, for purpose of determining the court-fee, it was held, the suit could not be taken to comprise only one single subject by reason of the principle of consolidation applied by section 67A. *1935 M 62(1)—68 MLJ 316*. See also *1940 Rang. LR 767*.

¹[68—Right to sue for mortgage-money—(1) the mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely :—

- (a) where the mortgagor binds himself to repay the same;
- (b) where, by any cause other than the wrongful act of default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 33, for the original section.

- (c) 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;
- (d) where, the mortgagee being entitled to possession for the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor;

Provided that, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

- (2) Where a suit is brought under clause (a) or clause (b) of subsection (1), 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.]

Case Law

Section 68—The amendment of section is not retrospective. Section applies only to mortgages and not to charges. *15 C 492*. A purchaser from the mortgagor cannot be made personally liable under this section. *26 NLR 312—1930 N 139(2)*. Provisions of this section are not applicable to anomalous mortgages. *9 OWN 280*. By instituting a suit for mortgage money under the circumstances enumerated in section 68, a mortgagee does not lose his right to proceed against the security. The Legislature could never have intended that if a mortgagor by his own default brings about deterioration of the mortgaged property and thereby forces the mortgagee to bring a suit for money, he can thereby deprive the mortgagee of what little security he has. *62 IC 15—1936 P 439*. The mortgagee should not enforce the personal liability before exhausting his remedy against the property except in cases where the mortgagor is prepared to abandon the

security. But this can only apply as between the mortgagor and the mortgagee. *1937 MWN 373.*

1. Section 68(a) : Personal Liability

Where the mortgagors covenant to repay the principal and interest within a time fixed and that in default of such payment, the mortgagee would be entitled to sue for foreclosure, there is no personal covenant in the deed, binding the executant to repay, on which personal decree could be passed. (*1939 All. 313—1939 ALJ 362—1939 All. 260.* See also *17 Pat. 737—19 Pat LT 737—1938 Pat. 585.* Any action claiming the mortgage moneys *simpliciter* must be made under section 68(a) if at all and there is no implied covenant creating personal liability. *152 IC 897—1934 Pat. 624.* Existence of personal covenant depends on the facts of each case. *86 IC 481—1925 M 991; 1941 Pat. 486.*

Personal covenant can be enforced though mortgage fails. (*Ibid.*) See also *23 OC 145—57 IC 967.* Where in a usufructuary mortgage there is express provision entitling the mortgagee to recover his money on the expiry of the term fixed, mortgagee is entitled to sue for and obtain decree for sale under section 68(I)(a) read with section 67 *ILR (1938) All. 218—1938 ALJ 18—1938 All. 188;* see also *1937 MWN 81;* where an usufructuary mortgage is void as effecting a transfer of occupancy holding, the personal covenant in the mortgage is also void and unenforceable. *44 A 486—22 ALJ 318; 57 IC 445—43 A 81.* See *contra 86 IC 481—1925 M 991.* Where an application for personal decree is dismissed, no separate suit for personal remedy is maintainable. *22 OC*

145—57 IC 967. An usufructuary mortgage does not in itself imply any personal liability. *85 IC 326—1925 O 628; 10 NLR 9—23 IC 131.* See also *31 Bom. LR 825—1929 PC 139.* In the absence of an express contract to pay, a personal decree cannot be passed. *57 IC 680.* See also *12 NLR 19—33 IC 753.* But see *13 L 259—1932 L 164.*

Where the mortgage was partly usufructuary and there was an express promise to pay the sum on a particular date and to redeem the land on that date : **Held,** that the mortgage was an anomalous one and that as the land could not be sold under section 15, Land Alienation Act, in execution of any decree the mortgagee was entitled to give up the security and to obtain a simple money decree for the sum sued for. *1935 L 103.* Where a mortgage-deed contained a personal covenant to pay interest independently of the principal, a suit for interest will lie, even though the personal remedy for principal may be barred. *41 IC 72.* See also *1924 N.83; 39 IC 852.* A simple mortgage carries with it a personal covenant to pay the principal and interest. *13 L 508—1932 L 630.*

2 Section 68 (b) and (c)

The section is applicable only when the property is lost owing to the fault of the mortgagor and not that of the mortgagee, and only there the mortgage is not void. *85 IC 802—1923 L 357.* But *see contra 21 IC 581.* There must be proof that the reduction in the security was caused by the wrongful act or default of the mortgagor. *133 IC 402(A).* A mortgagee who has been induced to enter into an invalid transaction through the deceit of the mortgagor can recover the money paid by

him and his suit cannot be resisted as not maintainable because the transaction was invalid. *25 ALJ 37—1927 A. 190*. Where, by a mistake of law a subsequent mortgagee entered into the transaction and subsequently found that he could not claim priority and he thereupon sued for the recovery of the money section 68 has no application as it is applicable only to cases where the security was lost to the mortgagee otherwise than by his own fault. (*7 IC 251. Dist.*) *1933 L 836*. 'Insufficient' does not mean misdescription of property, nor does it cover a case of inclusion of property as mortgagor's while it does not belong to him *70 IC 423—1022 B 217*.

The word "mortgagor" includes the assignee of the equity of redemption. *1932 P 273*. Section 68(1)(c) only speaks of the 'mortgagor', but in view of section 59-A, that word must include the subsequent purchaser of the mortgaged property. *ILR (1940) Nag. 63—1939 NLJ 338—1939 Nag. 256*. The mortgaged property is 'destroyed' when it is taken under the Land Acquisition Act. *42 IC 793—20 OC 256*; or when the mortgagee is dispossessed through adverse possession. *2 Bur LJ 47—1924 R 143*. Section 68(c) is sufficiently general to cover a case where the mortgagee of an undivided share of a co-sharer is dispossessed of the property by the co-sharers of the mortgagor who have been allotted that property at a subsequent partition. *1936 OWN 21—1036 O 174*. See also *13 PLT 373—1932 P. 273*. Where in a mortgage there is no personal covenant to pay, yet, if the mortgagee is dispossessed, a suit for money is maintainable though the mortgage was unattested and invalid. *44 C 388—44 IA 87—32 MLJ 39 (PC)* See also *1941 PWN 506—1941 Pat. 301*.

Such a suit may be maintained either against the mortgagor or the purchaser of the equity of redemption. *1832 P 273*. 'Security' must be one effected by a mortgage under the Act. *33 IC 753—12 NLR 19*. If the mortgaged property is diminished, the mortgagee can insist on the mortgagor giving another security. *45 A. 388*, or sue for mortgage-money; *51 IC 785*. To ask for fresh security is condition precedent to a suit for the money. *42 M 578—36 MLJ 286*. See also *1938 All. 221—1938 ALJ 313 (FB)* (Withdrawal of compensation money by mortgagor—Mortgagor not entitled to sue to enforce his security). Mortgaged property not in possession of mortgagor—Suit pending in respect of it—Mortgagee aware of such circumstances—Mortgagor found not entitled to such property—Suit by mortgagee before expiry of stipulated period for mortgage-money—If lies. See *1938 Cal. 48*. Article 97 of the Limitation Act applies to a suit for money under this section. *21 IC 581*. But see also *3 R 60—89 IC 56—1925 R 223, 1936 R 80*.

Where an usufructuary mortgagee is dispossessed, but his right to sue for the mortgage-money on such dispossession is allowed to be barred by time, he has no further cause of action to sue for the mortgage-money. *152 IC 897—1934 P 624*. Where the mortgagee is deprived of his security in consequence of the default of the mortgagor in paying the land revenue due on the land, time would not begin to run against the mortgagee until the default in payment of land revenue, which resulted in the sale of the land, took place. Inability of the mortgagor is a default within section

68(c). 151 IC 426—1934 R 227. Mortgage—Provision for three months notice for repayment—Power of sale on default—Sale of property—by prior mortgagee—Deficiency—Suit by subsequent mortgagee—Limitation—Cause of action.

Held : that though under section 68(b) the mortgagee may require the mortgagor to give sufficient security for his debt, and on default of the mortgagor to sue for the mortgage-money, yet there was a condition precedent to such suit, namely, a notice to the mortgagor requiring him to furnish another sufficient security for the debt; and in the absence of proof of such a notice, it cannot be held that limitation did not arise until the property was sold in exercise of the power of sale conferred on the mortgagee, the bond being only an on-demand bond. 1934 M 644—67 MLJ 499.

Under clause (c) of section 68(1) no question of the security becoming insufficient within the meaning of section 66 arises and the only question is, whether or not the mortgagee has been deprived of the whole or part of the security by or in consequence of any wrongful act or default of the mortgagor or his representative-in-interest. Where in the case of an usufructuary mortgage of a house, it is found that owing to want of repairs, the house had become uninhabitable and that while a tenant had left the house, another had his rent reduced by half, it was held that it showed that the value of the security had diminished and that it amounted to a deprivation of part of the security entitling the mortgagee to sue for his money. 1938 OWN 806—1938 Oudh 210. Where a mortgagor is left in possession of the

mortgaged property as a tenant of the mortgagee, mere nonpayment of rent by him cannot be considered to be a wrongful act on the part of the mortgagor depriving the mortgagee of the possession of the lands mortgaged. So long as the tenancy is not disputed any dispute as to the nature of the tenancy cannot be said to deprive the mortgagee of part of his security. *ILR (1938) All. 218—1938 All. 188*. Where a mortgagee is presumably aware that the security which he was accepting for his loan belonged to a joint Hindu family and he advanced the loan knowing that it was not for legal necessity, he takes a risk and loses. It cannot be said that the mortgagee was deprived of the security by or in consequence of the wrongful act or default of the mortgagors. Even if the result appears to be somewhat inequitable, no principle of equity can prevail where the law is clear. *ILR (1939) All. 313—1939 ALJ 362—1939 All. 260*; See also 1936 *Oudh 174—1036 OWN 21*.

3. Section 68(d)

The section will apply when the mortgagee is dispossessed by person holding better title than mortgagor. 43 A 484. See also 27 ALJ 581—1929 PC 139; 15 M 304; 19 A 191; 42 M 578. The mortgagor cannot be held liable for the tortious acts of strangers. 32 PLR 561—1931 L 694. Where dispossession is caused by one who is not claiming under any title superior to the mortgagor, or where it is caused by mortgagee's own default, the mortgagee cannot invoke the aid of clause(d) of section 69. 161 IC 821(2)—1936 O 263. The sub-mortgagee can sue his mortgagor for money when possession is not delivered. 87 IC 439(1)—1925 A 736.

Usufructuary mortgagee can sue for sale if possession is not delivered. *41 M 259—33 MLJ 623 (FB)*; *8 PLT 355—103 IC 592*. As to his powers of sale when the mortgagee retains possession over a portion of the mortgaged property and when the other properties have been transferred to another, see *84 IC 26—1924 A 877*. In a mortgage by conditional sale, it is not the duty of the mortgagor to put the mortgagee in possession of the property after the expiry of the stipulated period and the mortgagee is not entitled to sue for the mortgage money for the failure of the mortgagor to do so. *1933 L 174—145 IC 159*. The remedy under the section is not a suit for foreclosure or for sale, but only a money decree. *41 IC 406*; *13 IC 336*. A mortgagee cannot be compelled to enforce the mortgage against the properties. It is open to the mortgagee to sue limiting his claim to a money decree on the personal covenant. *175 IC 593—1938 Mad. 132—(1937) 2 MLJ 920*. See also *1937 ALJ 815—1937 A 711*.

Where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and

the alienation has been set aside at the instance of the landlord in a suit brought under section 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage-money. *36 PLR 233—1934 L 853(2) (FB)*. As to suit for money by usufructuary mortgagee who was not placed in possession of the property at all, see *7 OWN 1045—1931 O 5*. If the mortgagee demands substitution in the place of the properties which were destroyed, he must show circumstances so as to raise an equity in his favour. *10 IC 689—7 NLR 2*. An usufructuary mortgagee can claim interest as well when he was kept out of possession by the mortgagor and also on money paid to avert a rent sale. *52 IC 433—46 C 448*. Before the statutory right given to a usufructuary mortgagee by section 68(1)(d) can be enforced, the mortgagee has to prove his mortgage. If the mortgage document cannot be tendered in evidence for want of registration, the mortgagee cannot obtain the remedy given by the clause or recover his money. *1937 ALJ 815—1937 All. 711*. See also *1938 Mad. 132—(1937) 2 MLJ 920*; *54 IC 814*; *8 OLJ 660—1922 O 102*; *41 IC 55*.

69. Power of sale when valid—¹(1) ²[] a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged

1. Section 69 was numbered as sub-section (1) by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.
2. The words "Notwithstanding anything contained in the Trustees and Mortgagees Powers Act, 1866" were omitted by Act VIII of 1973 section 2 and 2nd Schedule (with effect from the 26th March, 1971).

property, or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely:

- (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, ¹[Muslim] or Buddhist ²[or a member of any other race, sect, tribe or class from time to time specified in this behalf by ³[the Government], in the ⁴[official Gazette]];
- (b) where ⁵[a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgagee is ⁶[the Government]; ⁷[or a schedule bank as defined in Article 37 of the Bangladesh Bank Order 1972;] and
- (c) where ⁵[a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgaged property or any part thereof ⁸[was, on the date of the execution of the mortgage-deed], situate within the ⁹[town of] ¹⁰[Dacca] ¹¹* * * or in any

1. Substituted by Act VIII of 1973
2. Inserted by the Transfer of Property Act (1882) Amendment Act, 1885 (III of 1885), section 5.
3. The word "Government" was substituted for the words "Provincial Government" by Act VIII of 1973, section 3 and 2nd Schedule (with effect from 26th March, 1971).
4. Substituted by AO 1937, for "local official Gazette."
5. Inserted by Act XX of 1929, section 34.
6. The original words "the secretary of state for India in Council" have successively been amended by AO 1937 AO., 1961, Article 2 (with effect from the 2nd March, 1956), to read as above.
7. Substituted by Act VIII of 1973, section 3 and 2nd Schedule (with effect from 26th March, 1971) for "or a schedule bank as defined in section 2 of the State Bank of Pakistan Act, 1956 (XXXIII of 1956)" which was added by Act V of 1966, section 2.
8. Substituted by Act XX of 1929, section 34, for "is".
9. Sustituted by AO, 1949, and scheduled, for "towns of Calcutta, Madras, Bombay".
10. Substituted by Act VIII of 1973, section 3 and 2nd Schedule (with effect from 26th March, 1971), for "Karachi".
11. The words "Rangoon, Moulmein, Basslin, Akyab" replied by AO., 1937.

other ¹[town] ²[or area] which the ³[Government] may, by notification in the ⁴[official Gazette], specify in this behalf.

^{5*} ⁶[(2)] ⁷[A power under sub-section (1) shall not] be exercised unless and until—

⁸[(a)] notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

⁹[(b)] some interest under the mortgage amounting at least to five hundred ¹⁰[Tk] is in arrear and unpaid for three months after becoming due[:]¹¹

¹²[Provided that the power of a schedule bank under clause (b) of sub-section (1) shall further be subject to such conditions as may be prescribed in this behalf by notification in the

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1. For notification relating to the towns of Chittagong, see gazette of India, 1929; (Pt) 1, page 1260; and Dhaka, Narayanganj, see gazette of India, 1933 (Pt) 1, page 158.
 2. Inserted by Act XX of 1929, section 34.
 3. The word "Government" was substituted for "Provincial Government" by Act VIII of 1973, section 3, 2nd Schedule (with effect from 26th March, 1971).
 4. Subs by AO 1937, for "Gazette of India".
 5. The word "But" repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.
 6. This para was numbered as sub-sections (2), by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.
 7. Substituted by Act, V of 1966, for "no such power shall."
 8. This clause was lettered (a), by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.
 9. This clause was lettered (b), by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.
 10. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Rs" (with effect from the 26th March 1971).
 11. Substituted by Act V of 1966, for "full-stop".
 12. Added, by Act V of 1966.

official Gazette by the ¹[Government] in consultation with the ²[Bangladesh Bank]

³[(3)] When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

⁴[(4)] The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incidental to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

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1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Central Government" (with effect from the 26th March, 1971).
 2. Subs by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Sch for "State Bank of Pakistan" (with effect from the 26th March, 1971).
 3. This part was numbered as sub-section (3), by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.
 4. This part was numbered as sub-section (4) by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.

¹(5)

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Case Law

Sections 69, 101—Interpretation—The word "unauthorised" in section 69(3) when it occurs a second time relates back to the first time where it is used, namely, to the expression, "no case had arisen to authorise the sale". "This refers to cases, where, for instance, some special condition precedent to the exercise of the power of sale, had not yet been fulfilled or where interest had not in fact accrued to the amount provided in sub-section (2) of section 69 and the word "unauthorised" refers to a case where the Legislature has otherwise prohibited the sale except otherwise than subject to the charge. *Adamji Abdullah & Sons vs Fida Hussain Abdul Gaffoor. PLD 1957 (WP) Karachi 828.*

Section does not apply to places where Act is not in force. See *1933 PC 114—4 L 284 (PC)* Section 69 does not purport to confer any power upon mortgagees, but it is intended when a power is actually conferred by a mortgage-deed to prescribe the procedure to curtail unfettered exercise of the power and to determine the rights of the

purchaser at such a sale. Consequently, a sentence in a mortgage-deed that "the mortgagee, his heirs, representatives and assigns shall have all the rights, powers, remedies and privileges conferred upon the mortgagee by Act IV of 1882" does not confer on the mortgagee a power to bring the mortgaged property to sale without the intervention of Court. *6 R 134—1928 R 128.* See also *13 A 28.*

The words "power of sale" in section 69(c) refer to a clause to be expressly included in the mortgage and must be understood to mean what is ordinarily known and understood in conveyancing by that expression. *1942 Bom. 46—43 Bom. LR 890.* A power to sell is a power to sell either now or at a later date: and a clause which gives power to postpone the sale is not against the words of section 69, and is not illegal. Nor is a power "to buy in or rescind or vary and contract of sale" bad and against the words of section 69. *1942 Bom. 46—43 Bom. LR 890.*

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1. Sub-section (5) was omitted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973) section 3 and 2nd Schedule (with effect from 26th March, 1971), which had been substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34, for what was originally the fifth paragraph of the section.
 2. The last paragraph of the section was repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 34.

The right conferred by section 69(2) on the mortgagee is the right to exercise his power of sale only upon fulfilment of one of the two conditions mentioned in section 69(2). The notice required by section 69(2)(a) is not only necessary but imperative, and even the period of three months cannot be curtailed by agreement of parties. 43 Bom. LR 553—ILR (1941) Bom 506—1941 Bom. 339. In a case where there is no time fixed for the repayment of the principal amount in a mortgage-deed and where the amount is made payable on demand, before there can be said to be a default, there should be a demand. 237 LW 476—1926 M 841.

Default in payment of interest alone does not justify the exercise of the power of sale where that power was to be exercised on default in payment of even a part of the principal sum. Parties could contract specifically that, if interest remained unpaid for three months, the whole of the principal would become payable and that the mortgagee could exercise his power of sale. 64 IC 634—23 Bom. LR 1241. Under section 69 if interest amounting to Rs. 500 is in arrears and unpaid for three months, the mortgagee can exercise the power of sale without notice to the mortgagor. 94 IC 860—1926 M 841.

Even in cases where this section does not apply, the mortgagee can have a power of sale. There is no positive enactment prohibiting such stipulation being annexed to a mortgage. 45 MLJ 497—50 IA 162—4 L 284 (PC) See also 94 IC 860—23 LW 476. Under clause(b) of sub-section (2) if interest has amounted to Rs. 500 and not been paid for three months after becoming due, power of

sale can be exercised even if there is no default in payment of the principal money. 11 Bur. LT 147—43 IC 921. It would be otherwise if the mortgage-deed specifically provides that the power could be exercised only when the principal money is unpaid. 64 IC 634—23 Bom. LR 1241; 23 LW 476.

The mortgagee is a trustee for the mortgagor for the surplus amount, and the trust is not lost by his mixing the surplus with his private moneys. Such surplus is movable property. 40 M 767—38 IC 986. A Court will not interfere with a *bona fide* exercise of a power of sale, unless the price is so low as in itself to be evidence of fraud. The mortgagee is not however a trustee of the power of sale. 13 IC 261—10 MLT 554 (PC). If the property is purchased by the mortgagee himself *benami*, the sale is void. 1929 B 24—30 Bom. LR 1519.

Section 69 applies to Hindus and the manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property belonging to a family in Madras City may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. There is nothing in section 69 to prevent a mortgagor giving to a second mortgagee, a power to sale, even when he has not given a similar right to the first mortgagee. 54 LW 656—1942 Mad. 232—(1941) 2 MLJ 923.

Notice—The three months' notice provided for by this section [see sub-section (2), clause(a)] cannot be curtailed by agreement of parties. 11 M 201. Where the mortgagor has assigned his interest in the mortgaged property, of which the mortgagee is aware, the notice must be served on the

assignee. *17 B 711*. If the sale is held before the expiry of three months from the date of notice, the sale is not liable to be set aside; but the mortgagor will be entitled to sue for damages. *11 M 201*. (See *6 Bom. LR 557*. Case of improper exercise of power of sale. See also *2 B 252*).

Section 69(4)

Surplus sale proceeds after meeting the costs of sale, etc., must be refunded to the mortgagor. The mortgagee holding such surplus sale proceeds is in the position of a trustee for the mortgagor or other persons entitled to them. *40 M 767; 16 B 141; 38 IC 986*.

¹[69A. Appointment of receiver—(1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provision of sub-section (2), be entitled to appoint, by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

1. Section 69A inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 35.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent. on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the

money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—

- (i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;
- (ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;
- (iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
- (iv) in payment of the interest falling due under the mortgage;
- (v) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) to (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the discretion of the Court.

(11) In this section "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage].

Case Law

A receiver appointed under section 69A is undoubtedly an agent of the mortgagor as laid down in clause(3) as the mortgagee is not liable in respect of any default committed by the receiver and the sole responsibility for acts and omissions on the part of the receiver rests on the mortgagor alone. But that does not entitle the receiver to pay out of the funds in his hands an unsecured creditor of the mortgagor before the dues of the mortgagee are satisfied. *195 IC 141—45 CWN 169—1941 Cal. 308.*

70. Accession to mortgaged property—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations

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

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

Case Law

Section 70—Charge created by compromise decree—Parties may contract themselves out of the charge—Contract to the contrary—Not barred under the section.

Where there is a statutory charge or lien which springs into existence as soon as a certain thing is done, there is no right in the parties to alter or obliterate the charge. But in the case of a decree based upon a compromise the right can be altered or modified by fresh contracts though the parties would not be able to go before the Court on the basis of such fresh contracts and ask for the decree to be correspondingly modified. Where a charge created as a result of compromise among parties is embodied in a decree, the parties are not prevented from contracting out of the rights created under the decree. Hence there can be a contract to the contrary within the meaning of section 70 (read with section 100) in the case of a charge created by a decree based on a compromise. *Jagadeesa vs Bavanambal Ammal*. AIR 1946 Mad. 293.

Section 70: Quere

Whether the words 'any accession is made to the mortgaged property' in section 70 bear the *prima facie* meaning and include any accession to the property, or whether any building erected upon the property or any other accession thereto by a stranger under a colour of title' or under a *bona fide* title or claim of title is excluded from the ambit of the section. 14 R 86—1936 R 65. Section 70 regulates not only the rights and liabilities of mortgagors and mortgagees personally, but also the rights and liabilities of the representatives or successors-in-interest of

the mortgagors and mortgagees respectively.

The section however does not apply to the case of strangers. 53 A. 334. The superstructure built on the mortgaged site is an accession within the meaning of section 70 available to the mortgagee. 195 IC 322—1941 Pesh. 49. The section does not apply to accession after decree on the mortgaged property. 63 IC 552—2 PLT 665. See also 41 MLJ 490—14 LW 449. (Acquisitions after decree and sale of mortgaged property do not form accretions to the mortgaged property). Mortgagor's share enhanced after mortgage—Right of mortgagee. 45 CLJ 571. Mortgagee of a grove or garden is entitled to enjoy even newly planted trees. 6 OWN 832. See also 29 C 803. (Trees growing on land after mortgage). Mortgage of entire mouza—Mortgagor having title only to portion but adversely possessing whole—Mouza subsequently diluviated by river and reforming with additional land—Mortgagor's title perfected by adverse possession—Enlarged area goes as security to mortgagee. 1939 Cal. 275.

If a lessee of a land which is subject to a mortgage created by the landlord acquires the equity of redemption, the acquisition is not an accession to the mortgaged property under section 70 of the Act. ILR (1939) 2 Cal. 551—43 CWN 1126—70 CLJ 415—1939 Cal. 692. Where goodwill and stock in trade are mortgaged, the mortgagee cannot have the benefit of stock acquired after the mortgage. 37 A 350. Fixtures attached to the land even subsequently will pass under the mortgage rights. 45 C 653—22 CWN 793. So also is the casual increase or decrease in the

extent of the boundaries of a mortgaged land or village. 11 BHCR 39; 2 A 787. As to houses or other buildings built upon land mortgaged after the mortgage, being treated as accession to the property, see 29 C 803; 30 B 250; 1 CPLR 83. Improvements, e.g., *electric installation* effected on the mortgaged property which are in the nature of fixtures and immovable, are accession to the mortgaged property and are liable for the mortgage charge. 1935 L 350.

In certain circumstances machinery existing in the mortgaged premises on the date of the mortgage and even machinery subsequently installed there may pass under a mortgage of the premises. But when the site itself is not comprised in the mortgage security machinery would not become part of the security merely by its being subsequently fixed up on the site, when what is mortgaged is a building constructed or being constructed on the site. 49 LW 578—1939 Mad. 684—(1939) 1 MLJ 692. A temporary structure put up without any intention that it should be a permanent fixture to the land, cannot form an accession to the mortgaged property within the meaning of sections 63 or 70. 1931 ALJ 273—1931 A 277 (FB). Where after a mortgage of undivided share different shares are allotted to mortgagor in partition the improvements effected and new buildings constructed on properties allotted to the mortgagor or his transferees must be treated as accessions to mortgaged properties and, as such, available for the satisfaction of the mortgage-debt under section 70(b). 14 L 749—1933 L 771.

The question of want of notice is of no significance so far as section 70 is concerned. (*Ibid.*) An auction-purchaser at a sale held in execution of a decree passed on foot of a prior mortgage, to which the second mortgagee was no party, is not entitled to remove the materials of the building erected by him on a site included in the mortgaged property purchased by him, and the building is liable to be sold as an accession to the mortgaged property for satisfaction of the second mortgage. (*Ibid.*).

Where a *service inam* land is enfranchised and assessed to revenue and a *ryotwari patta* is granted, the enlargement of the inamdar's interest is "accession" to the property, which adds to the mortgagee's security. 1931 MWN 595. A surrender of his interest by an occupancy tenant in mortgaged property, which enhances the value and increases the interest of the landlord, is also treated as accretion to the property. 1929 N 225—25 NLR 12. See also 1941 NLJ 35.

Where after a mortgage of certain *warg land* and the *kumaki* land adjoining it, the Government assigns the *kumaki* lands on *dharghast* to the *wargdar*, the lands so assigned do not form an accession to the mortgaged property, as they were at the absolute disposal of the Government at the time of mortgage. 35 MLJ 120—49 IC 147. See also 7 MLT 148—4 IC 357. Land mortgaged as *khudkasht* subsequently becoming *sir*—Foreclosure—Mortgagee gets only proprietary rights—Cultivating rights continue with mortgagor. 1933 N.104—142 IC 603—29 NLR 142.

71. Renewal of mortgaged lease—When the mortgaged property is a lease ¹* * *, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

Case Law

Section 71—Even where a lease is renewed on forfeiture of the original term or even when the new lease covers additional area, the mortgagee will have the benefit of it. *2 A 538; 18 A 34. See also 1 BHCR 22; 4 NWP 11.*

72. Rights of mortgagee in possession—²[A mortgagee] may spend such money as is necessary—

³* * *

- (b) for ⁴[the preservation of the mortgaged property] from destruction, forfeiture or sale;
- (c) for supporting the mortgagor's title to the property,
- (d) for making his own title thereto good against the mortgagor; and
- (e) when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

1. The words "for a term of years" repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 36.
2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 37 for "When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he".
3. Clause (a) was repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 37.
4. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 37 for "its preservation".

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and where no such rate is fixed, at the rate of nine per cent per annum: ¹[Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.]

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be ²[added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine percent per annum]. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorised to insure.

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1. Proviso inserted by section 37 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).
 2. Substituted by section 37 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929), for certain original words.

Case Law

Section 72—Repairs—Mortgagor entitled to recover money spent on repairs only when mortgagee had not taken steps to preserve property.

Held: The mortgagee was not entitled to the amount alleged to have been spent by him on the repairs to the mortgaged property, as he had not proved that the mortgagor had been called upon and had failed to take proper and timely steps to preserve the property in accordance with the principles underlying section 72 of the Transfer of Property Act. Good conscience are applicable to the Punjab where the Transfer of Property Act is not in force. *Fazal Elahi vs Mohammad Amin* PLR 1954 WP 467.

For scope, see 20 SLR 277. Section is based on the fiction of an implied request by mortgagor. 11 A 234; 23 WR 305; 27 IA 989. As to *right of mortgagee to recover amounts spent in necessary repairs*, see 118 IC 186—1929 A 777. Question of necessity for repairs is one of fact. 1925 O 429—87 IC 829. Usufructuary mortgagee can lease the property to the mortgagor and sue him for rent. See 49 A 658—101 IC 516—1927 A 552. The value of improvement is to be made on the money spent and not on the appreciated value of the property on the date of redemption. 70 IC 1. A prior mortgagee, setting aside a sale by the *puisne* mortgagee by deposit of the sale amount, can only add it to his mortgage amount and cannot get a money decree. 87 IC 829—1925 O 429.

The *puisne* mortgagee is entitled to add the money paid for the redemption of a prior mortgage. 69 IC 578—1924 L 154; 22 OC

32—51 IC 549. Mortgagee is entitled to recover revenue newly assessed and paid. 1925 L 76.

The mortgagee has a right to add to the principal money payments made by him towards rent which the mortgagor was bound to pay. This statutory right is not affected by the fact that he professed to make those payments not as mortgagee but as owner under a purchase found by the Court to be invalid. As soon as the conveyance failed, the only capacity he could have occupied was that of a mortgagee. 10 P 210—1931 P 325. Zamindar's rent paid by mortgagee can be legally added to principal sum. 72 IC 391—1924 P 372. As regards payment of arrears of Government revenue, see 5 Pat LJ 248. Mortgagee is entitled to interest as well along with the excess revenue paid by him. 90 IC 184—1925 O 678.

When on account of the improvements, the mortgagee receives increased rent from tenants, he cannot ask for the money spent on the same. 1924 A 47; 30 IC 234. See also 54 IC 112; Bom LR 215—1927 B 145. Money spent on repairs will carry interest if the improvements add to the letting value, but not otherwise. 1922 N 262. See also 67 IC 132—3 Lah LJ 184; 1925 O 678—90 IC 184. Where an usufructuary mortgagee of certain properties was dispossessed from some of the items, but he did not take steps to obtain additional security for the debt; the mortgagee is not entitled to claim interest on the mortgage-money on account of such dispossession. 37 CWN 1162—58 CLJ 80. Courts will reduce value of excessive or unreasonable improvements when they

hamper redemption. 45 B 1301 Parties may specifically agree that certain specified amounts should be spent annually for certain specified purposes and charged on the property and Courts will uphold such covenants. 50 IA 41—46 M 108—11 MLJ 631 (PC)

Section 72(a)

The provisions have now been included in section 76, infra

Section 72(b)

Interest on costs of improvements effected can be claimed, even though interest is not specifically allowed by the document.

16 IC 635—10 MLJ 129. Forfeiture of the call by holders of shares holding them as security is not an expenditure for preservation of the security. 42 B 159.

The mortgagee has the right to the charge, even though the payments were made subsequent to the decree obtained by him. CWN 1940—1931 PC 226—61 MLJ 843 (PC). Mortgagee has a charge on repairs necessary to keep house from falling down as well as interest thereon. 14 B 28.

Where the mortgaged katcha house fell down during rains and was rebuilt into a pucca house by the mortgagee and it appeared that the rebuilding was within the contemplation of the parties when the mortgage deed was executed, the mortgagee's claim to recover the value of the improvements is quite fair and it should be allowed. 7 OWN 488—1930 O 337. Where the mortgagee, in addition to repairs, extended the buildings not unreasonably, [he is entitled to be compensated: 75 IC 185—1923 L 587; 52 IC 862—78 BR 1918, but cannot claim interest

on such improvements. 62 IC 132—3 LLJ 184. But see also 4 B 584. Where the mortgage deed permits repairs to be effected by the mortgagee, no notice to mortgagor is necessary to effect the repairs. 51 IC 979. "Sale" in this section does not include sale of equity of redemption, as such sale is made without endangering the security of the mortgagee. See 40 MLJ 524; 10 IC 744—160 C 48; 1 Pat LJ 589—38 IC 232.

Under section 69, Contract Act, the mortgagee is clearly entitled to be reimbursed by the mortgagor for the money spent by him on revenue and land taxes paid in order to save the property from forfeiture and sale. Section 72, Transfer of Property Act, is clearly

permissive. A mortgagee is not obliged to add the money so spent by him to the principal money of the mortgage. He can still make his claim under section 69, Contract Act. Order XXXIV rule 14 is no bar to the mortgagee bringing the mortgaged property to sale in execution of a decree obtained in such a suit.

charges and 61 IC 626—1936 R 47

Section 72(c)

The money spent in protecting the mortgagor's title can be recovered by a separate suit or be added to the mortgage amount. 45 IC 949—34 MLJ 177. An express agreement is not necessary for this purpose. 58 IA 254—10 P 654—61 MLJ 489 (PC). See also 21 M 32 (as to costs, charges and expenses of necessary litigation properly incurred by the mortgagee); 1924 B 264. 25 Bom LR 839 (even if such expenses be incurred in criminal proceedings). 34 MLJ 177. But charges not bona fide incurred by the mortgagee cannot be claimed from the mortgagor. 167 RWR 1912.

Section 72(d)

Expenses incurred in defending an unsuccessful suit for redemption by the mortgagor can be added to the mortgage amount. *26 IC 184—16 MLT 365*. Where to work out his rights under a deed of mortgage, the mortgagee has to sue for possession, the amount spent in such suit in getting a decree for possession is money spent in making good his title against the mortgagor which he

is entitled to spend under section 72(3). *1941 OWN 768—1941 Oudh 498*.

Section 72(e)

The mortgagee is not entitled to enforce a permanent lease executed in his favour by the mortgagor, where it is found that the terms of the lease were unfair and the bargain was unconscionable or oppressive. *33 Bom LR 755—1931 B 399*.

[73. Right to proceeds of revenue sale or compensation on acquisition—(1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (1 of 1894), or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

3) Such claims shall 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.]

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 38, for the original section.

Case Law

Section 73—The object of section 73 of the Transfer of Property Act is only to protect a mortgagee whose security has been diminished. The section does not lay down that if a mortgaged property is sold owing to pay arrears of revenue or other charges of a public nature or rent due in respect of such property the only remedy of a mortgagee is to claim payment of his money out of any surplus of the sale-proceeds. The section permits a mortgagee to take recourse to this section only when his security has been diminished on account of sale as contemplated by section 73. *Tripura Modern Bank vs Khan Bahadur Khalilur Rahman*, 25 DLR (SC) 34.

Under the law as it stood before the amendment of 1929, the mortgagee had the right to the surplus sale proceeds only in a case where the whole of the estate has been sold for arrears of revenue; but under section 73 as it now stands the right of substitution has been conferred on him even where a portion only of the property has been so sold. 15 Pat LT 95—1934 P 200. But there is nothing in the section precluding the right of mortgagee to proceed against the mortgaged property also where by reason of section 54 of the Bengal Revenue Sale Act, the sale of portion of the estate was subject to encumbrance and the mortgage rights still subsisted. 1934 Pat 209. Section 73 contemplates only those cases where the property has been sold free of all encumbrances under the provisions of the Land Revenue Act for recovery of arrears of revenue or rent due, but it does not apply where property is sold not by the Collector

but by a decree-holder under the provisions of Rent Act, which would not be a sale free of the encumbrances. 5 OWN 791—1928 O 442. See also 3 Luck. 719; 51 IC 333 (C); 9 CWN 117; 22 CWN 139—43 IC 996; 24 C 746; 20 C 241; 15 C 546; 33 C 878. If portions of the property are converted into cash, that cash also should be available as a part of the security, because section 73 says that if any part of the property or interest in the property is sold the mortgagee's right comes into play to realise the money. If any portion of such surplus is taken away by anyone else, the mortgagee has got a right to follow it. 169 IC 805—1937 Pat 307. Section 73 merely gives effect to the old law of substitution.

The amendment extended the section so that it deals not only with the sale of the mortgaged property at a revenue sale, but also sale of any part thereof or any interest therein. The section has no application at all to a case where the mortgagee's security is not diminished by the revenue sale at all and he had his full rights to put the mortgaged property to sale in spite of the revenue sale. Where a residuary share in a tauzi including properties subject to a mortgage is put up for sale for arrears of revenue, the sale being subject to the mortgagee's right, the sale does not in any way diminish the security and section 73 has no application. 16 Pat 299—18 Pat LT 566—1938 Pat 179. See also 1939 Mar LR 131 (Civ). But see 1937 P 307. The principle of the section is one of substitution of one security or property for another. 39 M 283; 9 CWN 117. See also 1939 Mar LR 131 (Civ). The surplus sale proceeds in the hands

of the Collector represents the mortgaged security. See 20 C 241; 24 C 746; 6 C 142.

An mortgagee on whose case the mortgaged property is sold for arrears of rent is not only entitled to proceed against the surplus sale proceeds, but can follow the property itself. The section, only governs cases where the law has otherwise provided that the effect of his sale for arrears of rent should nullify the charge. The omission of the word charge from Cl (1) of section 73 is attributable to the recognition by the Legislature of the fact that even apart from any statutory provision, the mortgagee has in accordance with the principle of substituted security a charge on surplus sale proceeds. ILR (1938) All 513 + 1938 All 313 + 1928 All. 221 (FB). When the mortgaged land is

acquired under the Land Acquisition Act during the pendency of the mortgage suit, the mortgagor can be restrained from drawing the compensation amount. 5 Pat LJ 650 = 59 IC 573. Compensation amount would be substituted security. 22 OC 342-34 IC 535. See also 42 PLR 40; 20 OC 256; 6 A 78; 6 M 344; 7 OWN 217—1930 O 292.

A mortgagee has a charge on the surplus sale proceeds after the sale of the mortgaged property for arrears of Government revenue. But he is not bound to follow the surplus sale proceeds of the property and the existence of the statutory charge is no bar to his seeking a decree against the successors of the

mortgagor. Section 73(3). 1933 P 257—144 IC 760. Where the mortgagor himself purchased in the revenue sale but Benami in the name of a third party, the mortgagee can bring property to sale again for balance of debt due after taking out the surplus sale proceeds of the previous revenue sale. 25 A 371. See also 26 M 385; 14 CWN 186.

The charge on the surplus continues, even though the mortgage debt is converted into a decree-debt. 20 CLJ 1-19 CWN 1007.

The principle of this section is applicable to a case where the auction-purchaser is deprived of crops on the land by a lessee pendente lite. He can claim the rent due from the lessee to the judgment-debtor. 28 IC 232—39 M 283. Where the surplus after sale in execution of a

mortgage drawn out by a third mortgagee, the second mortgagee can recover back the amount. 4 IC 65A + 1 JA 45 + 26 MLJ 243 (PG); 5 A IC 333 + 19 IC 226—129 CWN 335. See also 20 C 241. Where a mortgagee of a share of landed property, the deed provided for the substitution of property allotted on partition, the whole share allotted would be subject to the mortgage. 19 CWN 162 + 23 IC 612—27 MLJ 113 (PG)

Mortgages of chattels cannot follow a chattel purchased with sale proceeds of mortgaged chattel. 1925 M 275—47 MLJ 704. Effect of revenue sale being set aside—Mortgagee can fall back on his original security. See 1955 C 145. Section 209. 1934 Pat 209.

contemplates only those cases where the property has been sold free of all encumbrances under the provisions of the Land Revenue Act for recovery of arrears of revenue or rent due but it does not apply where property is sold not by the Collector

~~74. [Right of subsequent mortgages to pay off prior mortgages.]—Repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 39.~~

~~75. [Right of the mortgagee against prior and subsequent mortgages.]—Repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 39.~~

~~76. Liabilities of mortgagee in possession—When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property—~~

~~(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;~~

~~(b) he must use his best endeavours to collect the rents and profits thereof;~~

~~(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature¹ [and all rent] accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;~~

~~(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;~~

~~(e) he must not commit any act which is destructive or permanently injurious to the property;~~

¹ The words "and all rent" in clause (c) were inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 40.

- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;
- (g) he must keep clear, full and accurate of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;
- (h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses ¹[properly incurred for the management of the property and the collection of rents and profits and the other expenses] mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest ^{2*} *and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;
- (i) (When the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must,

1. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 40.

2. The words "on the mortgage-money" repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 40.

notwithstanding the provisions in the other clauses of this section, account for his ¹* receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be ²[and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property].

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 in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure.

Case Law

Section 76(a)—Agriculture lease granted by mortgagee—When binding on mortgagor after redemption.

The authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into it in the usual course of management. This being in the nature of an exception, it is for the person who claims the benefit thereof to strictly establish it. *Asa Ram vs Ram Kali PLD 1958 Supreme Court (Ind) 352. Rel AIR 1952 SC 205.*

Section 76(1)

Expense—Meaning of—Includes taxes.

There is no warrant for limiting the word “expenses” in clause (i) to what has to be spent in connection with the management and in respect of the collection of rents and profits. Clause (h) refers to the public charges also as expenses. Hence, where the decree for redemption directs the mortgagee to pay *mesne profits* to the mortgagor from the date of the plaints the mortgagee is not entitled to the credit for public taxes for the property which he paid after the amount due under the decree was rendered by the mortgagor. *Rajagopala Aiyar vs Karuppiah. AIR 1946 Mad 464.*

1. The word "gross" repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) section 40.
 2. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 40.

Section 76—Mortgagor in redemption suit—Entitled to accounts. If the land is sold at a certificate sale for default in payment of rents by him, and is purchased by him, it is still open to redemption by mortgagor, *Sm Kamini Sundari Mallick vs Sm Neroda Sundari Dasya*. PLR 1956 Dacca 210—5 DLR Dacca 541—6 DLR 131.

When the deed is admitted to be a mortgage deed by both the parties, the mortgagor, the plaintiff in the redemption suit, is certainly entitled to accounts under section 76 of the Transfer of Property Act. *Eshad Ullah Haji vs Muhammad Hussain*. PLD 1952 Dacca 47—PLR 1951 Dacca 409—3 DLR 480(a).

—Sale of property for arrears of rent—Mortgagees responsible.

Section 76, clause (c)—Mortgage by conditional sale—Property sold and purchased by mortgagee—May still be redeemed by mortgagor.

A mortgage by conditional sale is attracted by section 76 of the Transfer of Property Act. According to clause (c) of that section the mortgagee in possession is bound to pay the usual rent, and to protect the property from sale. If the land is sold for his default of payment and is purchased by him, it is still open to redemption by the mortgagor. *Kamini Sundari Mallick*. PLD 1951 Dacca 191. Dist ILR 57 Cal 377.

Section 76—Mortgagee—When liable for payment of rent. Clause (h) of section 76. If the mortgage of a leasehold property amounts to an assignment or transfer, the mortgagor would be liable for the rent to the landlord. *Haraden Der vs Mozin Hussain*. 6 DLR 220.

Section 76(c)—Rent payable by mortgagee—Sale for arrears of rent—Mortgagee purchasing property—Mortgagor may still redeem it.

Held: The mortgagee in possession of the mortgaged property is bound to pay the usual rent and protect the property from sale. If the land is sold at a certificate sale for default in payment of rents by him, and is purchased by him, it is still open to redemption by mortgagor, *Sm Kamini Sundari Mallick vs Sm Neroda Sundari Dasya*. PLR 1956 Dacca 210—5 DLR Dacca 541—6 DLR 131.

—Mortgagee in possession is to pay rent. Before the amendment of section 76(e) of the Transfer of Property Act, the land as regards the liability of the mortgagee in possession for arrears of rent can be found in the provisions of sub-section (d) of section 65 of the Transfer of Property Act and that section was not amended by the Act 20 of 1929. That section says that the mortgagee is to pay rent if the mortgagee is not in possession. From this it can be legitimately deduced that the mortgagee in possession is to pay rent. 6 DLR 115.

—A sale in execution of a decree for rent against a mortgagee in possession of a leasehold property does not affect the right. *Ibid*.

—Where an usufructuary mortgagee takes upon himself the burden of paying off the rent of the property under mortgage and makes the stipulation that if for any default in payment of rent, the mortgage property is lost on account of sale for arrears of rent and purchased by the mortgagee or his successor-in-interest, that purchase will ensure to the benefit of the mortgagor, specifically where the purchase takes place in relation to decree for arrears of rent for the period under mortgage. 7 DLR 222.

—Under section 76(c) of the Transfer of Property Act, mortgagees are responsible for sale of the property in execution of a decree for arrears of rent even though they are for a period prior to the execution of the deed. 6 DLR 115.

—The mortgagee in possession of the mortgaged property is bound to pay the usual rent and protect the property from the sale. If the land is sold at a certificate sale for default in payment of rents by him, it is still open to redemption by mortgagor. 6 PLR (Dac) 210.

—The true rule is that a mortgagee cannot, by mere assertion of his own or by any unilateral act of his, divest himself of his character as mortgagee and convert his possession as possession of an absolute owner. 7 DLR 103.

Sections 76(h) and 77—The exception laid down in section 77 of the Transfer of Property Act is subject to the rule embodied in section 5 of the Assam Money Lenders (Amendment) Act, 1943 which limits the liability of the mortgagor to double the principal of the loan. 6 DLR 45.

—Where there has been excess payment over double the principal, the mortgagor on the application of the rule of accounting and refund laid down in section 76(h) of the Transfer of Property Act can ask for a refund of the excess paid whether or not there was any contract that the usufruct would be set off against interest or interest and a specified portion of the principal. *Ibid.*

—Excess of the double of the principal.

In determining whether the money lender has received any sum in excess of the double of the principal of the original loan, amounts set off before the commencement of the amending Act are required to be taken into account. *Ibid.*

Abstract

1. Section 76: Scope
2. Section 76: (a)
3. Section 76: (b)
4. Section 76: (c) Other public charges.
5. Section 76: (d)
6. Section 76: (e)
7. Section 76: (f)
8. Section 76: (g)
9. Section 76: (h)
10. Section 76: (i)
11. Sections 76 and 77

1. Section 76: Scope

The principles enunciated in sections 76 and 77 are a mere codification of the existing law and are applicable to mortgages executed before the Act came into operation with regard to the liability of a usufructuary mortgagee to account for the rents and profits. 17 Pat LT 684—1936 Pat 583. See

also 1940 Pat 627. A person entering into possession as mortgagee, is liable under section 76, to maintain accounts, in every mortgage, whether usufructuary or otherwise. 1940 OWN 1205; 191 IC 716—1941 O 84. See also 1941 Pat 296. Before liability to account can be enforced in favour of the mortgagor, it must be proved that the mortgagee received possession by virtue of the mortgage. The mortgagee can only be charged in respect of that part of which he had taken possession. The fact that the mortgagee has been in receipt of the rents and profits of the mortgaged estate does not necessarily make him chargeable as a mortgagee in possession; for that purpose it must be shown that he took out of mortgagor's hands the power and duty of managing the estate and dealing with the tenants. 39 Bom LR 795—1937 Bom 483, See also 1939 Mar LR 153 (Civ); 22 Pat LT 230—1941 Pat 296.

Section does not apply to usufructuary mortgagee, and applies only when possession is taken during mortgage and not at inception. 1929 A 348. But See also 26 LW 450—105 IC 419—1927 M 964; 25 CLJ 560—40 IC 371; 9 OWN 60. Section does not apply to a case where the mortgage has become extinct: 47 IC 224; nor to a mortgage by the lessee. 1925 B 330—27 Bom LR 553. As to the meaning of the expression “during the continuance of the mortgage,” See 9 OWN 60. As between a mortgagor and mortgagee attornment by the latter to a superior landlord cannot in any way prejudice the rights of the former, See 29 IC 746. Mortgagee taking possession otherwise than as mortgagee—Rent can be set off towards interest due on mortgage debt. 105 IC 419—1927 M 964. As to the right of the mortgagee in possession

to cut trees planted by him, see 99 IC 400; 112 IC 434. After redemption the position of a mortgagee in possession is only that of a tenant: 49 IC 179—8 LW 599; and a mortgagor taking a lease from the usufructuary mortgagee is a tenant until the mortgage is redeemed: 17 IC 424; 17 IC 265—1912 MWN 907. Where the mortgagee takes possession of the mortgaged property with or without the consent of the mortgagor, his possession cannot be adverse to that of the mortgagor. 46 IC 872. See also 25 CLJ 560—40 IC 371; 8 PLT 92.

2. Section 76(a)

The *measure of prudence* required under this section is that of a trustee under section 15 of the Trust Act, and that of a bailee under section 151, Contract Act. Lease created by mortgagee being an act in the course of management is binding on the mortgagor even after redemption. 11 IC 817; 31 IC 630; 52 IC 472; 97 IC 852—1926 PHCC 300; 1 UBR (1910) 14—8 IC 466. See contra 44 IC 839; 10 PLJ 625—1929 P 630. He must put the land to the best use so that fair amount of profits may be realised. 1923 L 71(2). See also 1941 OA, (Supp) 960—1941 AWR 1212. *Tadi* from trees on the land is not to be accounted as a source of income unless the trees were leased for the purpose. 6 NJ 93—1923 N 137(2). The mortgagee in possession can settle *bakasht* lands. The tenant is a non-occupancy tenant. 1925 P 198. The mortgagee need not look up to mortgagor's consent as to what rent should be collected or as to whom the property should be let out. 1927 B 145—29 Bom LR 215. See also 49 A 658—1927 A 552. A lessee for a term admitted into possession by the mortgagee cannot be ejected on redemption where there was nothing to show want of good faith in

granting the lease. *52 CLJ 142—1930 C 738*; nor is the mortgagee required to take any special trouble to make the best of the property. *2 Bom HCR 211*. A mortgagee cannot give a permanent lease. *14 RD 585*. See also *ILR (1937) 2 Cal. 181*. A mortgage with possession providing for the appropriation of profits of land mortgaged in lieu of interest being mentioned in the bond, which is governed by section 13 of the Dekhan Agri. Rel. Act, is one to which section 76 of the Transfer of Property Act does not apply. Consequently, the rule that the mortgagee is bound to manage the property as a person of ordinary prudence would if it were his own and to use his best endeavours to collect the rents and profits does not apply. Accounts should therefore be taken on the basis of receipts shown as having actually come into the hands of the mortgagee. *58 B 472—36 Bom LR 633—1934 B 321*.

3. Section 76(b)

A person in possession under an invalid agreement of sale may be treated as a mortgagee in possession who has to account for rents and profits. *35 CLJ 58—1923 C 114*. The mortgagee is responsible for so much as he has actually collected and what he might have failed to collect through his negligence. *38 IC 537*.

See *6 NLR 109—7 IC 547*. Mortgagor taking mortgaged property on lease from mortgagee—Mortgage-deed providing for payment of interest and also for crediting rent paid towards interest—Default in payment of rent and right to recover it time-barred—Mortgagee's right to recover interest. *ILR (1940) Lah 658—1940 Lah 333*.

4. Section 76(c): Other Public Charges

Section 76 cannot confer on a landlord the right to proceed directly against a usufructuary mortgagee from his lessee for rent or jodi due to him. *1941 Mad 401—(1941) 1 MLJ 225*. See also *66 CLJ 10—41 CWN 1141*. Even under the old law, it was the duty of the mortgagee in possession to pay the rent of the mortgaged property. *19 Pat LT 849—1938 Pat 196*. If in a suit for redemption of a mortgage with possession, the mortgagor calls upon the mortgagee to account for the amounts paid by him as rent which the mortgagee is under an obligation to pay either by reason of section 76(c) or by reason of contract, the mortgagor must establish a loss in view of the language of the last paragraph of section 76 of the Act. The mortgagor would not be entitled to have an account if he merely paid the amounts voluntarily. If the mortgagor had been obliged to pay the sums of money as rent, a loss has been occasioned to him which he is entitled to set off against his liability. But if the payment was voluntary, the mortgagor would be entitled to a money decree under section 70 of the Contract Act for three years' rent, all other sums being barred by limitation. There is no liability on the mortgagee to pay interest. *1940 PWN 1028—1940 Pat 579*. The word "summarily" occurring in the latter portion of section 76(c) implies that the proceedings for realisation of rent by sale of the property are of a summary nature, for instance, as in the case of a certificate proceeding under the Public Demands Recovery Act. *19 Pat LT 849—1928 Pat 196*.

Mortgagee is entitled to add Government revenue paid by him to the mortgage amount. *56 LA 339—51 A 686—1929 PC 243 (PC)*. A

mortgagee cannot add expenses for payment of road cess to the sum due on the mortgage. The payment of a public charge for which the mortgaged property may not be summarily sold does not create a charge upon the property. *1 Pat LJ 589—38 IC 232*. Unless the deed provides a fixed amount as Government revenue when such fixation would imply a contract to the contrary, the enhanced rent is payable by the mortgagor. *25 IC 641*. See also *2 LW 118*. The mortgagees should pay up even arrears of rent due prior to the mortgage and not allow the land to be sold away. *52 IC 902*. If he pays revenue on other lands included in the same patta, but not mortgaged he is entitled to the amount on redemption. *25 IC 797—27 MLJ 295*. But see *1925 A 189—83 IC 188*. Unless the mortgagees have actually collected rents or profits for a period to their getting into possession or unless they were so authorised to do, the mortgagor must pay the revenue on the property for period prior to the possession of the mortgagees. *10 Pat LT 849—1938 Pat 196*. A mortgagee who escapes from payment of revenue for some years need not account that to the mortgagor, *10 IC 113*. The mortgagee from a lessee will be deemed to covenant with the lessor for due payment of rent *27. Bom LR 553—1925 B 330* See also *5 PLJ 492—1920 P 277—38 IC 291*. Where the mortgagee had undertaken the duty of meeting the Government revenue and the intention of the parties was that the mortgagor should be responsible for increase or decrease in the Government revenue, the mortgagee could not be allowed to throw the burden of his own laches on the property for which the revenue was not paid and any equity that might have been invoked against the mortgagor, who did not seek redemption, did not arise against the purchaser of the equity of redemption. *32 A 612—20 MLJ 890—37 IA 182 (PC)*. See also *17 ALJ 93—*

57 IC 774. A mortgagee is not bound to pay the arrears of rent which accumulate in respect of that portion of a fixed rate holding which is not mortgaged to him. What he can be made liable for under that section is the rent or other charges which fall due in respect of the mortgaged property after the date of the mortgage. *83 IC 188—1925 A 189*.

Where the mortgage-deed provided that, if the revenue should be assessed in future, the mortgagor would pay it and would not be entitled to redeem without paying it, the intention of the parties is to make it a charge. Under section 76(c) the mortgagee in possession is primarily responsible for payment of the revenue. *25 OC 2—1922 O 91*. Mortgagee in possession failing to pay Government revenue—Mortgagor making payment—Liability of mortgagee to reimburse mortgagor. Section 24 *LW 657*. Where the mortgagee in possession pays municipal taxes, and there is an agreement that the rent was to be set off against the principal and interest, he is entitled to set off the amount paid as municipal taxes in the mortgage accounts so that he can remain in possession till the liquidation of the sum paid as taxes. *163 IC 55—1936 P 312*.

5. Section 76(d)

The duty to make the necessary repairs is a paramount one, and he will be held accountable to the mortgagor for loss cause by non-repair at time of redemption. *15 M 290*. Mortgagee can recover reasonable costs for improvements effected. *43 B 69—20 Bom LR 895—47 IC 751*. Failure to keep accounts of repairs will not be fatal to a claim for compensation. *37 IC 125—99 PR 1916*. The price of old materials should be reduced from the cost of improvements. *28 IC 375—105 PLR 1915*. Usufructuary mortgagee of a house cannot claim sums spent by him for

ordinary repairs, because he is bound to pay all normal expenses from rents and profits. *1929 A 348*. An usufructuary mortgagee who claimed compensation in respect of improvements effected by him such as building of a granary, payment of increased water-tax and introduction of water pipes, is not entitled to the same as (1) the granary being a movable structure can be removed by him, (2) the increased water-tax paid would fetch an increased rent, and (3) the introduction of water pipes is not a 'substantial repair' within the meaning of section 76, clause (d), so as to make the mortgagor liable for the same. *15 MLT 375—22 IC 635*.

6. Section 76 (e)

The question of waste cannot be gone into in an application for restitution nor be the subject-matter of a separate suit. *88 IC 521—1925 O 654*. See also *8 IC 466 (Bur)*. A mortgagee in possession is entitled to cut down trees which he had planted on the land after entering into possession, unless his act is destructive or permanently injurious to the property. *28 Bom LR 1258—50 B 692*. Mortgagee cutting trees—Suit for damages by mortgagor—Maintainability. See *112 IC 434 (Oudh)*. This rule being based on equity and reason applies also to cases not governed by the Transfer of Property Act. *24 M 47 (FB)*.

7. Section 76 (f)

Section applies only where the insurance is made by the mortgagee, but where the insurance was effected by the Court through the receiver during suit on the mortgage, the money received may be directed to be laid out as Court pleases. *40 IC 623*.

8. Section 76(g): Accounts

The liability of the mortgagee to render accounts is well recognised even before the coming into force of the *Transfer of Property Act. 155 IC 22—1935 P 148*.

But it cannot be laid down as a hard and fast rule that whenever a mortgagee has failed in the obligation imposed on him by section 76(g), he must necessarily be made liable on the basis of the gross rental, unless a presumption that all the tenants have paid their rents may not be justified. When the mortgagee is made liable for the rental, he should be allowed the costs of the collection. *9 Luck, 456-1934 O 104*. A mortgagee in possession in lieu of interest where the rate of interest is not specified and is not liable to account. *1937 ALJ 304—1937 A 317*. Nature and extent of mortgagee's duty to account. *9 OWN 60—1932 O 123*. As to presumption regarding the same, see *9 OWN 253*. Duty to keep accounts cannot be contracted against. *1923 A 175*. But see *25 MLJ 561; 47 IC 161—5 O LJ 263; 1924 O 92*. See also *28 OC 100—1925 O 114; 2 Luck, 564—1927 O 199*. In the absence of accounts, every presumption will be made against the mortgagee. *44 IC 9; 47 IC 21; 37 PLR 567*. See also *30 Punj LR 431*.

But this would not justify the Court in accepting without any examination of any evidence which may be offered by the mortgagor. *63 IC 598*. Mortgagees in possession cannot be deprived of their claim regarding expenses incurred even after a valid tender, because the tender was not accepted. *44 MLJ 534—1923 M 533*. So also they cannot be deprived of interest in cases where the mortgagee reasonably and *bona fide* does not accept a tender. *17 IC 368—1912 MWN 1175*. Where an usufructuary

mortgagee failed to keep such accounts as are required of a mortgagee in possession, the Court is justified in view of the provisions of section 76(g) in disallowing his claim for interest. *37 CWL 420*. So long as he does not enforce or execute the mortgage and is in possession throughout *qua* auction-purchaser, he is not liable to account for the profits of the property during the period he has been in possession. *ILR 1936 N 19—1936 N 293*. The accounts must be separate for each mortgage. *14 B 19*. As to security and examination of accounts, see *26 B 363; 11 B 78*.

9. Section 76(h)

See *1941, Mad 549—(1941) 1 MLJ 484; 1935 P 148*. For section 76(h), to be applicable the possession of the mortgagee must be *qua mortgagee*, and must be proved that the mortgagee had received possession by virtue of the agreement of mortgage. It has no application where the mortgagee is in possession as a tenant on rent under a lease which has nothing whatever to do with the mortgage. *22 Pat LT 230—1941 Pat 296; 19 OC 328—37 IC 23; 5 Pat LJ 492—58 IC 291*. The liability of mortgagee in possession under section 76(h) to give credit for the receipts after deducting the expenses and interest in the account is absolute unless the case comes within the purview of section 77 and the parties would not be at liberty to contract themselves out of the statutory liability. *1931 ALJ 977—1931 A 562 (FB)*. Mortgagee in possession letting premises and making large profits is liable to account to mortgagor. *19 Pat LT 487*. See also *ILR (1937) 2 Cal 181*.

Where a mortgagee in possession has to file suits for recovery of rent from tenants, it

is an act of management and hence expenses incurred in connection therewith are receivable under section 76(h). *16 Luck 812—1941 OWN 768—1941 Oudh. 498*. Ordinarily a suit for accounts upon a mortgage cannot be maintained by the mortgagor unless he asks for redemption. *47 IC 21*. Where there is an agreement between the parties, the mortgagee is not bound to account for the profits. *25 MLJ 561—21 IC 701; 53 CLJ 380*. When the mortgagee in possession has no accounts, he is to be debited with fair occupation rent and credited with simple interest on the mortgage-debt. *48 C 22—39 MLJ 147—47 IA 207(PC)*. He is also liable to pay interest on surplus collection. *46 A 897—1924 A 881—22 ALJ 833*. See also *7 OLJ 231—56 IC 962; 57 IC 294; 16 IC 217*. Rents and profits have first to be applied towards the principal and then towards interest. *8 MLT 420—7 IC 871*. Mortgagee in possession as manager or receiver is not a trustee for the mortgagor, but he has to prove that his accounts are true. *24 CWN 769—58 IC 13*. He cannot charge for personal service. *10 IC 748—13 Bom LR 161; 6 Bom LR 590*. But he can charge for agent's salary. *1 NWPSDA 447*; As to case where agent was the son of the mortgagee himself, see *26 C 1 (PC)*. Filing of suits to recover arrears of rent is an act of management. *23 IC 456—17 OC 47; 16 Luck 812*. No question of limitation arises as between mortgagor and mortgagee when accounts are taken at the time of redemption. *28 MLJ 184—27 IC 989; 1925 M 825—48 MLJ 363*. But if the suit for accounts is after redemption, it should be brought within three years from date of restoration of possession. *38 IC 610; 20 OC 25*. As to form of decree for accounts and mesne profits, order for costs see *16 IC 217 (M)*. *A Mortgage by the*

lessee creates privity of estate, and the mortgagee is liable to the lessor on all covenants that run with the land including the covenants to pay rent. 27 *Bom LR* 553—88 *IC* 79. See 5 *IC* 26 (case of mortgagee tenant) Zarpeshgi thika lease—Mortgagee given possession on fixed rent to appropriate part for interest and pay fixed sum to mortgagor annually—Nature of transaction—Failure to make annual payment to mortgagor—Effect—Redemption—Accounts—Basis. 1939 *Pat* 427.

10. Section 76(i)

The conflict of rulings between the Madras and the Allahabad High Courts [*vide* 47 *M* 7 and 5 *IC* 529] has been set at rest by the amendment in the section, favouring the Allahabad view that the mortgagee would not be entitled to the expenses incurred after tender of deposit. Even after a tender of deposit the mortgagee continues as

mortgagee, but with a statutory liability to account for the profits received by him from that date. The liabilities of the mortgagee in such a case have to be determined once and for all in the redemption suit and cannot be determined in a separate suit. A *second suit for mesne profits* is therefore not sustainable under section 14, Explanation IV and Order XI, rule 2, CPC, after a suit for redemption is brought. 2 *R* 382—84 *IC* 395.

11. Sections 76 and 77

Applicability—Usufructuary mortgage—Stipulation for payment of rent to landlord by mortgagee out of rent and profits and for appropriation of balance towards interest—Non-payment of rent—Decree for rent obtained by landlord getting barred—Right of mortgagor to claim credit for unpaid rent in reduction of mortgage amount. 51 *LW* 617—1940 *M* 686—(1940) 1 *MLJ* 693.

77. Receipts in lieu of interest—Nothing in section 76, clauses (b), (d), (g) and (h), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Case Law

Section 77—Section is to be construed strictly. See 6 *M* 74; 53 *IC* 59. See also 5 *A* 419. *Covenant for appropriation of the receipts of mortgaged property towards*

interest ceases to operate after the deposit by the mortgagor of the money due into Court; and clause (b), (d), (g) and (h) of section 76 become applicable to the mortgagee. 47 *M* 7.

But it does not necessarily follow that simply because the rate of interest is mentioned, the parties must have intended that there was to be accounting. Where the sub-mortgagor recited that he would repay the amount borrowed with interest at a certain rate, that he was put in possession, that after payment of Rs 95 for Government revenue yearly out of the profits, he would appropriate the balance in payment of interest, the sub-mortgagor is not entitled to ask for an account. *1934 Oudh 220*. See also *1929 P 571*. Where there is no provision in a mortgage-deed that the interest be not a charge on the property, but an undertaking is given by the mortgagor that he would make good to the mortgagee any deficiency in interest from his other properties, any shortage in profits, while the mortgagee is in possession of the property can be claimed by him but only he cannot claim interest on the shortage. *16 Luck 812—1941 OWN 768—1941 Oudh 498*. Section 77 only comes in where the

mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced. It does not cover the case in which only a part of the interest is to be paid out of the usufruct. *155 IC 22—1935 P 148*. A provision for payment of portion of income to mortgagor is valid, legal and binding. *41 M 959—55 MLJ 489*. So also a provision that the mortgagee must pay the land revenue whether profit or loss occurs *23 IC 131. 10 NLR 9*. See also *46 A 633*. An usufructuary mortgage-deed provided that the mortgagee would be entitled to appropriate in lieu of interest the profits remaining after the payment of Government revenue and *malikhana* to the *malikhanadars* and that all profits from increased incomes would go to the mortgagee. The mortgagee made profits by not paying *malikhana* to the *malikhanadars*. In a suit for redemption of the mortgage, the mortgagee is not bound to account in respect of the *malikhana*. *7 P 44*.

Priority

78. Postponement of prior mortgagee—Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Case Law

Section 78—Section 78 is an exception to the general rule that the prior mortgagee takes precedence over the subsequent mortgagee. The onus of proving gross neglect lies on the subsequent mortgagee who asserts exception to the general rule. *63 C 880—1936 C 283*. Section 78 applies in cases of prior and subsequent mortgagees and, not to the case of a prior mortgagee and subsequent purchaser. *150 IC 145—1934 O 283*. Principle of section is that where a person holding a prior title connives at or assists in a fraud for the creation of a subsequent title without notice of the prior estate, the prior title is postponed to the subsequent one. See *18 B 444; 15 CWN 813*.

Priority—If priority could be pleaded as a defence, it could be claimed in a suit as well. *34 A 102—12 IC 607—8 ALJ 1289*. Fraud is not always necessary to bring a case under this section *34 IC 115—43 C 1052; 23 SLR 97—112 IC 722; 6 R 423—111 IC 105; 4 R 238*. As to failure to search in the Registration Office, see *47 IC 774*. “*Gross neglect*”, meaning: *1928 R 136; 56 C, 868; 63 C 880—1936 C 283*. *Gross negligence* does not mean negligence amounting to fraud. *15 M 268*. Neglect is apparently something different from fraud; it may include honest inadvertence. Neglect is to be determined in every case on its own facts and no precedent can serve as a safe guide. *1940 Lah 269; 43 C 1052 (1083); 1929 (Rang) 65; 12 M 429; 15 M 268; 1929 Lah 314—118 IC 655*. It would be ‘gross neglect’ within the meaning of section 78, if a prior mortgagee has by any act or omission enabled the mortgagor to deal with the property as if it is

not encumbered. Where a mortgagee has failed to secure the title-deeds and has permitted the mortgagor to delay the registration of his mortgage, a subsequent mortgagee who on the strength of the title-deeds produced, and on reference to the encumbrance certificate, advanced money is entitled to priority. *46 LW 778—1938 Mad 87; 1938 M 161*.

In proof of gross negligence, all that is necessary to show is not direct and positive fraud, but lack of good faith in the sense of due care and attention. *30 NLR 196—1934 N 29*. The mortgagee parting with the title-deeds relating to the properties when he had sufficient reasons to think that the mortgagor required them for the purpose of effecting a sale of the properties, is guilty of negligence under section 78 of the Act in having allowed the mortgagor to defraud a purchaser, but no estoppel under section 115, Evidence Act, arose against the mortgagee in favour of the purchaser. *1936 MWN 871—1937 M 195*. Slight negligence cannot be construed as gross negligence. *8 M 200; 1929 L 314*. A mortgagee who allows the mortgagor to remain in possession of the mortgaged property as a tenant, is not guilty of gross negligence within the meaning of section 78. *42 PLR 265—1940 Lah 308*. It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the properties mortgaged and ordinarily his registered mortgage is sufficient protection to him. *1935 R 26*.

The omission on the part of a subsequent mortgagee, who lends money *bona fide* in ignorance of the claim of a prior mortgagee,

to call for the title-deeds is not by itself sufficient to postpone his claim to that of the prior mortgagee, when the latter has not the custody of the title-deeds. It is only in favour of the person in possession of the title-deeds that the doctrine of constructive notice can be invoked on the ground of the omission of the other party to call for the title-deeds. *47 LW 40—1938 Mad 161*. For the application of the section, it is necessary to prove that the fraud, misrepresentation or gross neglect of the prior mortgagee was the proximate cause for the advance of money by the subsequent mortgagee. *1933 ALJ 16—1933 A 299—146 IC 488; 1935 L 108*. Failure to obtain possession of title-deeds by a first mortgagee cannot be held to amount to such “*gross neglect*” as would postpone him to a second mortgagee under section 78. *1930 R 246 (2); 1936 R 152*.

Where the possession of the title-deeds is an essential part of the earlier encumbrancer’s security, then, if he having got the title-deeds allows them by negligence to be again, without sufficient reason, in the possession of the mortgagor, he will be postponed to a subsequent encumbrancer to whom they are delivered. *63 C 880—165 IC 332—1936 IC 332—1936 C 283*. The omission on the part of the prior mortgagee to enquire about the original redemption certificate cannot be deemed gross negligence. *36 CWN 420—1932 C 589*. It is no part of the duty of a mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. It is fundamentally erroneous to talk of a mortgagee who is out of time in discovering that the equity of redemption has been assigned, as a person who has been guilty of

negligence or laches. *38 CWN 124—1934 C 421*. Where in a mortgage created by deposit of title-deeds the mortgagor deposits all deeds showing his title but does not deposit other material deeds, the mortgagee cannot be held guilty of any gross neglect so as to postpone him to a subsequent mortgage. *1930 L 920*.

Where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage, merely because the prior mortgagee has omitted to get his mortgage registered until after the execution of a subsequent mortgage. *60 C 225—1933 C 398*. Misrepresentation does not mean fraudulent misrepresentation. *43 C 1052—34 IC 115*. Section makes fraud, misrepresentation and gross negligence quite disjunctive; they are not in any way co-existent. They are three different kinds of conduct, each of which would make the section applicable. See *43 C 1052—34 IC 115; 15 M 268 (275); 1928 S 179*. See also *1929 R 298; 30 NLR 196—1934 N 29*.

Abstention from Enquiry for Title-Deeds—In a place where one knows that mortgages by deposit of title-deeds are legal and usual it would amount to notice of mortgage under section 3 of the Act. Where the vendor on being asked to produce the title-deed by the vendee said he has not got it and the purchaser did not enquire what happened to the deed and it appeared subsequently that the title deeds had been deposited with another person in order to create an equitable mortgage, the vendee must be fastened with notice of the mortgage and the purchase is to be subject to the mortgage. *31 CWN 703—1927 C 538*. See

further 7 IC 810—20 MLJ 797. A mortgage executed in satisfaction of a prior mortgagee decree has priority over a *mesne* encumbrancer. 33 A 368—9 IC 205; 7 IC 468—7 ALJ 984.

A suit in respect of priority is governed by Article 132 of the Limitation Act. 23 IC 448—17 OC 38. Where the first mortgagee of two villages did not appeal against a decree subordinating his rights over one of the villages to those of a second mortgagee, he is not prevented from enforcing his full rights over the other village. 37 A 474—42 IA 163—29 MLJ 159(PC). The prior mortgagee would lose his priority when he joins with the mortgagor to induce the second mortgagee to believe that the property was free from encumbrances. 15 CWN 813—21 MLJ 936 (PC). See also 49 A 233—1927 A 211; 33 IC 112(C). The same principle would apply where a certain mortgaged property was described wrongly and was purchased by a third party. The purchaser will not be bound by the mortgage. 15 IC 335. See also on this section 11 OLJ 381—1924 O 85; 20 LW 651—1925 M 129—82 IC 846.

Under this section an intermediate mortgagee with notice of a prior mortgage is postponed so far as regards further advances which are subsequently made on the security of the prior mortgage, provided the prior mortgage expresses a maximum, which is not exceeded. 1 PLT 582—58 IC 489—1920 P 261; 17 IC 927—16 CLJ 394. For future

advances to have priority there must be a maximum fixed and future advance must be limited to that maximum. 1 R 635—45 MLJ 505—51 C 86—1923 PC 211 (PC). Where a mortgage is executed by way of continuing security for the payments of all debts due and thereafter may be due by the mortgagor and a subsequent mortgagee takes the mortgage of the same property with knowledge of the prior mortgage and the prior mortgagee thereafter does not make any advances, the prior mortgagee is entitled to priority not only in respect of principal sum but also interest accruing on it. As there are no advances by prior mortgagee after execution of subsequent mortgage, section 79 does not apply and hence a statement that the maximum principal amount secured by the prior mortgage was not fixed at certain amount for purpose of section 79 will not disentitle the first mortgagee to priority in respect of interest on that sum. 1938 ALJ 658—1938 A 473. The maximum amount may either be express or gathered by implication. 17 IC 927.

Where in a family partition certain debts were allotted to the share of each member, creating a charge over the share of each to a fixed maximum and subsequently one member mortgaged his share, the mortgagee could sell the share only subject to the prior charge created by the partition deed. 70 IC 362—41 MLJ 282. Section applies to a mortgage as well as charge. See also 14 LW 559.

79. Mortgage to secure uncertain amount when maximum is expressed:—If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advance 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 ¹[Taka] 10,000.00. A then mortgages Sultanpur to *C*, to secure ¹[Taka] 10,000.00 *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 ¹[Taka] 5,000.00. *B & Co* subsequently advance to *A* sums making the balance of the account against him exceed the sum of ¹[Taka] 10,000.00. *B & Co* are entitled, to the extent of Taka 10,000.00, to priority over *C*.

80. [Tacking abolished.]—Repealed by section 41 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Marshalling and contribution

²[81. **Marshalling securities:**—If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.]

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1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "Rs" (with effect from the 26th March, 1971).
 2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 42 for the original section.

Case Law

Section 81 Scope—See *1941 Pesh. 49* (applicability of section to North West Frontier Province). As to applicability. See *9 IC 725; 38 IC 542*. Under section 81 a subsequent mortgagee has the right to claim marshalling against the prior mortgagee. *1935 R 139*. Object of section is to protect subsequent mortgagees in respect of properties mortgaged to them being sold to satisfy a prior mortgage, when the prior mortgagee has other properties also mortgaged to him which could be sold to satisfy his dues. See *1924 P 459—3 P 522—78 IC 796*.

The undoubted right of a mortgagee to release any part of his security cannot be lost or be made subject to the right of marshalling given by section 81. The right given by section 81 is expressly made subject to the condition that there should be no prejudice to the rights of the first mortgagee. Where the first mortgagee releases one of two properties mortgaged to him and subsequently sues for the amount due to him by sale of the other property included in his mortgage, the subsequent mortgagee of the latter property is not entitled to invoke the doctrine of marshalling and to ask for the other property not mortgaged to him to be sold before the property mortgaged to him, because it is impossible for the first mortgagee to ask for the sale of the released item of property, it being no longer subject to his mortgage. *1938 M 503—(1938) 1 MLJ 310*.

Where two properties have been mortgaged to a person who has obtained a decree on the mortgage, and one of them has been subsequently mortgaged to another, the

latter would come within section 81, and can claim a right to marshal provided the exercise of such right is not to the prejudice of the prior mortgagee or of any other person having interest in any of the properties. But where the property is found not to be worth anything like the amount due under the mortgage, the subsequent mortgagee has no right of marshalling, because to compel the prior mortgagee to sell that property first would be prejudicial to him. *1941 PWN 582*. Section 81 applies to mortgages of immovable property and not to the hypothecation of movables. *14 R 198—1936 R 266*. Second mortgagee of part of property covered by first mortgage, acquiring mortgagor's right in that part—His right of marshalling. *1937 Rang LR 13*. The section applies only to subsequent mortgagees and not to subsequent purchasers. *130 IC 817—1931 N 91*. See also *1930 A. 634* (as to auction-purchasers seeking to preserve mortgaged property from sale). In the case of the representative of the mortgagor himself no question of contribution arises. *79 IC 69—1924 A 929*. Decree-holder mortgagee can sell in any order in the absence of direction in the decree. *45 MLJ 722—47 M 688—83 IC 852*. See also *1930 M 178*.

The Court has a discretion to make orders for exclusion of any property from Court-sale, if the circumstances of the case require. *41 C 418*. The words "but not so as to prejudice the rights of the prior mortgagee" cannot be construed as giving the prior mortgagee a right to have the properties mortgaged to him sold in any order that he may prefer. *40 CWN 1173*. The purchaser of

the property in execution of his mortgage decree is entitled to enforce the rights of marshalling against a prior mortgagee so long as that prior mortgage is not extinguished. 3 P 522—1924 P 459. See also 1929 MWN 629; 42 CWN 502. But see 1929 A. 309 following 22 A 284. Certain property consisting of two items was subject to successive mortgages. One of the *puisne* mortgagees brought a suit and purchased one item in execution. He subsequently obtained an assignment of a decree passed in favour of a prior mortgagee in respect of the other item. As assignee decree-holder, he applied for execution against the other item alone. By the purchase of one of the items, the mortgage had been discharged *pro tanto* and the assignee-decree-holder could proceed against the other item, only for the proportionate value of the debt in relation to the mortgage-debt; and an objection of this nature could be taken in execution by the *puisne* mortgagee. 141 IC 366 (M); 69 MLJ 303; 42 CWN 502.

The provisions of this section as to marshalling cannot be availed of to the prejudice of the prior mortgagee, so as to defeat or unduly delay or prejudice his rights. See 29 M 217 at 223-4; 18 B 160; 1930 L 731; or to the prejudice of third parties. 18 B 160. The material time for the exercise of the right of marshalling is the time when the prior mortgagee seeks to realise his mortgage

amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee then the right of marshalling does not exist. Primarily the right of marshalling is a right given against a mortgagor. The right is not enforced against a mortgagee or purchaser of the other estate and the right of such a mortgagee or purchaser not to be marshalled does not depend upon whether he had notice of the second mortgage. 54 M 59—60 MLJ 69.

Notice—Under this section as amended, it is not necessary that the subsequent mortgagee should have no notice of the prior mortgagee to exercise the rights under the section. 23 C 790; 33 IC 815; 34 IC 338; 31 M 419; 1925 PHCC 239; 1926 P 94; 1929 A 309; 1930 P 442 and 51 M 648—55 MLJ 358 are not now good-law.

Sections 81, 82 and 101—Under section 81 before the amendment, a subsequent mortgagee, who has notice of a prior mortgage, cannot claim marshalling as against the prior mortgagee who is entitled to recover the entire mortgage debt from every item of the properties mortgaged to him. A *puisne* mortgagee who is not entitled to claim the benefit of marshalling does not get any higher rights than the mortgagor, under section 75 of the Act, before the amendment. 46 LW 555—1937 M 965.

82. Contribution to mortgage-debt—¹[Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.]

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section 81 to the claim of the ²[subsequent] mortgagee.

Case Law

Contribution to mortgage debt—not against mortgagee.

Section 82 applies to mortgagors *inter se* and gives one mortgagor a right to have the other's property contribute to the discharge of the mortgage debt. This right cannot be availed of against mortgagee or auction

purchaser. *54 CWN (DR) 287.*

—Auction purchaser under mortgage sale—Cannot avail of the section—Applicability.

Section 82, Transfer of Property Act applies to mortgagors *inter se* and gives one

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 43, for the original paragraph.

2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 43, for "second".

mortgagor a right to have the others' property contribute to the discharge of the mortgage debt. This right cannot be availed of against the mortgagee or the auction-purchaser at a mortgage sale by a purchaser of mortgaged property at an auction sale held under a simple money decree. *Joshoda Sundari Devi vs Sumanta Chandra Kangsha Banikya*, PLD 1950 Dacca. 31 Rel; AIR 1931 Cal 251—30 IC 889.

Abstract

1. Object
2. Application of Section
3. Principle and Application of Section
4. Encumbrance
5. Illustrative Cases
6. Release by Mortgagee

1. Object

Where several properties are mortgaged to secure one debt, such properties should contribute rateably for payment of such debt, the valuation for such purpose being made after deduction from each property or estate the amount of any other encumbrances by which such estate is affected at the date of the mortgage. In such cases the law requires equality. See 26 A 407. (pp 416, 436-7). Section 82 can apply while the mortgage is still subsisting; but it applies even more when the mortgage has been paid off out of some only of the properties mortgaged, and the owner or the person interested in the properties from which the mortgage has been paid off has a right to claim contribution from the owner of other properties which were liable under the mortgage but which were

not called upon to pay it off. 44 Bom LR 15. It is open to the mortgagee to recover his debts from any one or more of the shares. The mortgagee does not owe a duty to each mortgagor to sue all other mortgagors or their assignees. 38 CWN 124—1934 C 421. This section only defines and declares the relations of mortgagors *inter se*, and does not affect the mortgagee-decree-holder's right of selling any one item for the whole amount and realising the same. 45 IC 862—20 Bom LR 175; 23 CWN 308—29 CLJ 297; 16 OC 199—20 IC 765. See also 31 A. 65—1 IC 5; 35 IC 43 (P); 1935 R 26; 1932 MWN 1343 [82 IC 2—1925 N 160(1)], holding that relation between co-mortgagors is dealt with in section 95(old) and this section deals with relations between mortgagor and mortgagee, is not in accordance with the various amendments to the Act.] 1928 S 101; 18 C 320; 29 M 217—7 CLJ 274. A co-mortgagor by paying the mortgage-money acquires a charge in regard to the amount paid by him in respect of his co-mortgagors over their shares independently of section 95, Transfer of Property Act. He gets the rights of the original mortgagee under section 92 and acquires a charge under sections 82 and 100 of the Act. 1942 OA 413 (FB). Courts cannot introduce any extraneous principle to modify the liability to contribution imposed by section 82. 16 P 557—18 PLT 787—1937 P 628. Where several properties are mortgaged and the sum actually advanced is less than that mentioned in the deed, the equitable method of dealing with this would be to distribute the reduction of principal over each item of property specified at the foot of

the mortgage. *33 CWN 1091—1929 PC 243 (PC)*. The release of part of the mortgaged property by the mortgagee does not take away as regards that part of the liability to contribute which section 82 imposes upon the different parts. *1942 ALJ 463—1942 PC 50—(1942) 2 MLJ 390 (PC)*. A mortgagee must not release the properties of one of the mortgagors to the detriment of the others. If the mortgagee relinquishes a valuable property for an inadequate consideration, he would not be allowed to throw the burden of the balance upon the other properties. *16 CLJ 401—17 IC 931; 44 B 223—55 IC 327; 23 CWN 308—50 IC 790*. See also *15 CWN 800—6 IC 842*. But see *contra 40 M 968—33 MLJ 211 (FB); 39 M 419—29 MLJ 319; 25 A 79; 28 A 194; 28 A 19; 29 A 369*, not approved; *19 CLJ 590—23 IC 426; 43 IC 915; 1 PLJ 228—36 IC 208*. (See also cases cited on the point under section 67.)

2. Application of Section

The section deals with the rights of owners *inter se* and therefore the contract to the contrary is a contract between them, that is, those liable to contribute. Where one of two persons owning mortgaged properties receives the whole amount to the exclusion of the other, there arises a contract, which need not be express, that the other shall not be liable to contribute. Similarly, when each of them receives an equal moiety, a contract must be implied that they shall bear the burden equally. The question how much money one man owes to another must be first determined with reference to the transaction between them, and after that question is determined, one has next to see on which it can be made a charge with reference to the

section. *69 MLJ 303*. See also *1933 A 929; 1939 A 86; 21 PLT 227; 42 CWN 1004—1938 C 618*. But see *131 IC 545*. The right to contribution presupposes the existence of joint liability. *1933 A 929*. The question of contribution between several subsequent mortgagees can be decided only in a properly framed suit for contribution. *4 PLJ 91—1923 P 199*. Plaintiffs who did not ask for a definition of the respective liabilities of the several defendants, are not entitled to a decree for a consolidated amount against the defendants jointly. The defendants could be rendered liable only in proportion to the properties held by them. *1931 ALJ 349*. The plaintiff cannot claim to fix the whole liability for contribution on only a portion of the mortgaged property. *1930 M 644*. Mortgage over three properties—Mortgagor selling property No. 3 to X—X retaining consideration agreeing to pay off entire mortgage—Mortgagee subsequently buying property No. 1—Liability of property No. 3 for entire mortgage-debt—X not personally liable. *42 CWN 1004—1938 C 618*.

3. Principle and Application of Section

The first paragraph of section 82 enunciates the general rule as regards the apportionment of liability between the several properties whether belonging to one or several owners when they are mortgaged to secure one debt. The provision that the properties are liable to contribute rateably to the debt secured by the mortgage clearly implies that this liability constitutes a charge upon the properties. Further, section 82 read with section 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability. *1935*

OWN 278-1935 O 245. The equitable doctrine of rateable apportionment, is not excluded by any statutory provisions and is applicable in India. *61 MLJ 512.* The general principles underlying this section are applicable to the Punjab. *1933 L 374—34 PLR 532.* Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debts secured by the mortgage. *102 IC 708.* See also *33 A 708—11 IC 145; 44 B 223—22 Bom LR 68—55 I 327; 1924 P 530.*

Where such a contract exempting the owner of one property from liability to contribute exists, the other parties are bound by this contract. *100 IC 833—1927 M 1086; 46 A 286—22 ALJ 193.* See also *50 A 569—1928 A 241; 24 M 85.* All the elements of contract are as much present when a sale takes place in execution of a decree as in ordinary sale. Hence, there can be a contract to the contrary even in a sale held in execution of a decree. (*27 B 334, Ref*) *1933 A 929.* Contract to the contrary is not between the mortgagor and one of the purchasers of the equity of redemption, but between the parties liable to contribute. *39 IC 405; 20 IC 765—16 OC.199; 24 ALJ 401—1926 A 352.* See also *96 IC 765—24 ALJ 714; 46 A 286—22 ALJ 193; 27 NLR 258.* Such a contract should be specifically alleged and proved. *13 IC 545.* The expression “contract to the contrary” means contract between mortgagor and mortgagee, and not between the mortgagors themselves, nor a subsequent contract between the mortgagors. *35 LW 145—1932 M 218.* The expression “contract to the contrary” includes also a contract

between the mortgagor and a purchaser of the equity of redemption and can be enforced by the mortgagor or a subsequent purchaser of the equity of redemption or of another portion of the equity of redemption, if the benefit of the contract has been assigned by him. *44 LW 447—1936 M 901; 1936 M 898; (1940) 2 MLJ 484—1941 Mad 66.* But see *160 IC 686—1936 M 113.*

Sale of zemindari villages belonging to different owners for arrears of revenue—Payment of entire arrears by owner of one village to set aside sale—Claim to reimbursement—Liability of other villages—Plaintiff not liable to pay revenue as between himself and zemindar—If “contract to the contrary”. *44 LW 214.* Rateable contribution is a charge on property mortgaged and cannot be enforced against the person. *27 ALJ 1162—1929 A 696.* It is essential to the accrual of the right of contribution that the whole of the debt in respect of the payment of which contribution is claimed should have been satisfied. *7 OWN 401—1930 O 260.* Section 82 lays down that *inter se* mortgagors are liable for contribution in proportion to the value of their property which has been included in the joint mortgage, and not merely to the extent of the benefit received. *131 IC 545.* See also *1942 ALW 500.*

Where section 82 governed it is not proper to introduce any extrinsic principle to modify the statutory provisions. *57 IA 189—52 A 358—59 MLJ 177 (PC).* The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of the other property alone.

There is no distinction in principle between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment is enforced by the sale of the property itself. The liability to contribute is imposed upon the property and is not personal. (1942) 2 *MLJ* 525 (FB). Value for purposes of contribution—Mode of ascertainment. 59 *IA* 106—62 *MLJ* 492 (PC).

4. "Encumbrance"

"Amount of any other encumbrance"—Meaning of—26 *ALJ* 298—109 *IC* 38; 1928 *A* 241. See also 6 *IC* 150(A); 1929 *PC* 243—33 *CWN* 1091 (PC); 1930 *P* 607. Purchasers of the property in execution of the mortgage decree take the property free of subsequent liability or equities. 20 *ALJ* 337—44 *A* 488; 43 *A* 42—58 *IC* 414; 43 *IC* 915. See also 6 *R* 417; 1922 *A* 495.

5. Illustrative Cases

Where a purchaser of part of the mortgaged properties pays off a mortgage-debt to which all the properties are subject, the owner of another part of the mortgaged properties, who seeks to redeem his share of the properties, is liable to contribute the proportionate share of the debt. But a claim to such contribution which is barred by limitation cannot be pleaded in bar of redemption. 41 *LW* 730—68 *MLJ* 362. Where the equity of redemption vests partly in a prior and partly in a subsequent mortgagee, neither the former can be compelled to redeem the whole nor the latter to give up his interest in the share of the mortgage. 20 *ALJ* 583—44 *A* 708. Where the owner of one of the items pays up the whole

mortgage amount, the owners of the other items must contribute rateably. 36 *A* 272—23 *IC* 339; 35 *IC* 43; 159 *IC* 1049—1936 *O* 196. So also in the case of a charge. 162 *IC* 304—1936 *M* 293. Where the mortgagee recovers the entire debt out of one item, an alienee from the mortgagor of that item can recover contribution from the persons who hold the other items included in the mortgage. 1931 *ALJ* 1073. Where properties belonging to different owners are subject to the same mortgage and one owner pays the whole, he is entitled to a charge over the other properties for amounts of the debt in proportion to their value. 43 *A* 589—63 *IC* 209; 40 *M* 968—33 *MLJ* 211 (FB); 7 *OWN* 401—1930 *O* 260; 51 *IC* 49 (Pat). On this point see section 92. Where both the mortgaged items belonging to two persons are sold and one contributes more than its rateable proportion, its owner has a personal remedy against the other to the extent of any surplus sale proceeds received by the other. 33 *A* 708—11 *IC* 145. Where the mortgagee of certain items buys the equity of redemption in one of them to that extent his mortgage is discharged. 10 *IC* 235; 43 *M* 372—38 *MLJ* 239 (FB); 29 *IC* 124; 20 *IC* 825.

Mortgage of land and house on it—Subsequent purchase of house alone and removal of materials by another—Suit on mortgage—Liability of purchaser. 5 *R* 764—1928 *R* 68. (As to apportionment of liability between life-tenant and remainderman see 36 *IC* 292 (C). See also 9 *PLT* 573. Where the mortgagee purchases at sale in execution of his decree on his second mortgage one of the two properties mortgaged to him, the equity of redemption in that property becomes vested in him and such purchase has the effect of discharging

and extinguishing a portion of the mortgage debt, which is chargeable to the property purchased by him. *59 C 76*. See also *1933 L. 374—34 PLR 532*. Where, in a suit on a mortgage comprising several items, the Court directed the properties to be sold in a certain order, in the event of the decretal amount being satisfied by the sale of only one property, the remaining mortgagors are not released from all liability to contribute to the mortgagor whose property alone has been sold, unless there is an indication of an intention in the mind of the Court to release them. *51 IC 49 (P)*; *41 LW 416*. A co-sharer who, to prevent arrest for a decree against himself and another co-sharer for arrears of rent due by both under the Estates Land Act, pays the whole rent is entitled to contribution from the other and to a charge for his excess payment on the co-sharer's share of the property, as it stood on the date of payment. It cannot avail retrospectively against prior mortgagees and others who have in good faith advanced money on the property. *55 M 468—62 MLJ 31*. Subsequent mortgagee is not liable to contribute to person interested in mortgaged property satisfying prior mortgagee's decree barred by limitation. *115 IC 552—1929 P 94*. Mortgage of several items—Sale to different persons—Items sold in execution of the mortgage decree obtained by the prior mortgage—Plaintiff, a subsequent purchaser of one of the items, deposited the amount under CPC, Order XXI, rule 90, and got the sale set aside—Plaintiff's suit for contribution against purchasers of other items is competent and he is entitled to recover poundage and interest on the debt but not cent percent. compensation paid. *1934 M 189*.

6. Release by Mortgagee

As to what amounts to a release by the mortgagee, see *1929 A 889*. The owners of parts of the equity of redemption cannot be deprived of their right to contribution under section 82 by the action of the mortgagee in releasing another portion of the mortgaged property. *162 IC 304—1936 M 293*.

Sections 82 and 60—If a mortgagor happens to purchase a portion of the mortgaged property, there would be a merger and extinction of liability under the mortgage to that extent, and in the absence of any other circumstances showing that it is for the benefit of the mortgagee to keep his mortgagee's rights alive or that he declares his intention either expressly or by necessary implication that he would keep his subsequently acquired right distinct from his prior rights which he held as a mortgagee, his right to recover his money under the mortgage, is, on his purchasing the equity of redemption in a portion of the property mortgaged with him, extinguished *pro tanto* to recover only a proportionate part of the amount due on the mortgage. The principle of section 82, Transfer of Property Act, should be applied to such a case and the mortgagee should not by his purchase be permitted to improve his position and should be treated in the same manner as a stranger would be if he happens to purchase the property and the value of the property to be taken into account is the value of the property as it existed on the date of the mortgage unaffected by any subsequent increase in the value on account of improvements or any subsequent decrease in value. The words "remaining due" in the last paragraph of section 60, Transfer of Property Act, are, to some extent, misleading,

and must not be taken too literally. *1942 M 44—(1941) 2 MLJ 520.*

Sections 82 and 100—Where the payment of certain maintenance allowances are charged upon two properties and by their own negligence the charge holders allow

their remedy to be lost as against one of the properties, they could not claim as against the other property to recover anything more than a proportionate share of the original maintenance charge. *192 IC 327—1940 OWN 1249—1940 O 203.*

Deposit in Court

83. Power to deposit in Court money due on mortgage—At any time after the principal money ¹[payable in respect of any mortgage has become due] and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor—The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law ²for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed ³[and all documents in his possession or power relating to the mortgaged property], apply for and receive the money, and the

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1. Substituted by the Transfer of Property (Amendment), Act, 1929 (XX of 1929), section 44, for "has become payable".
 2. See the Code of Civil Procedure, 1908 (Act V of 1908), Schedule I, Order VI, rule 15.
 3. Substituted by Act XX of 1929, section 44, for "if then in his possession of power,".

mortgage-deed ¹[and all such other documents] so deposited shall be delivered to the mortgagor or such other person as aforesaid.

²[Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.]

Case Law

No deposit, when necessary.

Section 83 has no application when by reason of section 26 GBT Act the property is freed from liability.

All that section 83 of the Transfer of Property Act says is that the amount remaining due on the mortgage may be deposited. If nothing is due, then no deposit is obviously called for. 5 DLR 57.

Sections 83 and 84—Mortgage—Minor—Misrepresentation—Minor entering into mortgage fraudulently representing as to his age and subsequently bringing action for restitution of mortgaged property—Restitution of property to be ordered—Minor must, however, be made to refund

consideration—Maxim: He who seeks equity must do equity. *Shah Pasand Khan vs Ihsan*, 21 PLD (Peshawar) 306.

Abstract

1. Who can make Deposit
2. Joint Mortgages
3. Tender and Deposit
4. Effect of Refusal of Deposit
5. Security

Section 83—[See also Notes to section 84] Section 83 deals with the right to deposit in Court and not with the right to redeem by payment direct to the mortgagee or the right to bring an action for redemption. A purchaser

1. Inserted by Act XX of 1929, section 44.

2. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 44.

of the mortgaged property from the widow of the mortgagor, whose sale is not effective on account of invalid registration, although precluded from proving his purchase, may establish his undertaking to pay off the subsisting mortgage by the deed. *13 P 111—1934 P 127*. Section 83 provides a special privilege and in order to claim its benefit, the mortgagor must come strictly within the provisions of that section. Thus the deposit has to be made to the credit of the mortgagee or mortgagees. Such deposits would be invalid if the mortgagor associates with the real mortgagee, some third person who is not entitled to any share in the mortgage-money. *50 A 655—1928 A 311—26 ALJ 394*.

Interest has got to be calculated only up to the date of the deposit, and not till the date when the notice required by the section might be served on the mortgagee. *1937 ALJ 757—1937 A 706*. In cases where the mortgage-deed provides for a rate of interest which is penal and unenforceable, the mortgagee would be entitled to a reasonable compensation, and the amount legally due is only what the Court finds it to be. If amount deposited is found to be what the Court thinks reasonable, then the deposit is valid and interest ceases to run. The mortgagee always acts in peril in such cases in declining to receive the amount deposited. The mere fact of the withdrawal of the amount deposited by the mortgagor when the mortgagee declines to accept it does not *per se* prevent interest from ceasing to run unless the mortgagee shows that the mortgagor was either not willing or not able to pay because he has utilised the moneys for other purposes. *1939 M 503; 1 MLJ 324*.

A deposit after a suit on the mortgage has been instituted with an insufficient court-fee and before the plaint has been represented with sufficient court-fee is not a good and valid deposit. *48 IW 929—1939 M 200*. Where the mortgage land contains a stipulation that the mortgage could be discharged only beyond the fruit season, a deposit while the fruit season is still on is not invalid, when the mortgage is in lieu of interest, and the mortgagor does not make a condition of the deposit that the mortgagee is to take out the money forthwith in satisfaction of his dues. *45 CWN 174—1941 C 18*. A deposit does not cause an extinction of the security as if there has been valid satisfaction. That result can follow only when the mortgagee applies for and receives the money. If, therefore, the deposit made by the mortgagor is drawn out by somebody who is not entitled to it and is not available to the mortgagee when he applies for its withdrawal the deposit does not extinguish the mortgagee's right to enforce the mortgage. *45 CWN 174—1941 Cal 18*.

Where the defendants 1 and 2 had allowed the property to stand benami in the names of defendants 3 to 7 in the record of rights and the mortgagor made the deposit to the credit of not only defendants 1 and 2 but also defendants 3 to 7, the deposit is valid and he is entitled to *mesne profits* from date of deposit. *15 PLT 689—1934 P 622*. The deposit must be unconditional. *14 M 49; 22 B 761; 29 IC 586*. Demand of receipt for moneys paid and delivery of title-deeds to which mortgagor would be entitled on payment of the debt would not make the deposit conditional or invalid. *17 M 267*. See also *4 OC 355*. Even if the deposit be

considered as valid, it cannot be treated as if the condition attached to it does not exist. The mortgagee is entitled to accept the money only subject to the condition. *184 IC 225—1940 P 18*. Deposit must be made in the Court in which suit for redemption can be instituted or suit for enforcement of the security can be laid. *35 M 209—10 IC 393*. See also *4 OC 387*. Section 83 applies not only to a suit on a mortgage, but also to a suit to enforce a charge, such as for arrears of maintenance. *11 OWN 1550—1935 O 93*.

1. Who can make Deposit

Deposit may be made by mortgagor or any person who can institute a suit for redemption, as owner of part of the mortgaged properties can make the deposit. *47 M 7—44 MLJ 534*.

2. Joint Mortgagors

Where two mortgagors jointly and severally liable to pay the mortgage-debt make a deposit under section 23 to save their property, there is no presumption either that both the mortgagors paid equally or that one paid the whole amount or a portion of it. *1935 C 728*.

3. Tender and Deposit

In a tender the party decides who is to receive the amount. He should offer it to the right person. In a deposit the Court ought to decide the right person. *40 M 804—31 MLJ 548*. See *1926 O 113—2 OWN 826*. Tender need not always be through Court. Interest will cease to run from the time of a valid tender which was refused. *38 IC 295—5 LW 718; 1929 P 397*. Formal offer or tender is not necessary where it is apparent that the

mortgagee would have refused it. *44 MLJ 631—46 M 108—50 IA 41 (PC)*. It is necessary that a mortgagor should after tender keep the money ready for payment. *1 P 350; 1922 O 17; 1926 O 113*. See also *1 LW 595—25 IC 96*. Tender before due date is not valid. See *31 C 183; 26 B 312; 44 A 185*. See also *39 IC 377*. Where the mortgagor deposits an amount which is adequate except to cover the penalty, the tender is not bad. *28 NLR 149*. A deposit made after institution of suit by mortgagee is invalid to reduce previous interest or avoid costs. *48 IC 693—35 MLJ 605; 35 M 209; 50 IC 332; 40 M 444*. See also *153 IC 263—11 OWN 1550—1935 O 93*. Interest will cease only on the actual deposit of the full amount due. *29 IC 145—2 LW 108*. Even a small deficiency of a few annas due to a *bona fide* miscalculation will make the tender bad and will not stop the running of interest: *30 MLJ 607—34 IC 825; 19 ALJ 582—63 IC 563*. See also *33 CWN 279; 1941 M 484—(1941) 1 MLJ 788 (FB)*; also tender of principal alone without interest: *20 ALJ 401—44 A 462; 33 CWN 279; 18 NLR 47*. Non-payment of penal interest which was also subsequently disallowed by the Court will make the tender good. *39 M 579—30 IC 497*. Tender of greater sum than is due is valid. *51 IC 13—29 CLJ 256; 45 IC 638—34 MLJ 439*.

Even where the mortgagee has purchased a part of the mortgaged property, the deposit must be of the whole amount, where proportionate reduction of the mortgage debt has not been ascertained. *44 MLJ 534—1923 M 533*. Deposit of mortgage amount—Suit for redemption—Subsequent withdrawal of mortgage amount—Decree for redemption in appeal—Liability of mortgagee for *mesne*

profits. See 99 IC 147—1927 O 103—3 OWN 942; 49 M 609. It is the duty of the Court and not that of mortgagor to see that due notice of the deposit is served on the mortgagee. 60 IC 454. In order to entitle the mortgagor to claim mesne profits from the date of deposit, he has to see that a proper guardian is appointed for minor mortgagees. 124 IC 191—1930 A 609; 1938 M 405. A mortgagor should not withdraw the deposit till the heirs of the deceased mortgagee are ascertained. 40 M 807—31 MLJ 548. See also 97 IC 735 1926 M 1087. Acceptance of deposit by the mortgagee must be deemed to be acceptance of the amount in full discharge of the mortgage debt. 25 A 179; 36 C 840. As to effect of withdrawal by mortgagee's agent, see 36 C 840—36 IA 85—19 MLJ 419 (PC). Deposit under this section though refused by the mortgagee does not extinguish the mortgage debt and only interest ceases. 1926 A 26; 26 B 643. As to *invalid tender*, see 30 IC 769—1915 MWN 763.

4. Effect of Refusal of Deposit

Where the mortgagee refuses to accept the deposit, the mortgagor may apply to and withdraw the money from Court; 73 IC 1053—1924 P 41; 1937 P 253—170 IC 99. Mortgagee cannot change his mind and ask for permission to take out the money as the tender is no longer open. 1923 P 256—73 IC 1053. *Interest on deposit* will cease to run from the date of deposit even though the mortgagor withdraws the amount on refusal of mortgagee to draw the amount. 44 A 198—20 ALJ 7. But see *contra* 1 LW 595—25 IC 96, or when it could not be drawn, because there are disputes between the mortgagee's heirs. 44 MLJ 362—1923 M 354 (1); 56 IC

814—19 OC 145. See also 36 MLJ 497—1924 M 559; 46 MLJ 74—1924 M 453. (But see now the proviso added to section 84). When a deposit has been made in a redemption suit, after decree, the mortgagee must draw the amount, even though an appeal from the decree is pending. The mortgagee must bear the loss if the money lapses to the Government. 16 CWN 793—16 IC 830—23 MLJ 738 (PC). A mortgagee who wrongfully refuses to accept a valid deposit would also be liable to account for rents and profits collected by him. 47 M 7; 2 R 382—1925 R 13. But see 40 CWN 627—1936 C 200. The relationship of mortgagor and mortgagee subsists even after deposit till the decree in a suit for redemption. 45 A 592—21 ALJ 545. See also 31 B 527; 1925 R 13; 40 CWN 627—162 IC 709—1936 C 200. A mortgagee in possession cannot by merely guessing as to the income he has derived from the property, refuse the tender made by the mortgagor, on the ground that it is a little less than the actual amount due, if he had refused to give accounts to the mortgagor before he made the tender. 99 IC 630—1927 N 138; 1924 P 41.

5. Security

There is no power under this section for the Court to ask for security from any party before allowing him to draw the money from the Court. 1924 P 41—73 IC 1053. Where the mortgagee under a usufructuary mortgage is a member of a joint family consisting of himself, his brothers and his nephews, and the mortgage-money is money belonging to the joint family, the amount must, if the mortgagee is dead, be deposited in the names of the survivors. A deposit in the names of the brothers and nephews who are really interested,

as also in the name of the widow of the deceased, is not a good deposit because the survivors of the joint family cannot withdraw the money without the permission of the widow, though she had no interest in the mortgage-money. *20 PLT 167—1939 P 415*. Where after the death of one of the mortgagees, the mortgagor makes a deposit to the account of the surviving mortgagee and the estate of the deceased mortgagee expressly or by necessary implication, impleading his sons and his heirs and it is subsequently found that one of the sons had no right to any part of the mortgage-money, interest ceased to run from the date of the deposit. On the other hand, if the deposit was made to the account of certain persons named and not to the estate of the deceased

mortgagee in such a way that only the persons named could recover the amount deposited, interest would not cease to run if some of the persons named were not entitled to the money. *ILR (1938) A 767—1938 ALJ 617—1938 A 423 (FB)*.

Where a subsequent mortgagee retains a part of the consideration to discharge a prior mortgage and deposits that amount in Court to the credit of the prior mortgagee, that amount does not become the property of the prior mortgagee unless he complies with the terms of the section and states his willingness to accept it in full discharge of his dues. If he does not do so, the subsequent mortgagee is at liberty to withdraw the money but is not entitled to interest on that amount from the prior mortgagee. *42 CWN 1177*.

84. Cessation of interest—When a mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or ¹[in the case of a deposit, where no previous tender of such amount has been made] as soon as mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, ²[and the notice required by section 83 has been served on the mortgagee:

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on

1. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 45.

2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929) for "as the case may be".

the principal money shall be payable from the date of such withdrawal].

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money ¹[and such notice has not been given before the making of the tender or deposit, as the case may be].

Case Law

Section 84—[See notes under section 83 also.] The amendment of section 84 has no retrospective effect. *ILR (1940) A 79—1939 ALJ 1099—1940 A 65*. As to what is “*all that the mortgagor who deposits the amount into Court or tenders it to the mortgagee has to do*,” see *35 M 44; 27 B 23; 46 MLJ 74; 44 A 102; 30 IC 709*. Interest ceases from the date of deposit, and not from the date of receipt of notice by mortgagee. *1923 A 24*. See also *30 MLJ 607; 70 IC 811; 50 MLJ 468*.

[The amendment effected by Act XX of 1929 now provides that interest would cease only on the service of notice.] The mortgagor must also see that a guardian of a minor mortgagee is appointed. *44 A 102—1922 A 147; 71 IC 278—45 A 273; 1925 M 1017; 27 B 23*. See also *124 IC 191—1930 A 609—1930 ALJ 120*. The provisions of section 84 apply, by analogy, to usufructuary mortgages, and a mortgagor on making a deposit of sufficient money due on the mortgage is entitled to recover profits and, simply

because the decree for redemption was passed later on, he cannot be treated as trespasser during the dates between the deposit of mortgage-money and of the redemption. *113 IC 23—1928 A 156 Cf. 124 IC 191—1930 A 609* under section 83. As to persons entitled to sue for redemption, see section 91.

Tender—Tender must be of the *whole amount due on date of tender*. *25 Bom LR 839—1924 B 264*. A mortgagee decree-holder is not bound to accept a part-payment of the amount under the decree, and interest does not cease to run by reason of deposit of such amount in Court. *34 PLR 853—1933 L 685*. Where by a mortgage-deed of 10th September, 1926, the mortgagors covenanted to repay all principal and interest payable under the deed “by the 10th September, 1928” it must be taken to mean that it shall be payable on or before the 10th September, 1928 and therefore a tender of the amount, in June, 1927 of the principal and interest then

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 45.

due, is a valid tender. *ILR (1941) M 767—1941 M 484—(1941) 1 MLJ 788(FB)*. A subsequent transferee wanted the mortgagee to accept the sum of Rs 1,000.00 either in full satisfaction of the amount due on the mortgage or to release the property sold to him out of the mortgaged property. The transferee had no right to demand either condition and such a conditional tender would not amount to a valid tender. *130 IC 817—1931 N 91*.

Where the mortgagee refuses to accept a tender not because the amount offered is short but because he maintains that the time for payment has not yet arrived, he must be deemed to have waived the objection as to the correctness of the amount, and cannot later on object on that ground. *ILR (1941) M 767—1941 M 484—(1941) 1 MLJ 788 (FB)*. Offer to give cheque or cash by cashing it, when valid tender. *52 M 322—56 MLJ 255*. Mortgagor need not always keep money for payment even after a wrongful refusal of a valid tender. *33 M 100* (see now proviso to first para, relating to deposits). An offer without production of money is not a good tender. *55 IC 991—18 ALJ 440; 36 A 139—22 IC 659; 45 IC 106; 42 A 420; 22 B 440*; See also *4 L 406—1923 L 632*. But see *1930 R 255* holding that where on the mortgagor asking the mortgagee to accept the money and the latter refuses to accept it, there is a valid tender although money would not be actually offered. See also *33 IC 735*.

Not only readiness and willingness to pay must be shown, but also present ability to pay immediately must appear. *45 IC 106; 5 Bom LR 387; 34 MLJ 488—45 IC 437*. But see also *30 M 865*. Money must be kept ready for immediate payment if mortgagee was willing

to receive. *1922 P 167*. But it is unnecessary to keep the money immediately at the disposal of the mortgagee, provided that it can be found whenever the mortgagee sees fit to demand it. *1934 R 316*. A mortgagor, in a usufructuary mortgage, making valid deposit, would be entitled to *mesne profits* from the mortgagee in possession if the latter refuses to accept the deposit and surrender possession of the properties. But if the mortgagor after keeping the money in deposit for some time, subsequently withdraws the deposit from Court and does not again produce it during the hearing of the suit or appeal, an inference against his willingness and ability to pay should be drawn and he is not entitled to *mesne profits* from the date of such withdrawal. *182 IC 287—1938 M 405*.

Tender—Disputes between claimants to mortgagor's estate—Withdrawal by depositor—Redeposit in suit by claimant for declaration of title—Interest, when ceases to run. *ILR (1940) A 79—1939 ALJ 1099—1940 A 65* (Case prior to amendment of section 84). A tender of more than the amount due is not invalid. *29 CLJ 256*. To constitute *valid tender*, actual readiness and willingness to pay is essential—Mere telegram expressing willingness to pay is not tender, but if followed by actual offer constitutes valid tender, *1929 P 397*. See also *1923 PC 26*. Offer of part payment is not a sufficient tender. *45 IC 175*. See also *1922 N 174*. An assertion of an absolute title by mortgagee coupled with a statement of the amount due—Effect of tender. *4 L 406—1923 L 632; 45 IC 437—34 MLJ 488*.

Tender of mortgage amount—Right of purchaser of equity of redemption after tender. *52 M 322—56 MLJ 255*.

Subsequent mortgagee seeking to redeem prior mortgagee can take advantage of a tender of mortgage-money made under section 84 to the first mortgagee and so would not be liable to pay interest from the date of such tender. *1930 R 255*. A tender before the date due is of no effect. *39 IC 377*. A tender is not rendered invalid

because a receipt for the amount is asked for: *34 C 305*; or that it was by way of a cheque, if the objection of the mortgagee was not as to the form of payment; *56 MLJ 255—1929 M 230*. See also *34 C 305*. In a deposit interest accruing due for the day of deposit should also be included. *34 IC 825—30 MLJ 607*.

¹*Suits for Foreclosure, Sale or Redemption*

85. [*Parties to suits for foreclosure, sale and redemption.*] Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), section 156 and Schedule V.

²*Foreclosure and Sale*

[86 to 90]. Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), section 156 and Schedule V.

Redemption

³**[91. Persons who may sue for redemption—**Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:

- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

1. For the repealed provisions, as re-enacted, see the Code of Civil Procedure, 1908 (Act V of 1908), Schedule I, Order XXXIV.

2. For the repealed provisions, as re-enacted, see the Code of Civil Procedure, 1908 (Act V of 1908), Schedule I, Order XXXIV.

3. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 46, for the original section.

- (b) any surety for the payment of the mortgage-debt or any part thereof; or
- (c) 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.]

Case Law

Section 91—Co-sharer—It may redeem mortgaged property.

A co-sharer has got such an interest, which entitled him to bring a suit for the redemption of the mortgage. To say that a co-sharer has no interest in the mortgaged property is shutting one's eye's to the actual fact. *Samarkand vs Qadar Khan. PLD 1954 Peshawar 78.*

Sections 91, 52—Charge decree—When mortgagor may redeem.

Where after the passing of the decree in a maintenance suit creating a charge, the property charged is mortgaged, the mortgagor is entitled to redeem and pay off the charge decree so long as the sale held in execution of the charge decree is not confirmed. *Venkatachala vs Rajagopal. AIR 1946 Mad 51 Dist AIR 1935 Mad 877; AIR 1944 PC 96.*

Section 91—The amendment is not retrospective. [*39 A 536—41 IC 190; 1923 N 311; 43 M 696*, are not now good law.] As to applicability of section to charge see *1933 A 934.*

Sections 91, 92, 95 and 101—Scope of—The entire law regarding the rights of

subrogation is now contained in sections 91 and 92 and also in sections 95 and 101, Transfer of Property Act, as amended by Act XX of 1929. A reference to section 59A which, whether it is to be regarded as defining "mortgagor" in section 92 or not, has to be borne in mind in construing this group of sections. *ILR (1938) N 206—1937 N 372 (FB).* A *puisne mortgagee*, who has been unsuccessful in a suit for possession and who fails to enforce his mortgage by foreclosure or sale within the prescribed period, is not a person who has any subsisting interest in or charge upon the mortgaged property and is not entitled to sue for redemption under section 91, although his right as a mortgagee cannot be said to have been extinguished. *153 IC 808—1935 O 139.* The interest can accrue either by succession, conveyance or contract. *1932 ALJ 605—1932 A 643.*

If one of the co-parceners, who is not a manager, mortgages co-parcenary property, the mortgage is binding so far as the mortgagor's joint share in the property is concerned, but does not bind the other co-parceners, who are not, therefore, entitled to redeem the mortgage. *122 IC 699—1930 N 173.* So also one tenant possesses no interest

in the share of another in the common property. 1930 N 173.

Persons Interested in Redemption—The smallest interest in the equity of redemption will suffice to entitle a person to redeem; and it cannot be said that he is entitled to redeem only that part of the property in which he is interested and not the rest. 53 B 353—1929 B 139. See also 52 M 322—56 MLJ 255—1929 M 230; 82 IC 943—1925 M 351 (1); 67 IC 737—22 CWN 128; 44 IC 77; 84 IC 293—1925 P 57; 48 C 22; 22 M 209; 22 CWN 800—48 IC 669; 1924 O 40; 39 A 719—15 ALJ 791—42 IC 879; 39 MLJ 147—57 IC 535 (PC); 92 IC 261—1925 L 651. One of several mortgagors is entitled to redeem the entire mortgage. 8 PLT 81—97 IC 386—1927 P 25. One of two *uralans* of a temple can redeem a *kanom* of the temple property without consulting the other *uralan*. 12 LW 425—61 IC 510—1920 MWN 646. As to redemption by *co-trustee*, see 16 IC 435. As to redemption by a *Zemindar's successors-in-interest*, see 1931 ALJ 914.

A daughter's daughter should show that she has a preferential right of succession to redeem the mortgage over that of any other collaterals. 1923 L 222. A daughter-in-law merely entitled to a right of maintenance has not sufficient interest to entitle her to redeem. 20 OC 37—1 IC 690. A *legatee* who is to take the estate after the death of the testator and his wife can also redeem. 112 IC 248—1929 N 27; also a *donee of the equity of redemption*, 2 Luck 564—1927 O 199. See also 40 CWN 974. A mortgagor or his heir in possession has a preferential right to redeem over other joint owners of the estate. 56 PLR 1916—30 IC 389. A landlord can redeem a

mortgage effected by his permanent tenant who died without leaving any heirs. 57 B 194—35 Bom LR 60—1933 B 97. See also 1932 ALJ 474. A person in joint possession of occupancy holding can also redeem. 74 IC 755—1924 A 147. Recognition of occupancy rights by landlord only does not give a person the right of redeeming. 1925 A 15. See also 19 M 151.

A person in whose favour there is an agreement to sell is not entitled to redeem. 92 IC 715—1926 M 597. A *prior mortgagee*, who is also the purchaser of the equity of redemption, can redeem the *puisne mortgagee*. 14 LW 355—69 IC 942. See also 29 IC 794 (A); 47 A 751; 86 IC 193—1925 C 59; 1938 O 10—1937 OWN 1118. A purchaser of the equity of redemption not impleaded in suit on the mortgage may redeem. 1927 P 25—95 IC 386. A *mere volunteer* cannot take the benefit of payment for another. 1928 M 541. As regards the purchaser of the mortgaged property, see 39 A 536—41 IC 190. See also 13 IC 299; 1931 A 238. A compromise by some of the mortgagors will not bar the others who were not parties to it from redeeming the property. 5 PLJ 644—58 IC 129. A mortgagor who has sold his equity of redemption but who has reserved a part of the consideration with the vendee can redeem. 1925 M 778—48 MLJ 213. The *puisne mortgagee* can redeem. The prior mortgagee cannot impugn it as invalid; only the mortgagor can impugn it. 22 IC 907. See also 101 IC 324—1927 L 81. A *sub-mortgagee* may redeem a prior mortgagee. 27 A 472; 20 M 35; 1913 MWN 903. See also 54 C 424; 8 B 168; 22 IC 907; ILR (1940) Kar 447.

As to prior mortgagee claiming to redeem a *puisne mortgagee* in possession see 1923 N 24. Where a Hindu widow surrenders her property to the next reversioner on condition of her receiving a fixed annual maintenance, the reversioner can sue to redeem a mortgage of that property created by her. 178 PWR 1918—50 IC 868. A present right to possession is not essential. Even a reversioner can redeem a mortgage. 112 IC 248—1929 N 27. But see 35 M 429—22 MLJ 364; 123 IC 211—1930 O 294. See also 1925 O 311. An assignee of the mortgagor's interest after passing of the preliminary decree cannot redeem the mortgage. 33 IC 486—12 NLR 50. But see 26 C 960.

A holder of *Zaripeshgi* lease of mortgaged property. 162 IC 225—1936 OWN 399—1937 O 146. A permanent lessee of the mortgagor (29 A 679; 47 IC 99—14 NLR 117); or lessee for a term of years can redeem; 1926 N 496; 50 IC 511; 23 NLR 128; 29 NLR 77—144 IC 521—1933 N 44; but not a mere tenant: 1925 O 270; nor a person who is a holder of a mere raiyati interest: 5 CWN 83; purchaser of a portion of mortgagor's interest in court-auction: 7 M 423; or purchaser *pendente lite* can redeem. 26 C 960. But see 33 IC 496—12 NLR 50. A person who has no present or existing interest cannot redeem. 30 A 497; 36 M 426. A surety of the principal debtor can redeem. 21 WR 34.

He has no right to redeem under the amended section, cl (f) of the old section being omitted in it. 43 M 696—39 MLJ 456; 64 IC 525—13 Bur LT 221; 15 IC 334; 1926 N 67; 37 M 418; 1923 N 311; 89 IC 444; 1925 M 266. See also 53 M 881—1930 M 801—59 MLJ 634 (FB); 58 C 598. As to whether attaching creditor is a necessary party to mortgage suit, see 1936 ALJ 708—1936 A 512.

Section 91—Mortgage—Equity of redemption of mortgaged property—Deed of redemption executed by a de facto guardian of a minor who earned a valuable right in the mortgaged property by efflux of time with the extinction of the right of mortgagor to redeem the property held void and ineffective against minor. *Taj Din vs Karim Bukhsh* 1998 Law Notes 930=1999 MLD 1216.

Section 91(a)—Partial owner of the equity of redemption is entitled to redeem the whole mortgage. *Arab Ali vs Abdul Khaleque Prodhania* 33 DLR 11.

Sections 91 and 92—A person holding an invalid mortgage does not come within clause (a) of section 91 and he is not entitled to be subrogated to the rights of a prior mortgagee whose mortgage has been redeemed with the money advanced by him. 42 CWN 1106.

¹[92. Subrogation—Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards

1. Sections 92 to 94 were inserted by the Transfer of Property (Amdt) Act, 1929 (XX of 1929), section 47.

redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Case Law

Sections 92, 94—Sale in execution of prior mortgage—Set aside on deposit of money received by mortgagor by selling some items of mortgaged property.

The prior mortgagee, in execution of this mortgage-decree, brought the mortgaged properties for sale. Before, the confirmation of the sale items 1 and 2 were sold by the mortgagor to the sixth defendant and with the money raised by the sale a deposit under Order XXI, rule 89, CPC was made and the sale was set aside. The subsequent mortgagee P claimed a mortgage over all the items on the ground that the sale in favour of the sixth defendant was

subsequent to his mortgage. The sixth defendant contended that there were equities in his favour as his money was for setting aside the sale under Order XXI, rule 89 and also contended that the decree passed in previous mortgagee's suit was binding on P he being a party to that suit and therefore when the property was sold in execution of that decree he had no right to claim priority over the purchasers.

Held: That (1) as the auction sale held in pursuance of the prior mortgage decree had been set aside by deposit under Order XXI, rule 89, the sixth defendant was not entitled to the rights of the purchaser in auction.

(2) Inasmuch as the right of subrogation was not conferred on the sixth defendant by registered instrument by the mortgagor as required by the Transfer of Property Act as amended in 1930, he was not entitled to the rights of subrogation and therefore, the sixth defendant was not entitled to priority over P. *Musali Ammal vs Chellaperumal. AIR 1946 Mad 145.*

Section 92—Subrogation—Insurance company can be subrogated in the position of the insured and thereby become vested with the right of the latter to sue the person liable originally to the insured. 12 DLR 690.

—'Redeemed in full'—explained.

The words "redeemed in full" section 92(4) do not mean that the subrogator should pay the entire amount himself. All that is required by the section is that the payment either of the entire sum secured by the bond or such portion as may be outstanding at the time, provided it puts an end to the right to the mortgage under the bond and redeems the mortgage in full, will give rise to a right of subrogation. 55 CWN (3 DR) 15.

—This section takes the place of repealed sections 74 and 75 and is retrospective. 1932 ALJ 627—1932 A 489 (FB); 59 M 359—70 MLJ 1 (FB); 160 IC 933—1936 P 60; 39 Bom LR 1309—1938 B 115; 1937 A 588; 1940 A 237. 44 Bom LR 415; 1940 A 175; 1936 M 171; 1938 OWN 401—1938 O 127—42 CWN 1106; 1938 B 508—40 Bom LR 1001. But see 1938 Rang 306; 1936 R 512; 1938 M 779; 1940 P 385; 40 Bom LR 517—1938 B 386. *Question left open in 67 IA 82—ILR (1940) 1 Cal 291—44 CWN 261—1940 PC 38—(1940) 1 MLJ 446. See contra 14 R 494—163*

IC 645—1936 R 152; 155 IC 905—1935 OWN 622. Act XX of 1929 did not clothe persons who under the previous law obtained only a charge with the rights of a mortgagee. 30 NLR 1—1934 N 97. The principles underlying section 92 ought to be taken as a guide for determining when there is a conflict of authority, what equitable rules with reference to subrogation should be adopted in cases arising prior to the amendment. 39 Bom LR 1309—1938 B 115. Where there are three successive mortgages, two simple, and a third usufructuary, in favour of the first mortgagee himself and a purchaser of the equity of redemption of such a mortgagor pays off the amount of the decree obtained by the second mortgagee, he is not entitled to claim to be subrogated to the rights of such mortgagee under section 92. Section 92 uses language which appears to postulate an existing mortgage and not a mortgage which has merged in a decree. ILR (1939) A 185—1939 ALJ 228—1939 A 190.

1. Scope and Application

The doctrine of subrogation is an equitable doctrine founded on principles of natural justice, by no means confined to section 92. 9 OWN 387. See also 41 CWN 472—1937 C 194. The section does not cover the case of a mortgagee paying up his own earlier mortgage but the doctrine is wide enough to govern such a case. 1937 C 194. Section 92 contains a principle of equity, applicable to NWF Province. 183 IC 833—1939 Pesh. 34. Section applies in the case of a co-mortgagor who redeems property subject to the mortgage. 178 IC 974—40 Bom LR 1001—1938 B 508. The principle is that he who removes another's burden steps into

the shoes of the person whose rights constitute the burden. 28 NLR 247. Even if general principles of subrogation are applicable in the Punjab, the principle is now embodied in section 92 and must be applied on the lines indicated there. 42 PLR 812—1941 L 53.

Section 92, Transfer of Property Act, applies only when someone other than the mortgagor has in fact redeemed the property. 1937 C 336. The “mortgagor” in section 92, as amended is not limited to person who effected the mortgage but includes those deriving title from him by transfer of his equity. ILR (1938) N 206—20 NLJ 253—1937 N 372 (FB). The doctrine of subrogation has no application when a person simply performs his own obligation, and pays off a charge which he has undertaken to satisfy. 110 IC 441—1928 N 230. See also 43 C 69—20 CWN 601; 11 OWN 139—1934 O 129; 1918 MWN 251—44 IC 753; 45 MLJ 693—1924 M 103; 1930 ALJ 1222—1931 A 76. It proceeds upon principles of equity and cannot be availed of by a person who has not performed his own obligation. 146 IMC 679—1933 L 810. See also 155 IC 905—1935 O 622. Sale of property subject to two mortgages—Bulk of purchase-money left with vendee to pay off mortgages—Payment of prior mortgagee by vendee cannot be used as shield against claim of second mortgagee. (Ibid) A purchaser from such purchaser with notice of the covenant cannot also claim any right of subrogation. 1933 M 715—65 MLJ 390. In order to support a claim of subrogation under this section, there should be a registered instrument to that effect. 134 IC 1093—8 OWN 1105.

Where full payment of the decretal debt due to the prior mortgagee has not been made by the *puisne mortgagee*, the question of subrogation and the latter stepping in the shoes of the former cannot arise. 110 IC 441—1928 N 230. See also 27 LW 544—1928 M 713 (FB); 43 C 69; 79 IC 766—1924 R 204; 1926 P 23; 43 MLJ 284—95 IC 689; 35 M 183—22 MLJ 12; 36 C 193; 38 A 502; 1926 N 21; 29 IC 583 (M); 29 IC 511(M); 55 IC 658 (M); 38 M 548—28 MLJ 484; 1930 N 166; 8 P 360—1929 P 325. (See now last para of section 92.) A right of subrogation cannot be claimed unless the prior mortgage has been redeemed in full. It does not mean that the redemption must be effected entirely by the person claiming subrogation. 18 P 342—1939 PWN 8—1939 P 375; 1937 A 588—1937 ALJ 659—ILR (1937) A 880.

A person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the encumbrances in question. Whether the right be claimed under the statute or under the preexisting law. 67 IA 82—ILR (1940) 1 Cal 291—44 CWN 261—1940 PC 38—(1940) 1 MLJ 446 (PC). If the mortgage has been paid off by two persons neither of whom would have been able to pay it off without the help of the other, there is no principle on which one of them should be granted and the other denied the right of subrogation. Both of them would be entitled to the right of subrogation. ILR (1941) M 924—1941 M 563—(1941) 1 MLJ 519. See also 42 CWN 1106. A person who advances money on a subsequent mortgage for the discharge of a decree, obtained by a prior mortgagee is also entitled to priority over an intermediate mortgagee, to the extent of the amount paid for

satisfying the prior mortgagee's decree. 97 IC 594—1927 A 28. See also 42 MLJ 15—48 IA 465 (PC). But see 40 A 407; 45 IA 130; 41 A 456—51 IC 155; 41 MLJ 399(413 and 420); 24 ALJ 570; 58 IC 813—39 MLJ 445; 26 MLJ 94—21 IC 971; 1933 M 715—65 MLJ 390.

Where a subsequent mortgagee after a preliminary decree in the suit by the first mortgagee, pays off the decretal amount, he is entitled to be substituted for the first mortgagee as a plaintiff. As the Court has to pass a final decree it is clear that the Court is not *functus officio* when the payment is made and accepted. 146 IC 514—29 NLR 183—1933 N 163. All that is necessary is that the mortgage in respect of which the right is claimed should have been redeemed in full. It is not necessary that the entire amount due on the basis of the mortgage should be paid if the mortgagee agrees to let the mortgage be redeemed on payment of a smaller amount. 158 IC 643—1935 ALJ 1129. Every subsequent mortgagee who pays off the previous mortgagee succeeds to the entire rights possessed by his predecessors in interest and if the rights include a right of priority, he will be clothed with that right too. 190 IC 599—1940 L 269. Where a descendant of a mortgagor is liable at least for a portion of the debt due on that mortgage, and his mother has executed a mortgage as his guardian, during his minority, to pay off entire mortgage-debt, the subsequent mortgagee's right of subrogation is not affected in a prejudicial manner. 171 IC 423—1937 OLR 551—1937 OWN 1107. Subsequent mortgagee—Money retained for paying off prior mortgage—Excess, if any, to be paid by mortgagor—Excess paid by mortgagee—Priority. 9 OWN 253.

A *puisne mortgagee* who pays off a prior mortgage as part of the consideration for the *puisne mortgage* gets no right of subrogation by his payment, because he is using the mortgagor's money and not his own in so paying of the prior mortgage. 44 Bom LR 20. See also 44 Bom LR 415. A subsequent mortgagee who redeems a prior mortgage with money left with him for that purpose by the mortgagor is subrogated to the rights of the prior mortgagee under section 92, though the mortgagor has not by a registered agreement agreed that he shall be so subrogated. 1942 OWN 165—1942 O 260 (FB). Where a person himself redeems a mortgage, that is to say, pays the mortgage-money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the right of subrogation under the first paragraph of section 92, if he is one of the persons, other than the mortgagor, enumerated in section 91. But where such person does not himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilised for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is left for such payment in the hands of the person advancing the money and it is then paid to the prior mortgagee through the hands of that person, the latter acquires the right of subrogation under the third paragraph of section 92, only if the mortgagor has by a registered instrument agreed that he be subrogated. 44 Bom LR 415. See also 1940 ALJ 234—1940 A 237.

The doctrine has been applied for the benefit of a party making the payment in suitable cases and cannot be applied to the disadvantage of that party. *50 A 569—1928 A 241*. Purchaser under sale-deed—Discharge of vendee's liabilities—Sale void for want of title in vendor—Vendee's right to subrogation. *12 Mys LJ 288—39 Mrs HCR 374*. It is open to the mortgagee to abandon his lien under the mortgage and bring a simple suit for the recovery of the money. The *puisne mortgagee* will be entitled to reimbursement under section 69 of the Contract Act. *54 C 424—101 IC 130—1927 C 393*. As to mortgagee himself taking renewal of previous liabilities claiming subrogation *see 6 OWN 718*. Subsequent mortgagee paying off prior mortgagee has priority over intermediate mortgagee. *27 ALJ 750—1929 A 621*. See also *54 C 424—1927 C 393; 1930 ALJ 890—1930 A 561; 1933 N 163; 1933 N 155—144 IC 969*.

Where a purchaser of a portion of the equity of redemption retains at the time of his purchase a part of the price and expressly agrees to discharge the prior mortgage-debts out of the same, he is not entitled to subrogation by paying off those debts as he simply discharges his obligation under an express contract. *62 C 677*. See also *1939 NLJ 369—1939 N 215*. As to the rights of the second mortgagee who purchases at a sale held in pursuance of a decree passed in a suit on a prior mortgage, see *35 CWN 877*. An officious or voluntary payment carries with it no right of reimbursement or of subrogation. *192 IC 712—1941 OWN 204—1941 O 226*. Section does not embrace strangers who pay off part of the mortgage decree. *27 LW 544*. See also *22 MLJ 364—15 IC 206; 1927 M*

204—52 MLJ 33; 32 A 25; 36 M 426 (432-434); 31 M 439; 1929 M 860; 1929 R 298; 26 MLJ 74—22 IC 253; 54 M 708—1931 M 592. But where a stranger pays up the prior mortgage with the consent of the *puisne mortgagee* he is entitled to subrogation and priority. *44 IC 726; 1931 M 720*. See also *12 IC 805—4 Bur LT 127*. Where a person *bona fide* thinking he is the heir of a deceased person spends money in freeing the estate from debts, he is entitled to relief. *42 IC 428—4 OLJ 514; also 9 IC 789—(1911) 1 MWN 197; 10 IC 556—8 ALJ 663; 37 MLJ 113—51 IC 57; 1937 MWN 582*. A third party paying off a mortgage-debt in the *bona fide* belief that he is entitled to do so, is entitled to subrogation of the mortgagee's rights. But he does not thereby extinguish the mortgage, so as to enable him to claim, if in possession, that he has acquired a title to the property by adverse possession by remaining in possession for over 12 years. *40 LW 300*. See also *45 LW 300—1937 M 451—1937 MWN 582*. As to whether a purchaser under a sale fraudulent under section 53, may claim subrogation in respect of a mortgage satisfied by him, see *1936 N 207—ILR (1936) N 183*.

If the reversioner does not impute bad faith on the part of the purchaser, he is not bound to allege or prove good faith. *1934 P 681*. An alienee from manager of joint Hindu family can be subrogated to the rights of the previous mortgagee whom he has paid, though the legal necessity in his favour has not been established. *8 OWN 222—1931 O 144(2)*. Where the defendant executed an equitable mortgage in the plaintiff's favour authorising the latter to pay off an earlier mortgage on the plaintiff paying off the prior mortgage is entitled to subrogation. *107 IC*

417(2)—1927 M 1180(2). See also 1931 N 138. Properties subject to two mortgages were sold by the mortgagor. The purchaser subsequently paid the first mortgage, got an assignment of it in favour of a third party, and then sold the property and part of the consideration was applied towards the discharge of the first mortgage.

Held: the second vendee was subrogated to the rights of the first mortgagee and his right was upheld, in a suit by the second mortgagee and the purchaser in execution sale could not question vendee's rights. 5 LW 360—38 IC 715. See also 42 PLR 139—1940 L 201. *Mortgagee of undivided share redeeming prior mortgage—Rights of—Subrogation and contribution.* See 9 PLT 313. *Sale under prior mortgage decree—Surplus sale proceeds go not to owner or transferee of his rights but to puisne mortgagee.* 1928 N 34.

On this section, see also 52 MLJ 532; 104 IC 358—1927 N 343; 103 IC 703—1927 P 379; 25 ALJ 20—31 CWN 538 (PC). *Meaning of. "To redeem up; to foreclose down".* 10 IC 748—13 Bom LR 162. See also 90 IC 410. *For difference between equitable and statutory subrogation,* see 20 IC 458—16 OC 148. See also 1925 M 80—47 MLJ 316; 11 OWN 619—1934 O 213. *Legal and conventional subrogation, difference between.* 31 NLR (Supp) 169—191 IC 551—1936 N 32. The law relating to legal subrogation is now contained in para 1 of section 92, and the law relating to conventional subrogation in para 3. Section 92 as it stands after the amendment of 1929 does not recognise any doctrine of agency. 1936 N 32. So, where a purchaser of the mortgaged properties as part of consideration

for the sale pays off and thus redeems a prior mortgage, he is entitled to be subrogated to the rights of the prior mortgagee under para 1 of section 92, as he is one of the persons referred to in section 92 and is entitled to set up the prior mortgage as a shield against the subsequent mortgage, although there is no registered agreement that he should be so subrogated. 1936 N 32. [See 1936 ALJ 281—1936 A 336. *Case of subsequent mortgagee redeeming earlier mortgage.*]

Where a person buys property in good faith and discharges a mortgage binding on that property, he becomes an equitable assignee of the mortgage if it subsequently turns out that the vendor had no right to convey. 37 MLJ 113—51 IC 57. See also 7 OWN 610—1930 O 397. Where a person alleging that he is the real purchaser in a Court-auction sale has on the basis of his supposed title paid off a binding mortgage-debt and his conduct is shown to be *bona fide*, he is entitled to remain in possession of the property till the certified purchaser pays him the amount and redeems the property. 1931 ALJ 601. An auction-purchaser who redeems a mortgage could be subrogated to the rights of the mortgagee under section 92. 13 Luck 484—1937 OWN 944—1937 O 493. See also 44 Bom LR 20.

Purchaser of property charged to Government for a tagai loan after attachment in execution of money decree—Part consideration retained for payment to Government—Sale in execution—Claim to subrogation—Maintainability—Absence of registered agreement of subrogation—Effect of—Claim to recover amount under section 69, Contract Act. 43 Bom LR 225—1941 B 153. To exercise right of subrogation, one

must have interest in redeeming the prior mortgage. *1 P 780; 3 PLT 232*. A mortgagee claiming under a void mortgage has no interest to protect by the payment of a prior mortgage decree, and where he does not obtain any covenant entitling him to the rights of the prior mortgagee there is no equity in his claim for a new security based on the prior mortgage. *1936 OWN 489—1936 O 280*. But see *1925 M 80—47 MLJ 316; 89 IC 116*. A *puisne mortgagee* can always pay off a prior encumbrance: *35 IC 87; 56 IC 717—15 NLR 134*; even after a decree on the prior mortgage: *24 IC 754*. [See *131 IC 599—1931 A 40*. Principles of subrogation discussed]; [*8 OWN 541*; prior mortgage not extinguished by the decree].

A subsequent mortgagee suing for redemption of an earlier mortgage is not an agent of the mortgagor. Rights on redemption discussed. *129 IC 378—1930 A 869*. His remedy to recover that amount is not by execution of the decree but by separate suit: *1925 M 129; 1925 M 80—47 MLJ 316*; and he is presumed to keep it alive (under amended section it is deemed to be kept alive) for this benefit. *17 LW 14—1923 M 349; 11 IC 469; 21 IC 560; 45 B 1112—62 IC 477*. There is a presumption that the holder of a subsequent mortgage who has prior mortgages on the same property would keep alive the prior mortgages if they are for his benefit. But the presumption can be rebutted if the circumstances are such that he could not have intended to hold the prior mortgages alive. The question whether such keeping alive would be for his benefit has to be decided in the light of circumstances existing at the time of the transaction, the

onus being on him to prove circumstances leading to the inference that it was in his interest to keep the charges alive. *153 IC 870—1935 L 203*.

His right to reimbursement arises on the date on which he pays off the prior mortgage. *51 IC 549—22 OC 32; 63 IC 604—19 ALJ 840*. See contra *42 IC 496—13 NLR 217*. On such redemption, subsidiary rights such as leases created by the prior mortgagee come to an end *ipso facto* and any tenant continuing in possession is a trespasser. *69 IC 651—41 MLJ 462*. Where in a suit by a prior mortgagee the *puisne mortgagee* is not a party, the latter's right to redeem is unaffected. *39 C 527—39 IA 68—22 MLJ 468 (PC); 1932 A 457; 40 M 77—30 MLJ 347; 1926 M 101; 44 A 418—1922 A 104; 1928 P 589; 34 Bom LR 1519*. Obiter: A *puisne mortgagee* whose right to enforce his mortgage is barred under Article 132, Limitation Act, may nevertheless be entitled to redeem a prior mortgage under section 92. *34 Bom LR 1519*.

As between a first mortgagee auction-purchaser and the *puisne* usufructuary mortgagee who renewed his mortgage after decree in the first mortgagee's suit to which he was not a party, he is deemed to keep alive his rights under the first deed in his favour. *37 IC 456—4 LW 477*. A purchaser of a portion of the mortgaged property by paying the amount to the first mortgagee acquires the rights of the first mortgagee, and he is entitled to use the first mortgage which he has satisfied as a shield against the second mortgage. *144 IC 326—1933 N 171; 13 Luck 761—1938 OWN 489—1938 O 127*. And no restrictions are placed on the applicability of

that section to cases where the money is paid out of the sum left in the hands of the transferee or cases where he has undertaken liability to discharge the previous debt. *1934 ALJ 887—1934 A 1035*. But see *62 C 677*. Sale of mortgaged property by mother for herself and on behalf of ward—Purchaser directed to pay off two mortgages—Earlier mortgage alone paid—Suit by subsequent mortgagee—Purchaser's right to sue prior mortgage as a shield—Avoidance of mortgage on behalf of minor—Restitution of benefit. *108 IC 728—1928 A 77*.

A subsequent mortgagee who advances money or covenants to discharge three prior encumbrances on the property, but pays off only two of them, is not entitled to avail himself of such payment so as to resist the claim of the encumbrancer whom he has not paid off. The covenant indicates an intention that the whole debt was to be extinguished; and since he breaks his contract and pays only two of the three mortgages, he cannot claim subrogation. Under section 92, there is no right of subrogation unless the mortgagor has, by registered agreement, agreed that the person advancing the money shall be subrogated in respect of the mortgage or mortgages discharged; and when no such agreement is forthcoming, the right of subrogation cannot be allowed. *59 M 359—70 MLJ 1 (FB)*. Where the purchaser of the equity of redemption is made to pay off a first encumbrance which a *puisne mortgagee* ought to pay as per terms of the *puisne mortgage*, he can sue the *pusne mortgagee* for such amount. *19 IC 676—11 ALJ 478*. Where a vendee who had undertaken to pay off prior mortgage under his sale-deed, and obtained possession delayed payment, in

consequence of which further interest accrued; the vendee can claim credit for the extra interest when a suit is brought by the subsequent mortgagee.

The subsequent mortgagee was not privy to the contract between the mortgagor and the vendee and could not be allowed to take advantage of terms of that contract. *1934 ALJ 887—1934 A 1035*. Where there was a prior and later mortgage, and a vendee undertakes to pay off a portion of the prior mortgage, a right to subrogation cannot arise until and unless he proves that he has made the payments undertaken by him to be paid and that the rest of the amount due under the prior mortgage has also been paid. *172 IC 301—1938 O 22*. As regards conflict of titles of purchasers in sales in execution of decrees of both prior and *puisne* mortgages. See *37 IC 343—14 ALJ*. The mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title. *1451 C 575—1933 C 181*. Where the *puisne mortgagee* obtained a decree for sale subject to a prior mortgage, and the mortgagor inherited the rights of the prior mortgagee, he cannot set up the prior mortgage as a shield, but the property will be sold free of encumbrance. *37 A 309—28 IC 973*. See also *52 IC 159—22 OC 72*.

2. Right of Subrogee

The remedies of the subrogee are not co-extensive with those of the original creditor. The subrogee's remedy is not to bring a suit on the original mortgage. His cause of action for a suit to enforce the right of subrogation would arise from the date when the mortgage or mortgage decree was paid off. *18 Pat 342—1939 PWN 8—1939 P 375*. It is clear

from the first two paragraphs of section 92, as amended, that the person who is subrogated to the position of a prior mortgagee has the same rights as that mortgagee. He cannot only use the earlier mortgage as a shield but also enforce the rights of the earlier mortgagee. If the case, however, falls under the third paragraph of section 92, then all that is necessary is that the mortgagor should have agreed by a registered agreement that the person advancing money to him should be subrogated to the position of an earlier mortgagee. Section has merely crystallised the existing law on the subject with this difference that now subrogation will not be granted unless the mortgagor has, by registered instrument, agreed that the person who has advanced money to him with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed. *19 P 752—21 PLT 453—1940 P 385 (FB)*.

3. Right of Co-Mortgagor redeeming the Whole Mortgage

A co-mortgagor redeeming the mortgage has now the same rights as the mortgagee whose debt he has paid. See for decisions prior to the Amending Act. *31 A 166; 46 B 213*. See also *1927 P 379; 1927 P 117; 4 OC 273; 55 MLJ 326; 50 A 569; 1941 PWN 667; 1938 L 184—42 PLR 546; 1923 L 129; 69 IC 643; 49 IC 416—9 LW 120; 38 A 138—34 IC 244; 38 A 92—32 IC 177; 41 M 650—34 MLJ 528; 12 O LJ 313—1925 O 613; 11 O LJ 381—1924 O 85; 60 IC 213—23 OC 384; 53 B 353—31 Bom LR 129; 26 B 379; 12 A 110; 45 IC 904* (Payments need not be in Court). The Legislature by the amendment has simply classified the position to the co-mortgagor holding a charge within section 95 read with section 100. *127 IC 889—1930 M*

300. Distinction between the right of subrogation conferred on the puisne mortgagee and co-mortgagor (prior to the amendment) pointed out in *58 C 1167—35 CWN 409—1931 C 251 (FB)*.

He can sue the other mortgagors for contribution in respect of the shares of each. *51 M 810—55 MLJ 326—1928 M 950; 4 OC 273; 1927 P 117; 1927 P 379*. See also *22 IC 918—4 CLJ 79; 3 C 397 (PC) 21 CLJ 104; 27 IC 780* (Decisions relating to the right of contribution under old section 95). As to charge in favour of co-mortgagor redeeming whole mortgage under old section 95, see *55 IC 450; 21 CLJ 104—27 IC 780; 11 CLJ 226—14 CWN 617—51 C 165; 46 C 111—22 CWN 637—45 IC 783; 57 IC 868; 31 Bom LR 129; 1919 MWN 467—49 IC 416; 12 A 110; 60 IC 213; 45 C 111; 12 Bur LT 19—47 IC 121*. As to the *principles on which contribution is determined see section 82*. Right of contribution does not depend upon whether redemption was voluntary or by coercive process. *57 IC 884; 27 IC 780—21 CLJ 104*. Principle of old section 95 also applies where part of the mortgaged property has been purchased by mortgagee. *47 M 4—44 MLJ 534—1923 M 533; 51 M 810—55 MLJ 326—1928 M 950; 88 IC 544—1925 O 629; 103 IC 84—1927 A 626*. A purchaser redeeming only a half share in the mortgage is not entitled to subrogation. *2 OWN 559; 13 PLT 686*.

A purchaser of part of the mortgaged properties who has a right to contribution in respect of mortgage debt paid off by him cannot use such right as a shield, or refuse to give up possession of the part belonging to another owner until payment of the amount of contribution, if such right is barred by limitation. Nor could such right be used as a

sword against the owner's independent equity of redemption or as a shield to protect the possession obtained by reason of paying off the mortgage-debt, when the right is barred by limitation. *41 LW 730—68 MLJ 362*. A co-mortgagor who redeems and obtains possession can retain possession till the other co-mortgagors pay. *22 IC 918; 8 PLT 81—1927 P 25*.

The redeeming co-mortgagor cannot set up against the other co-mortgagors a covenant enforceable as between such other mortgagors and the mortgagee. *52 IC 91—22 OC 112*. Co-mortgagors can bring a suit for redemption against the redeeming mortgagor in possession for redemption of their shares and possession *20 ALJ 611—1922 A 410; 8 PLT 81—1927 P 25; 1930 A 523*. So also a surety who pays off the debt of the principal debtor gets all the rights of the original creditor. *21 WR 347*. In the absence of an open disclaimer of hostile title by a co-sharer against the others, he cannot get title by adverse possession barring the other's right of redemption. *15 IC 500—14 Bom LR 314*. Limitation, see *41 M 650—34 MLJ 528*. Mortgagor must show that his suit is within limitation. *103 IC 215—1927 L 574*. Purchaser redeeming mortgage rights off, as against prior purchaser. *109 IC 777—1928 N 246*.

A vendee of the equity of redemption paying off prior mortgages out of sale price left with him under an express covenant for such payment is not entitled to subrogation when there is no registered agreement conferring the right. *17 P 666—19 PLT 500—1938 P 532; 1937 N 372*. See also *1939 M 949; (1939) 2 MLJ 533; 1937 OWN 1107; ILR (1937) A 880—171 IC 153*. Vendee of

sham title of the mortgagor is not entitled to any rights under old section 95. *17 LW 254—1923 M 392*. A purchaser under sale void *ab initio* is entitled to be subrogated to rights of mortgagee paid off to the extent of the purchase-money applied in discharge of the mortgage. *1937 N 330—ILR (1937) N 111*. But he is not entitled to use such payment as a shield and resist the plaintiff's claim for possession under a valid sale-deed. But he could enforce his rights in proper proceedings taken for the purpose. *1936 ALJ 1176—1937 A 119*. A lender might well have a statutory subrogation right under para (1) as falling within the class delimited by section 91 and not as being a person who has advanced money, or he might only have a conventional right of subrogation.

In this latter case he could come in only in virtue of para (3) and then his contract must be in writing registered. *ILR (1938) N 206—1937 N 372 (FB)*. See also *ILR (1937) A 880*. The words in the section 'mortgage has been redeemed' refer merely to the payment off of the mortgage-money and not to an extinction of the mortgagee's rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money would be subrogated. *67 IA 82—ILR (1940) 1 C 291—1940 ALJ 550—44 CWN 261—1940 PC 38—(1940) 1 MLJ 446 (PC)*. See also *1940 P 64*. Since the amendment, a transferee discharging an encumbrance on the property cannot be subrogated to the rights of the mortgagee in the absence of a registered agreement between him and the transferee as required by para (3) of section 92. Nor can he get any equitable relief in the form of a charge. *(1942) 2 MLJ 444*. Section 92, para 4 makes no exception in favour of a person

who has been allowed by the mortgagee to redeem the mortgage in part and hence such a person cannot claim to be subrogated, to any proportionate rights. *187 IC 274—1940 A 75.*

4. Sections 92 and 95

A person who has acquired a portion of the equity of redemption is in the position of a co-mortgagor with the owner of the remaining portion. If such a person redeems the entire mortgage, he is entitled to the right of subrogation under section 92 or 95. *188 IC 417—1940 P 620.*

Sections 92, 82, 85 and 100—Subrogation being a mere substitution does not create any fresh rights but puts the claimant in the shoes of the creditor. In a case of subrogation under section 92, the mortgage that is redeemed is not extinguished but is regarded as assigned to the subrogee. The limitation would be that applicable to the original encumbrance irrespective of the date of its discharge. Right of subrogation may exist with and as a further security to the right of a simple action for reimbursement. The latter right arises not under section 92 but under sections 82 and 85 read with section 100. *1942 NLJ 267.* See also *1937 N 402.*

93. Prohibition of tacking—No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Case Law

Section 93—The section prohibits tacking. *16 A 295; 8 CWN 699; 51 C 86.* This is new and takes the place of old section 80 now repealed. The words “in the case provided for by section 79” do not really mean mortgages to secure future advances or the balance of a running account, but that the mortgages there referred to must express a maximum. The words “to secure future

advances, etc” denominate the different classes of mortgages, but to bring them under section 79, they must have the common feature of a maximum expressed. The word ‘*subsequent*’ means subsequent to the intermediate mortgage and an advance made after another mortgage becomes a subsequent advance. *45 MLJ 505—50 IA 283—51 C 86 (PC).* An undertaking by a mortgagor who

takes a fresh advance that he will not redeem the mortgage until he repaid the advance is legal and enforceable against himself and not against a purchaser. *9 O LJ 484—1923 O 24*. Where a second mortgage provided that “the amount due on it would be paid along with the sum of the first mortgage” and that the

second mortgage was to be tacked on to the first, the first mortgage could not be redeemed without redeeming the second. It is possible to tack a simple mortgage upon a usufructuary mortgage. *129 IC 550—1931 A 197*.

94. Rights of mesne mortgagee—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.]

Case Law

Section 94—See *10 IC 748—13 Bom LR 162; 90 IC 410* and also notes under section 92. The latter mortgagee can always redeem the earlier; but the prior mortgagee cannot redeem the latter except with the consent of the latter. *1926 N 21; 130 IC 301—1931 A 347*. Purchase by mortgagor of his own

property in execution—Right of subsequent mortgagee. *1931 M 642*. A purchaser of mortgaged property who pays the prior encumbrances and subsequently claims interest on such payments should also account for corresponding proportion of the profits derived from the property.

¹**95. Right of redeeming co-mortgagor to expenses**— Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

1. Sections 95 and 96 were substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 48, for the original section 95.

Case Law

Section 95—'One of several mortgagors'—what connotes.

Section 95 has by Act XX of 1929 been amended in such a way that sections 92 and 95 of the Act, as they now stand, make it clear that the right of the co-mortgagor redeeming is the 'same right as the mortgagee whose mortgage he redeems may have against the mortgagor' occurring in section 92 of the Act. "One of several mortgagors" in section 95 means one of several persons interested in the equity of redemption. *Ibid.*

Section 95—Prior to the amendment, a co-mortgagor who redeems the mortgage is not subrogated to the rights of the mortgagee whom he redeems but has only the rights conferred on him by section 95 as it stood then (i.e.) to contribution from each of his own co-mortgagors *ILR (1941) N 434—1941 NLJ 439*. The section has been amended in such a way that sections 92 and 95 as they now stand make it clear that a co-mortgagor redeeming has the "same right as the mortgagee, whose mortgage he redeems may have against the mortgagor". In effect *25 CWN 283* is now statute law. The amendment provides to the co-mortgagor the same security that proper conveyances would always have provided and not a form of charge which is different in some of its incidents. *35 CWN 409—1931 C 251 (FB)*. The application of section 95 is not restricted to cases where the co-mortgagor cannot redeem his own share only and is compelled to redeem the whole property and will apply where a co-mortgagor redeems the whole property with the mortgagee's consent, although he might

have compelled the mortgagee to permit the redemption of his own share only and the other co-mortgagors cannot recover possession of their share without payment of their proportionate amount. *1932 ALJ 986*.

The expression "the expenses properly incurred in so redeeming" in the old section includes the mortgage-debt. *35 CWN 409—1931 C 251 (FB)*. Now the right of the co-mortgagor to the mortgage security for the debt discharged is provided in section 92. Section does not apply to a *member of a Malabar tarwad* redeeming a kanom by a previous karnavan. See *1929 MWN 722—1929 M 860*. Mere mutation of names does not confer any title. *1933 O 28—9 OWN 923*. Where the holder of a mortgage decree for sale assigns it to a person who acquires the interest of one of the judgment-debtors before the assignment and in execution proceedings started by him the other judgment-debtors object to the execution and challenge the assignment the rights of the parties cannot be determined in execution proceedings but must be left for determination in a proper suit for contribution. *1939 C 425*. Purchaser of equity of redemption—Redemption of mortgage—Suit by owner to recover possession—Limitation. *57 B 134—35 Bom LR 48*. A joint mortgagor redeeming the entire mortgage has a charge on the share of his co-mortgagor. The right to enforce such charge accrues on the date of payment. Article 132 of the Limitation Act applies to claim. *1936 M 500—70 MLJ 532*. On the question of limitation, see also *1932 ALJ 19; 13 P 356—1934 P 612*.

96. Mortgage by deposit of title-deeds:—The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.]

Case Law

Section 96—This section is new and makes the provisions as to simple mortgages applicable to mortgages by deposit of title deeds. Copies of the documents of title are not such substantial documents as may be regarded as documents of title for effecting a mortgage by deposit. 59 C 586—36 CWN 193. A mortgage by deposit of title deeds in Burma has ceased to possess, if it ever did possess, the characteristics of an equitable mortgage in England which carries with it the remedies incident to an English mortgage. In this country it carries with it only the remedies to which a simple mortgagee may have recourse. 1939 Rang LR 403—1939 R 321 (FB).

¹[97. *Applicability of proceeds.*]—*Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), section 156 and Schedule V.*

Anomalous Mortgages

98. Rights and liabilities of parties to anomalous mortgages—In the case of ²[an anomalous mortgage] the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does extend, by local usage.

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1. For the repealed provisions as re-enacted, see the Code of Civil Procedure, 1908 (Act V of 1908), Schedule I, Order XXXIV, rules 12 and 13.
 2. Substituted by Act XX of 1929, section 49, for "a mortgage, not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms."

Case Law

Section 98—The rights and liabilities of the parties to a mortgage must depend on the terms of the instrument as controlled by the Transfer of Property Act. An *anomalous mortgage* enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents of the property in satisfaction of interest, will be valid if it does not also hinder an existing right to redeem. A hindering of such right existing in the mortgagor will be invalid and ineffectual. 30 *MLJ* 584—44 A 185—48 IA 60 (PC). See also *IR* 419—1924 R 83; 28 *IC* 161; 54 *IC* 687; 1928 M 226; 10 *LLJ* 198.

An anomalous mortgage is governed by the deed itself, but the principle of substitution of some other property for the mortgaged property, being a general principle of law not provided for in the Transfer of Property Act, is not affected by section 98. 1937 p 345—18 *PLT* 523. A mortgage containing a clause to the effect that after the expiry of the due date the mortgagee shall have power to realise the entire amount found due by sale of the mortgaged property or enter into possession of the mortgaged property by having it foreclosed is clearly an anomalous mortgage. 115 *IC* 839(2)—1929 O 282. A mortgage partly of the nature of a simple mortgage and partly of the nature of an usufructuary mortgage, does not fall within “anomalous mortgages” as described in section 98 as it stood before the amendment. The rights of the parties have to be determined with reference to the terms of the deed. 182 *IC* 132—1939 p 540.

Where the mortgage deed stated that the mortgagee had been put in possession of the

mortgaged property and further provided that in case of the mortgagee's failure to get possession, he would be entitled to interest on the principal amount at a certain rate, but the mortgagee was not put in possession of the property, the plaintiff is entitled to a decree for sale in respect of the mortgage money. 1935 *OWN* 221—1935 O 254. In considering an anomalous mortgage, if the intention appears that sale was not contemplated, the mortgagee has no right to a judicial sale. 15 *NLR* 134—56 *IC* 717 (PC). See also 18 *IC* 24; 8 p 585—1929 p 664, where it was held that, if the area put in possession of the mortgagee in lieu of interest is reduced along with the consideration money, and the document also gives the creditor a right of sale, it would be anomalous mortgage. See also 8 p 16—1929 p 635.

A simple mortgage which was to be converted into usufructuary after some period, continues to be simple, until the mortgagee expressly or impliedly signifies his intention to convert to the mortgagor. 50 *IC* 332 (O). See also 18 *IC* 286 (O). Anomalous mortgage—Mortgage to be simple one in first instance and to be usufructuary one on nonpayment of principal sum on fixed date—Separate covenant to pay interest yearly—Suit for interest alone—Maintainability. 152 *IC* 494—1934 R 159. Kanom is an anomalous mortgage. 44 M 344—40 *MLJ* 282. As to *arakkattu otti*, see 21 M 1. A mortgage for a fixed term without any provision for accounting is in the nature of an anomalous mortgage. 12 *NLR* 1—1923 N 60. Even in an anomalous mortgage clog on redemption is invalid. 44 A 185—42 *MLJ*

584—49 IA 60 (PC); [1 R 419; 1918 MWN 235; 43 M 589; 39 M 1010; 43 IC 989 are not now good law after the decision of the Privy Council in 49 IA 60] Stipulations in the nature of penalty in anomalous mortgage would be relieved against. 6 MHCR 258.

Where the anomalous mortgage remains in possession even after the mortgage term, he becomes a tenant by implied consent and is entitled to notice to quit. 87 IC 669—1925 M 881; 16 OC 90—19 IC 748. Mortgagee placed in possession for interest—No right to bring property to sale. 107 IC 511—1928 M 226; 8 p 16. Mortgagee in possession given right of sale—Preliminary and final decree—Procedure. 10 ALJ 198. As to covenant for payment in an anomalous mortgage, see 21 OC 341—50 IC 220; 18 IC 24 (O). It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. Where a mortgage deed contains a personal covenant,

under which the mortgagor undertakes to pay the mortgage-money on the due date, the personal covenant carries with it by necessary implication, a power of sale, 11 OWN 760—1934 O 255.

The fact that the deed authorises the mortgagee in case of default to enter into possession of the mortgaged property, cannot take away the power of sale implicit in the personal covenant, more particularly when the mortgagor has failed to put the mortgagee in possession. Such a mortgage is not an anomalous mortgage within the meaning of section 98 (*ibid*). Provision for reduction of mortgage debt—Creditor given right of sale and possession—Anomalous mortgage made out. 8 p 585. Where during the period of the mortgage the land which was service inam land was enfranchised and assessed to revenue as ryotwari land, the assessment should properly be paid by the mortgagor. 1931 MWN 595.

¹[99. *Attachment of mortgaged property.*]—Repealed by the Code of Civil Procedure, 1908 (Act V of 1908), section 156 and Schedule V.

Case Law

Section 99—A sale held in contravention of section 99 (Order XXXIV, rule 14, CPC) is not void, but only voidable, and if not set aside within the period of limitation, cannot be impeached afterwards. 11 OWN 1403—1935 O 183; 38 Bom LR 242—1936 B 177. Section 99 does not apply to a sale held prior to the enactment of the Act. 152 IC 839—11

OWN 1403—1935 O 183. A maintenance decree cannot be brought within the ambit of rule 14, Order XXXIV, A decree-holder attaching such decree is entitled to bring to sale the property which is charged as security for arrears of maintenance. 148 IC 196—1934 N 83.

1. For the repealed provisions as re-enacted, see Act V of 1908, Schedule I, Order XXXIV, rule 14.

Charges

100. Charges—Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained ¹[which apply to a simple mortgage shall, so far as may be, apply to such charge].

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, ²[and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.]

Case Law

Section 100—Charge—registration of document creating a,—when necessary—unregistered document creating a charge where the amount involved is over Rs 100— not admissible. *12 DLR 395.*

—Compromise decree—Charge created need not be registered.

Where a charge, created as the result of a compromise entered into between the parties in a maintenance suit, has been embodied in the decree, no registration or attestation is necessary. *Jagadeesa vs Bavanambal Ammal. AIR 1946 Mad 293.*

—Charge created by decree—Section applicable.

The words by operation of law in section 100 include a charge brought into being by decree of a competent court. *Venkatachala vs Rajagopal. AIR 1946 Mad 51.*

—Subsequent mortgagee—May plead purchase for value without notice.

The amendment of section 100 of the Transfer of Property Act by section 50 of the Transfer of Property (amendment) Act (XX of 1929) makes it clear that the defence of purchaser for value without notice is now

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 50, for "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to such charge."

2. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 50.

open to a subsequent mortgagee so as to defeat the prior charge. *Adamji Abdullali & Sons vs Fida Hussain Abdul Gafoor*. PLD 1957 (WP) Karachi 828.

—Charge as distinguished from mortgage.

A charge comes into existence when property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to mortgage. *Abdur Razzak Howlader vs Sh Muhammad Shafi* 14 DLR (SC) 119.

Where the first part of section 100 deals with substantive rights, the second part deals with procedural law and so the latter cannot be said to govern the former. So, when an agreement clearly falls within the definition it cannot be invalidated altogether simply because it contains provisions which offend against procedural law. Where an agreement was that in default of payment of an agreed amount of maintenance the other party was to be at liberty to enter into possession and cultivate the land, that clearly creates a charge and does not amount to a mortgage. 1939 NLJ 129—1939 N 132. In a charge there is no transfer of interest in the property as in a mortgage but only the creation of a right of payment out of the property specified. 1939 NLJ 121—1939 N 118. See also 1940 N 163; 38 PLR 8. For a charge immovable property must be made a security for the payment of money in such a way that the transaction does not amount to a mortgage. 1940 NLJ 651. Unless given by statute, a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge, and attested by at least

two witnesses. *ILR (1940) M 306-50 LW 844—1940 M 140—(1940) 1 MLJ 922*.

A sale in execution is not a “transfer” and what is sold in a Court-sale is merely the right, title and interest of the judgment-debtor, and auction-purchaser cannot claim to have purchased the property free from the maintenance charge on the ground that he had purchased it *bona fide* without notice. 1940 M 701—(1940) 1 MLJ 831. The rule against perpetuity would not apply to a charge of this kind which does not amount to a transfer of interest within the meaning of sections 13 and 14. [19 IC 661 and 42 M 581 (PC), *Rel on*] See also 1939 ALJ 542. Where the Act does not apply to the principles of justice, equity and good conscience applicable in the determination of the question whether a particular transaction created a charge or not may be taken to be identical with the provisions in the Act. 57 IA 173—5 Luck 365—59 MLJ 342 (PC). The definition of charge in section 100 does not create a personal liability. But where a charge is the result of a contract, there may also be a personal remedy. 52 A 901—130 IC 198—1931 A 99.

The question whether a particular document does or does not create charge depends on its particular terms, and therefore cases as regards other documents are not always a good guide. 90 IC 787—1926 A 171; 1929 O 539. An intention to create a charge is to be gathered from the document. 32 IC 740—2 OJL 601. There must be the expression of a present intention coupled with the necessary words of hypothecation, to constitute a charge. 1924 N 360. See also 14 C 687; 3 ALJ 220 (a document which merely contemplates the future possibility of a

charge being created. See also *67 IC 939*. No particular form of words is necessary, but there must be a clear intention to make the land a security for payment of money. *44 CWN 221—1940 C 93*. See also *1939 NLJ 121—1939 Nag 118*. A valid charge on immovable property could be created to secure a contingent liability or to take effect on a future contingency. *1938 R 145*. A declaration of lien on all assets now existing or to be brought hereafter creates immediate charge. *1939 S. 100*. In order to make the property security for payment of money, the property must be specified with particularity. *36 CWN 153*.

Usufructuary mortgage of transferable holding—Subsequent bonds for further advances stipulating not to redeem unless both bonds are paid for—This creates charge and not a mortgage. *52 A 281—1930 A 136 (FB)*. See also *1935 N 129*. In order to create a valid charge, the beneficiary must be specially named. *27 ALJ 902—119 IC 81—1929 A 834*. See also *91 IC 507—1926 O 209*; as well as the property or fund on which the charge is created: *1924 N 360; 34 M 47; 91 IC 1009—1926 O 230*; but no writing is necessary: *23 IC 867; 123 IC 297—1930 S. 377*; nor registration: (*Ibid*); *142 IC 376 (N)* (but see also *10 C 315; 28 A 655*); but if a charge is created by a document, it must be registered when the charge is for a sum in excess of *Rs 100*: *44 LW 438—1936 M 865*; the fact that it was registered cannot by itself amount to notice to a transferee for value. *142 IC 376—15 NLJ 41* nor attestation, *66 IC 554*. [See *130 IC 489—1931 A 62*, as to the requisites for creation of a charge.] A document executed by the creditor, such as a release deed, and accepted by the debtor is

sufficient to create a charge. *44 LW 438—1936 M 865*. Section 100 is limited in its application to charges created by act of parties or by operation of law and it cannot apply to a charge created by a decree. *1940 NLJ 1—1940 N 163*. See also *1941 p 95*.

Where a decree directs that all the property of the defendant, both movable and immovable, should be charged for the amount due, it cannot be said that the charge is void for uncertainty or that the property to which the charge relates is not specific. There is no reason why description on property by survey number, extent, boundaries, etc, should be insisted upon on pain of the charge being held to be void for uncertainty. *1941 M 794—(1941) 2 MLJ 386*. Where in a compromise decree the defendant undertakes not to alienate certain property till decree is discharged, it creates a charge on the property. *6 OWN 903—1929 O 539*; but see *19 IC 478—24 MLJ 474; 55 M 436—62 MLJ 533—Attachment before judgment—Compromise decree providing that property should remain under attachment till payment—No charge is created. 164 IC 940—1936 L 610; 164 IC 463—1936 L 508*.

Where a charge is created subsequent to 1929, the question of notice is material in considering whether the charge is to be enforced against the property in the hands of a transferee. The facts that a charge is created by a decree of Court makes no difference. A charge created by a decree in pursuance of an agreement between the parties would be a charge created by act of parties contemplated by section 100 and the question of notice is relevant and material. *21 PLT 783—20 p 86—1941 p 95*. See also *1940 R 163; 40 PLR*

429—1938 L 509 (Compromise in execution proceedings). Where a decree creates a charge on specified properties, a decree-holder is entitled to realise the maintenance by executing the decree without having recourse to any suit. 33 LW 109—1931 M 120.

Where a decree mentioned that the arrears of maintenance have made a charge on the property described in the plaint, and with reference to future maintenance it stated that plaintiff was to recover the value thereof at a particular rate by executing the decree and selling the plaint-mentioned property. It is sufficient to create a charge in respect of future maintenance as well. 39 CWN 725. See also 1936 S 16; 71 MLJ 538. A covenant in a document that the obligee could recover the debt from the estate and heirs of the doctor does not amount to charge on the property. 1924 N 360. Where a will gives details of particular estates out of which certain allowances should be met, the allowance constitutes a charge on those estates. 1937 OWN 188—1937 O 420.

A provision in an agreement for sale: “I, the declarant, mortgaged, hypothecated, and pledged the land in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, *rehan*, etc, in respect of the land entered in the deed of contract, the same shall be treated as null and void and inoperative, etc” does not amount to a “charge” nor could it be construed as a mortgage; the intention was merely to covenant, against encumbering or selling the land, after once having sold it under the agreement. 13 p 620—1934 p 495.

P advanced a sum of money to U who agreed to pass a document in the form of a sale-deed, and P agreed to pass an agreement to reconvey. U executed his deed, but P failed to execute the agreement to reconvey. In a suit by P to enforce the sale-deed, it was found that the transaction amounted neither to a sale nor to mortgage. Whatever the intention of the parties, the failure to carry it out was due to P’s own default and no charge could therefore be created in favour of P. 35 Bom LR 1138—1934 B 24. A letter was addressed to the Bank by a customer undertaking not to alienate certain properties and some time after the letter moneys were lent by the Bank to the customer. Such a letter does not amount to a charge. 40 LW 677—1934 M 713.

When parties refer in a document to particular properties as the source from which a debt is to be paid that can ordinarily be taken as an indication to make the property more directly liable than on a mere personal liability. But where the facts recited in the document clearly show why the properties are referred to in the document and in what manner the properties are to be made available for the obligations arising under the document, it will not be right to ignore these circumstances and imply a general intention to create a security. 40 LW 883—67 MLJ 801—1935 M 17. Where the debtor has a running account with the creditor on cash credit system and for repayment of all advances in this account, the shop of the debtor is made collateral security, subject to the maximum not exceeding Rs 4,000, the charge is limited to the first advance of Rs 4,000 but is to include all advances in the

account. 1934 L 765. The landholder's claim to recover rent under the Madras Estates Land Act cannot be said to be one to enforce a charge within this section, whatever might be the result of the sale of the holding by the Revenue Court in execution of decree for arrears of rent passed by it. 1932 MWN 1287—1932 M 716.

Where a mortgagee has paid the revenue and land tax in respect of the mortgaged property, section 100 can have no application unless the mortgagee elects to have the money sent by him added to the principal. (54 IC 616; 43 IC 190, Dist) 161 IC 626—1936 R 47. An agreement that a person will execute a mortgage in favour of another on the latter discharging a prior mortgage does not confer a charge on the property when the payment is so made, 134 IC 1093—8 OWN 1105. Where in making a partition, in order to equalise the shares, one of the sharers is asked to pay some money compensation to the other, it does not create a charge over his share. 91 IC 1009—1926 O 230. But see also 33 MLJ 58; 39 IC 867. Plea of *bona fide* purchaser—Circumstances amounting to constructive notice. 65 MLJ 390. A *co-owner paying the full revenue* on an estate to save the same from revenue sale, does not merely by such payment get a charge on the shares of the other *co-sharers*. See 15 C 542; 22 C 800; 14 C 809; 1928 p 641; 1928 R 278; 15 M 258. See *contra* 28 M 493; 26 M 493; also 36 M 493—24 MLJ 548. See 9 PLJ 573; 27 LW 544—109 IC 872—1928 M 713 (FB); 8 p 585.

A *co-sharer* who, to prevent arrest for a decree against himself and another *co-sharer* for arrears of rent due by both under the

Estates Land Act, pays the whole rent, is entitled to contribution from the other and to a charge for his excess payment on the *co-sharer's* share of the property. 34 LW 889. A *co-heir* paying a decree amount to set aside an execution sale of property of deceased judgment-debtor does not get a charge in respect of the shares of the heirs. 6 R 500—113 IC 801—1928 R 278. A *contingent charge* is not a charge within section 100. 91 IC 507—1926 O 209. See also 7 p 584—1928 P 587; 36 CWN 153—1932 C 457. But see *contra* 1937 Pesh 76. A charge may be created on the happening of a condition. See 21 MLJ 562—11 IC 629; 12 M 69. See also 110 IC 526—9 PLJ 743. A *charge to create future liability* is valid. 39 IC 867—33 MLJ 58. See also 1934 L 765. A *floating charge* is a present charge, though it does not finally attach or crystallise upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of the business. 58 C 136.

As to *requisites of a floating charge*, see 59 C 1372. As to its distinction from specific charge, see 10 Mys LJ 16. Decree for dower obtained by a widow of a Mohamedan—If charge against estate. See 1939 OWN 1010. Property subject to recurring charge—Sale in execution for arrears—Liability for future payments—If extinguished. 1940 C 60.

Transferee without notice

Quaere—If the law was not the same even before the amendment. 152 IC 267—Bom LR 277—1934 B 189. Section 100, even with its amendment in 1929, does not apply to a charge for maintenance *created by a decree of Court*. A decree binds not only the

parties to the suit, but also their privies, and a charge created by a decree must necessarily bind a subsequent transferee who claims through the judgment-debtor, though he may be a transferee for value without notice, *19 NLJ 254*. See also *1936 C 112*; *1941 P 95*; *39 CWN 725*; but see contra *1937 OWN 25—1937 O 217 (FB)* Charge of buyer under section 55(6)(b)—Enforceability against purchaser for value without notice. *ILR (1937) B 140—1937 B 142—38 Bom LR 1200*. Person purchasing property with notice cannot be allowed to set up a defence that although he knew of those alleged charges, he did not believe them to be valid and binding. *167 IC 52—1937 OWN 188*. Whether the matter falls squarely within section 100 or whether it comes under a more general rule of law, the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. *1939 NLJ 129—1939 N 132*.

Other instances of charges

The mere fact that the charge does not come within the meaning of section 100 does not necessarily imply it is not a charge within the meaning of Article 132, Limitation Act, *42 M 114* and *43 M 786*, *Expl 49 MLJ 117—1926 M 41*. Cost awarded to mortgagee in redemption suit by mortgagor is a charge on the mortgaged property. *48 A 425—1926 A 424*. This is an instance of a *charge created by operation of law*. Other instances of such charges being created by operation of law are the vendor's lien for unpaid purchase money under section 55, and a Hindu widow's claim of maintenance charge on the family properties by a decree of Court. *28 A 743*; *130 IC 66—1931 M 120*. Unless fixed and

charged on such estate by decree or agreement, a Hindu widow has no charge for maintenance on her husband's estate. *36 CWN 153*. Maintenance charged on two properties—Loss of remedy against one—Extent of liability of the other property. *1940 OWN 1249—O 203*. A transaction intended to be a mortgage and not reduced to writing or registered, so that it cannot operate as a mortgage, is not a charge under section 100. *2 R 429—1925 R 55*. See also *2 R 429*; *1927 S. 66*; *7 Bom LR 934*; *10 NLR 81*; *35 A 164*; *44 C 388*; *16 CWN 1075*; *31 M 337*; *32 C 729*; *10 IC 919*; *18 SLR 282—1926 S 88*; *36 IC 903—31 MLJ 133*; *26 IC 601—10 NLR 81*; *9 Bur LT 64—32 IC 595*; *40 Bom LR 545* (agreement to mortgage—if creates charge). An *invalid usufructuary mortgage* under which land has been given into the mortgagee's possession and the mortgagor has obtained a debt does not create a charge. *2 R 313—1925 R 1*. In *cases of lease* the movables and immovables shall ever be regarded as security for the payment of the rent. If it creates a mortgage or a charge the difference is very little. *1 P 387—1922 P 529*. A stipulation in a registered lease to the effect that the lessee should deduct from the annual rent certain portion as repayment of a sum of money already borrowed by the lessor from him, creates a charge on the property leased. *130 IC 489—1931 A 62*. Personal liability to pay interest does not in any way affect a valid existing charge *96 IC 477—1926 L 624*. Charge under Land Improvement Loans Act—Enforceability against land in the hands of *bona fide* purchaser for value without notice. See *41 Bom LR 257*. Charge—Creation of—Payment by lambardar of the arrears of land revenue of defaulting co-sharers. See *1941 MLJ 311*.

Difference between Charge and Mortgage

A charge is a liability to pay money laid upon a person or estate. Such a liability is created by every mortgage; so that every mortgage includes a charge, but the reverse is not always true. There is no personal covenant to pay in a mere charge and no transfer of any interest in the property, but merely an obligation imposed on the property with reference to the payment. It is difficult to conceive of a charge with a personal covenant to pay which does not amount to a mortgage. *36 BLR 277—1934 B 189*. See also *38 PLR 8; 1936 R 303*. There is very little difference between a charge and a simple mortgage. In both the creditor is entitled to follow the property for the satisfaction of his debt with this difference that a simple mortgage being a right *in rem* is good against subsequent transferees while a charge is only good as against a subsequent transferee with notice or a volunteer with or without notice. *1941 ALJ 518—(1941) OA (Supp) 727—1941 A 345 (FB)*. See also *1939 N 118; 38 PLR 8; 1940 N 163*. The distinction between a charge and simple mortgage is a very subtle one and to judge of the intention*of parties, the language in which the intentions are expressed alone must be looked into. Where a person gave a statement in a proceeding instituted by him under section 145, CPC, in which he undertook to pay Rs. 750 to the respondent in that proceeding by a certain date and to give him the right of proceeding against the property in respect of which the proceedings were instituted and two other properties if he fails to pay and on the respondent agreeing to those terms the proceedings were dropped; all the requirements of a mortgage are satisfied and

as it was not attested or registered, it was invalid as a mortgage and could not be a charge either. *1937 M 148*. One obvious distinction is that a mortgage is for a fixed term whereas a charge may be in perpetuity. In the case of a mortgage it can be ultimately redeemed, whereas a charge in perpetuity cannot be redeemed at all. *1933 A 934*. See also *42 C 625—19 CWN 37; 23 IC 867; 1 P 387*.

See also *6 OWN 903—1929 O 539; 9 OWN 900*. Provisions of Evidence Act relating to attestation do not apply to deeds creating charges. *66 IC 554—14 LW 99*. Mortgage can be created only by the act of the parties; charge can be created either by act of parties or operation of law. In a simple mortgage and generally in most other kinds of mortgages *also* there is a covenant to pay; in a charge there is no such covenant. See *11 IC 629; 23 MLJ 131*. Registration, attestation and other formalities required for the creation of a mortgage are not necessary for a charge. *35 C 837*. A charge cannot bind a *bona fide* purchaser for value who had no notice of the charge; but in the case of a mortgage, the mortgagee can follow the property in the hands of any subsequent transferee for value or not, and whether with or without notice of the mortgage. *23 IC 867; 38 A 254; 42 C 625; 33 C 985; 9 NLJ 130—92 IC 25—1926 N 262; 36 CWN 153—1932 C 451*. A subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee had no notice. *152 IC 267—36 Bom LR 277—1934 B 189*.

See also *5 Luck 172—1929 O 316* a decision under the old section as to

enforceability of a charge against execution purchaser without notice. The holder of a decree for arrears of maintenance charge upon certain properties is entitled to enforce the same against the transferee of the properties for value with notice of the charge, even though the transferee purchased only a part of the estate. If he is obliged to satisfy the full amount of the charge, his only remedy is a suit for contribution against the owners of the remaining portion of the estate. 9 OWN 900—1932 O 336; 167 IC 52—1937 OWN 188. See also 161 IC 547—1936 S 16. Charge for rent—Mortgagee purchasing with notice—Enforceability of charge. 144 IC 760—1933 P 257. As to the distinction between a *charge* and *lien*, see 13 A 28. A charge in the nature of a mortgage cannot be created by implication. 18 IC 80—40 C 514. Annuity payable creates a charge on the estate for the amount. 64 IC 518; 40 IC 865. For maintenance charges, see 14 CLJ 303—16 CWN 99. An undertaking to pay Government revenue over lands granted for the maintenance of a junior member of a Talukdar's family is personal and not a charge on the estate. 24 CWN 929—47 IA 146 (PC); 18 CWN 129—19 CLJ 19. Portion of estate sold—Purchase-money applied in payment of allowances to other members, which are a charge on the estate—Purchaser has no charge over the estate. 27 LW 544—1928 M 713 (FB). Further advance on same terms—New mortgage if created, see 13 L 160—1932 L 465 (FB).

Agreement to make advances on the security of immovable property—Charge, if created to the extent of advances made. See 3 OWN 315 (Supp) as to when *equitable charge* is created. See 52 MLJ 33; 28 Bom LR 939—

1926 B 495. When a subsequent mortgage of different property to the same mortgagee provided that the latter would be paid first, it did not create a charge on the former mortgaged property as well. 33 A 393—9 IC 319. A charge on movable property not in existence is valid. 1923 A 199; 89 IC 410; 59 C 1372. As to future crops, see 1926 A 164—89 IC 410. A person can assign his fixed deposit in a Bank by way of charge. 36 A 507—24 IC 385. Whether charge created by Court of foreign jurisdiction over the property outside its jurisdiction is on the face of it invalid and does not affect the mortgagee security of subsequent mortgagee. 30 NLR 303—150 IC 20—1934 N 149. Bihar and Orissa Public Demands Recovery Act—Right of Secretary of State and purchaser at certificate sale. 13 P 364—1934 P 648. The intention of section 67A is to compel a mortgagee who is entitled to the same kind of decree in respect of several mortgages over the property of the same mortgagor to consolidate the mortgages and enforce them in a single suit, provided he was not contracted out of his obligation. The proviso that there may be a contract to the contrary is applicable to a charge by act of parties, though it is inapplicable to a charge by operation of law. 60 C 1470—38 CWN 153.

Section 100—Transfer of land—Shelter belt area, allotment of—Disputed land was the property of Provincial Government and the same had been given to Forest Department for plantation of shelter belt—Same land was allotted to the respondent in lieu of adjustment of her claim—Board of Revenue cancelled the allotment for the reason that the disputed land was not available for allotment as the same had

already been transferred to the Forest Department—High Court in exercise of Constitutional jurisdiction set aside the order of the Board of Revenue and upheld the allotment—Contention of the respondent was that the Forest Department could not have been considered owner of the land as no document pertaining to ownership could be brought on record and under the provisions of section 100 of Transfer of Property Act, 1882, and sections 18 & 49 of Registration Act, 1908, the ownership could not devolve upon the department—Validity—Where claim of the respondent could not have been adjusted

against the land in dispute, the question of applicability of provisions as contained in section 100 of Transfer of Property Act, 1882, and sections 17 & 49 of Registration Act, 1908, would not arise—Board of Revenue had decided the controversy in comprehensive manner and the conclusion drawn by the Board did not call for any interference—Supreme Court set aside the judgment passed by the High Court and resultantly the order passed by Board of Revenue was upheld. Secretary to the Government of Punjab, *Forest Department, Punjab, Lahore vs Ghulam Nabi* 2001 SC 415.

¹[101. **No merger in case of subsequent encumbrance**—Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.]

Case Law

Section 101—Rule of merger.

Section 101 deals only with mortgages and charges; it is inapplicable to a case where a right of reconveyance having been reserved

by a vendor, that right is subsequently sold by the vendor to the vendee but this does not necessarily mean that where section 101 does not apply, the rule of merger should be

1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 51, for the original section.

applied. The section as it stands makes non-merger the rule, and consequently merger an exception. (1952) PLD (Lah) 196.

—Applicability—Merger—Section not applicable—Principle of merger not necessarily applicable.

Section 101 deals only with mortgages and charges, it is inapplicable to a case where a right of re-conveyance having been reserved by a vendor that right is subsequently sold by the vendor to the vendee but this does not necessarily mean that where section 101 does not apply, the rule of merger should be applied. The section as it stands makes non-merger the rule, and consequently merger an exception. *Umar Din vs Fazal Din*. PLD 1952 Lah 166—PLR 1952 Lah 196.

—The section is inapplicable to suit commenced two years prior to amendment. Nor is the amendment purely declaratory. (1942) 2 MLJ 47.

Doctrine of Merger

In view of the amendment the older cases as to whether there was or was not any declaration or intention to keep alive the prior encumbrance are obsolete. But even under the old section, the tendency of Courts was in favour of an intention to keep alive the mortgage, rather than otherwise. This was on the principle that a man who has a right to act in one of two ways should be deemed to have acted in the way that would be to his interest. See 9 C 961 (PC); 3 Luck 472; 1929 O 88; 13 P 200—1934 P 134; 26 MLJ 94; 49 MLJ 361; 1935 M 1217; 74 IC 503; 18 IC 704; 23 IC 827; 1925 P 605; 10 C 1035; 29 C 154; 94 IC 152; 39 IC 500; 1922 A 394; 51 CLJ

656—1930 C 572; 10 R 465. Section is not exhaustive. 1929 MWN 722. The amendment of 1929 is not retrospective in its operation, though section 101 is not one of the sections which, section 63 of the Amending Act declares, shall not be retrospective. 10 R 465—1932 R 197. See contra 1932 ALJ 627—1932 A 489 (FB). As to *scope of the doctrine*, see 144 IC 736—1933 N 241. It is not necessary for the owner of a charge or encumbrance that he must, simultaneously with his acquiring the equity of redemption by inheritance or otherwise, declare his intention to keep the charge or encumbrance alive expressly or by necessary implication in order to prevent the extinguishment of the charge or encumbrance. He can do so within a reasonable time. If he conveys the security to his wife benami for himself, that would be a sufficient expression of his intention to keep the charge alive. (1942) 2 MLJ 47.

Where a mortgagee purchases from his mortgagor the mortgaged properties pending an attachment of the properties in execution of a money decree, it cannot be held that the sale extinguishes the mortgage. In such a case it must be presumed that it is to the advantage of the mortgagee to keep his interest as mortgagee and his interest as purchaser of the equity of redemption distinct, because of the intervening attachment against which his sale cannot be effective. The principle of section 101 is not limited to cases where the rights of mesne encumbrancers come up for decision though the section has generally been invoked in such cases. The section only lays down a general rule of presumed intention, and where the later conveyance would be inoperative as against any intermediate right,

whether founded on an encumbrance or an attachment, the principle must be held equally to apply. *ILR (1939) M 600—1939 M 393—(1939) 2 MLJ 72*. Purchase by mortgage of part of mortgaged property in full discharge of debt due under mortgage—Merger—Mortgagee not given possession of entire property sold—Mortgagee then brought a suit against *mortgagor* to enforce his mortgage.

The purchaser can use his earlier mortgage only as a shield against any subsequent encumbrancer and not as a weapon to sue the mortgagor; there was a merger, and his remedy was only to sue as on breach of contract. *15 P 120—1936 P 404*. A subsequent mortgagee seeking foreclosure under his mortgage is bound to redeem a prior mortgagee, who has already foreclosed and is in possession of the property, before he can take possession. There is no difference in principle between a mortgagee who has obtained possession under a sale in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage, Section 101 allows a subsequent mortgagee two alternatives, either to redeem the prior mortgage or to take the property subject to that mortgage; and the words, "otherwise than subject thereto" in the concluding part of the section, refer to the second eventuality contemplated by the section, and not of his seeking foreclosure. A subsequent mortgagee, who has obtained a decree for sale, can avail himself of either of two alternatives. But a subsequent mortgagee seeking foreclosure cannot foreclose and get possession subject to the charge of the prior mortgagee already in possession.

In such a case, the subsequent mortgagee has no option but to redeem the prior mortgage. *155 IC 498—1935 OWN 684*. See also *1939 ALJ 559—1939 A 660*; The doctrine laid down in *Toulmin vs Steere* (3 Mer 210), that the purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent encumbrances of which he had notice, is not to be regarded as a rule of justice, equity and good conscience and cannot therefore be applied in India. *33 Bom LR 1238*. See also *1938 MWN 60*. The principle contained in section 101 can be applied to the Punjab as a rule of justice and equity. *130 IC 49—1930 L 1063*. Where there is no intermediate encumbrance, there will be a merger by the purchase of the equity of redemption by the mortgagee. *128 IC 296—1930 L 620*. It was held that the section (old) applied where the whole property subject to the encumbrance was acquired by the encumbrancer in full ownership: See *1930 ALJ 1222—1931 A 76*.

The section was held inapplicable where the encumbrancer obtains only a limited interest. See *57 C 473—126 IC 413—1930 C 530*. Certain property consisting of two items was subject to successive mortgages. One of the puisne mortgagees brought a suit and purchased one item in execution. He subsequently obtained an assignment of a decree passed in favour of a prior mortgagee in respect of the other item. As assignee-decree-holder, he applied for execution against the other item alone. On objection by another puisne mortgagee, *held*, that, by the purchase of one of the items, the mortgage had been discharged *pro tanto* and that the assignee-decree-holder could proceed against

the other item, only for the proportionate value of the debt in relation to the mortgage-debt; and that an objection of this nature could be taken in execution by the puisne mortgagee. *141 IC 366 (M)*. Purchase by mortgagee of a part of the mortgaged property does not extinguish the debt *pro tanto*. *39 A 74—14 ALJ 1025—37 IC 4*. See also *1931 ALJ 153—1931 A 154*. As to the effect of the proviso to the old section, see *57 C 473—1930 C 530*.

Where a mortgagee holding two different mortgages over the same property sues and obtains a decree on the first and purchases the property himself "subject to this second mortgage" the second mortgage is extinguished. *38 B 369—16 Bom LR 26*. (See also change in the present section). Under section 101 prior to amendment, the purchase by the mortgagee of an undivided share in the mortgage properties does not extinguish the mortgage. *1932 C 772—36 CWN 696*. Whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. (*11 IA 126 Foll*) *33 Bom LR 1238*. See also *144 IC 736—1933 N 241*.

Where a mortgagee obtained a decree on his mortgage and in execution thereof purchased the property in Court auction himself he becomes the owner of the property from the date of the purchase, and he cannot maintain as against himself or third parties unconnected with the mortgage transaction on the property, the position that his mortgage remained an encumbrance thereon after that date. *40 C 89—39 IA 228—23 MLJ 311 (PC)*. See also *31 IC 891 (A)*; *44 Bom LR 15*. Also *59 PR 1909*. Where the mortgagee decree-holder has purchased at the auction-sale in execution

of his decree of his second mortgage, one of the properties mortgaged to him, the equity of redemption in that property becomes vested in him and such purchase has the effect of discharging and extinguishing a portion of the mortgage debt, which is chargeable to the property purchased by him. (*22 A 284, Foll*) *59 C 76—1932 C 319*.

Even where a third mortgagee agrees by his mortgage-deed to discharge the first mortgage, he can use the first mortgage as a shield against the second mortgagee, because his intention in paying off the first charge is to keep it alive for his own benefit and not for the benefit of intermediate encumbrancer or any other party. *144 IC 969—1933 N 155*. Where there is a puisne encumbrancer, the mortgagee purchasing the equity of redemption can use his mortgage as a shield against him. *51 IC 728*; *4 IC 810*; *38 M 18*; *16 IC 877*. See also *9 OWN 557*; *1933 N 155*; *144 IC 736—1933 N 241*. The fact that he has taken no distinct steps to keep his mortgage alive does not necessarily create a merger. *57 C 82—1930 C 335*. [This is now made plain by the amendment]. But where the acquirer was bound to discharge the subsequent mortgage by covenant or by law, he cannot have such a right. *43 C 69—20 CWN 601*; *1918 MWN 251—44 IC 753*; *45 MLJ 693—1924 M 103*.

Where a person purchases a property in execution of a charge decree and a mortgage of the property subsequent to the charge decree and before the Court auction, sues on his mortgage, the purchaser under the charge decree cannot claim priority to the extent of the charge. Section 101 has no application. In the cases governed by the section, the one

having his own interest to protect buys out the interest of the other, that is to say, the owner buys up the charge, or the chargeholder buys up the property and steps into the shoes of the owner. But each has an interest to protect at the date of the purchase. That is not the position where a stranger having no interest to protect, deliberately, with eyes open, purchases in order to enable the owner and chargeholder to extinguish the charge between them. In such a case the stranger purchaser is not in a position to act in either of two ways. He is not protecting his interest and is only in the position of a money-lender who advances to pay off the charge and then after the charge is extinguished, purchases in lieu of his own debt. 1941 *NLJ* 634—*ILR* (1942) *N* 309—1942 *N* 33. Subrogation—Debt due to bank—Third party paying debt and taking back title-deeds—Right to be subrogated. 34 *PLR* 477—1933 *L* 416. Where the purchaser of mortgaged property undertook to discharge two mortgages on the property, but in fact, discharged only the prior mortgage and not the later mortgage in favour of the plaintiff, *held*, that it was to the benefit of the purchaser to keep alive the first mortgage, which he discharged out of the purchase money and that he was therefore entitled to be subrogated to the position of the prior mortgagee. 37 *LW* 751—64 *MLJ* 606.

Where the puisne mortgagee obtained a decree for sale subject to the prior mortgage, and mortgagor inherited the rights of the prior mortgagee, he cannot set up the prior mortgage as a shield, but the property will be sold free of encumbrance. 37 *A* 309.

Where a purchaser of the mortgaged property, who has discharged a prior

mortgage which he thinks is the only mortgage, is ousted by a later mortgagee whose mortgage was not disclosed to him at the time of his purchase, he is entitled to claim the right of subrogation in respect of the mortgage he has discharged, and to sue to enforce that mortgage by sale of the mortgaged property. Section 101 is no bar to the maintainability of such a suit. 59 *M* 1042—70 *MLJ* 719—1936 *M* 814.

If in execution of a decree for sale of mortgaged property, the mortgagor purchases the property himself, it passes into his hands subject to the right of the subsequent mortgagee, it being his duty as owner of the estate to discharge the debt of the subsequent mortgagee, for which he had pledged the estate. The same principle would apply even if there had been intermediate purchasers of the property before it came into the hands of the mortgagor. 132 *IC* 290 (*M*). When the new mortgage taken in supersession of the old one proves invalid, he can fall back on the old one. 39 *A* 178—44 *IA* 60—32 *MLJ* 241 (*PC*). See also 38 *IC* 468; 35 *A* 211—25 *MLJ* 111 (*PC*).

One of two brothers executed a mortgage in respect of the shares of both of them in certain agricultural land. The mortgagee paid off prior encumbrance on the share of the brother, who had neither joined in the execution of the mortgage nor ratified the action of his brother, and also some of his debts. The mortgage is invalid, but the mortgagee should be presumed to have intended to keep alive for his own benefit the prior mortgages and debts which were redeemed by the invalid mortgage, and the brother's share was liable to the extent of the

prior encumbrances on his share and his debts which had been paid off. [10 C 1035 (PC); 38 PR 1894; and 1922 L 275, Ref] 34 PLR 864—1933 L 1000. Extent of land erroneously stated in first mortgage—Fresh deed correcting the error executed after second mortgage—Right of prior mortgagee not extinguished. 1934 R 7.

The conversion of an usufructuary mortgage into a simple one by the execution of a second bond indicates a change in the form of security and does not extinguish the former. 25 IC 500; 38 IC 240—32 MLJ 263. Several mortgages—Payment of prior mortgage—Subrogated right as against intermediate mortgagee. 1932 A 489 (FB). A firm as a prior mortgagee sued the mortgagors and joined S firm as a subsequent mortgagee. The suit was decreed in terms of agreement arrived at between the mortgagors and A firm. The Court added as part of the decree a note dismissing the case as against S firm who did not put in appearance. In execution of the decree the property was sold to A firm. Meanwhile S firm also obtained a decree on the mortgage. A firm is entitled to keep their first mortgage as a shield. 9 R 1—1931 R 105. Mortgagee paying up his own earlier mortgage in consideration of a fresh mortgage—Priority, 7 Luck 655—1933 O 9. Where a person buys property while it is under attachment and redeems the mortgage, the presumption is that he intended to keep the encumbrance alive for his benefit. 18 IC 704—11 ALJ 727.

Where in the course of execution proceedings under a money decree, the mortgagee made a statement that the equity of redemption may be sold subject to the mortgage charge but the mortgage charge was not mentioned in the proclamation of

sale and the sale certificate and the mortgagee purchased the property himself; the purchaser could be taken to have intended to keep the mortgage charge alive, even though it was not mentioned in the sale proclamation and sale certificate. (43 A 703, Ref) 32 PLR 759. Mortgage to plaintiff in 1913—Subsequent sale to plaintiff in 1919—Attachment of property in execution by creditor of vendor—Mortgage of 1913 mentioned in execution petition—Plaintiff's claim under his sale under Order XXI, rule 58, CPC, dismissed as filed late—No suit brought by plaintiff within 1 year to set aside claim order—Creditor purchasing property in his execution sale—Creditor's suit against plaintiff for mesne profits—Plaintiff contesting the same on the strength of the sale in his favour, but not successfully—Subsequent suit by plaintiff to recover money due under mortgage of 1913 cannot succeed. 1933 M 879—65 MLJ 819. Subsequent equitable mortgage to discharge prior mortgage—Prior mortgage paid—Security not transferred to the second mortgagee—Right of the second mortgagee to sue on the first mortgage. 14 R 494—1936 R 152.

Extinction of Mortgage—A mortgage debt is not extinguished by a fraudulent revenue sale. 24 CWN 662—55 IC 689.

Sections 101 and 92: Subrogation—A right to subrogation cannot be claimed on the strength of a partial discharge of a prior mortgage. But a prior mortgagee who has purchased portions of the mortgaged property in part satisfaction of the mortgage-debt by piece-meal purchases is entitled to claim the benefit of section 101, as against a subsequent mortgagee and his claim cannot be resisted on the ground that his debt has not

been fully discharged. Whatever the difficulties may be when a stranger invokes the benefit of the doctrine of subrogation, no such difficulty arises where the claim is made by the prior mortgagee himself under the terms of section 101. *1936 M 473—70 MLJ 506.*

Notice and Tender

102. Service or tender on or to agent—Where the person on or to whom any notice or tender is to be served or made under this Chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorised to accept such service or tender shall be deemed sufficient.

¹[Where no person or agent on whom such notice should be served can be found or is known] to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served and any notice served in compliance with such direction shall be deemed sufficient:

²[Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the Court in which the deposit has been made.]

³[Where no person or agent to whom such tender should be made can be found or is known] to the person desiring to make the tender,

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1. Substituted by Act XX of 1929, section 52, for "Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown."
 2. Proviso inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 52.
 3. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 52, for "Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown."

the latter person may deposit ¹[in any Court in which a suit might be brought for redemption of the mortgaged property] the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

Case Law

Section 102—Observation that the notice under this section of the Act having not been served by the landlord, was bad in law—The observation was beyond the pleading and amounts to making out a new case for the defendant—A benamdar is a trustee of the beneficial owner. A suit for eviction at the instance of the owner's wife and son in whose name the kabalas stand is maintainable—A benamdar represents the real owner—A proceeding by on against the banamder, although the beneficial owner, is not party to it, is fully binding on the beneficial owner. *Kutubuddin Ahmed vs Hasna Begum & another* 40 DLR (AD) 272; 1987 PLD (AD) 18.

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

Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served ²[on or by], or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of the Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which

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1. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 52, for "in such Court as last aforesaid".
 2. Inserted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 53.

could or ought to be done by such person if he were competent to contract¹; and the provisions of²[Order XXXII in the First Schedule to the Code of Civil Procedure, 1908 (V of 1908) shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder.

Case Law

Section 103—As to persons competent to contract, See Sections 11 and 12 of the Contract Act. It is proper to get the Court to appoint a guardian *ad litem* when the mortgagee is a minor. *16 OC 261—22 IC 245*. Mere making of the application will not be sufficient. Interest will not cease on a deposit till one is appointed. *21 ALJ 39—45 A 273*. See also *44 A 64; 48 A 611; 49 MLJ 327; 22 IC 245; 1922 A 355; 44 A 102—64 IC 907—19 ALJ 893* (Stuart and Lindsay, JJ, dissenting). Section 103 clearly provides that where the party on whom notice is to be

served and by whom deposit has to be accepted or taken out of Court, happens to be a person incompetent to contract, the provisions of Order XXXII of the Code shall apply. If the point as to the minority of the person is in dispute, the Court has to be satisfied of the fact of minority, and this cannot happen unless the Court enquires into the matter. *50 A 655—1928 A 311*. The procedure mentioned in section 103 is consequent upon the deposit having been made and not precedent to an intention to make the deposit. *50 A 655—1928 A 311*.

104. Power to make rules—The³[Supreme Court] may, from time to time, make rules⁴consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature subject to its superintendence, the provisions contained in this Chapter.

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1. As to persons competent to contract, see sections 11 and 12 of the Contract Act, 1872 (IX of 1872).
 2. Substituted by Act XX of 1929, section 53, for "Chapter XXXI of the Code of Civil Procedure."
 3. Substituted by the Bangladesh Laws (Revision and Declaratoin) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "High Court" (With effect from the 26th March, 1971).
 4. For rules made by different High Courts, see different local Rules and orders.

Case Law

Section 104—For rules made by—(1) the High Court at Bombay, see *Bombay Government Gazette, 1904, Pt 1, p 1001*; (2) the Chief Court of Burma, see *Burma Gazette, 1904, Pt IV, p 437*. The section is directory. If no rules are made, the rules in the CPC would apply. 19 A 205; section is an enabling one i.e. it gives a power to the High Court to make rules; it is not compulsory on the High Court to make such rules. 25 M 244. As to how far the rules made under this section are binding on the High Courts in the exercise of their ordinary original jurisdiction, see 1 CLJ 31.