# Chapter V
# Penalties and Forfeitures

*"Where a contract provides that on breach thereof, the party in breach shall pay a sum of money to the other party, the sum may be an agreed sum for damages, known as liquidated damages, or the sum may be a penalty to be held over the other party in terrorem."*

—Snell's Principles of Equity, p. 534.

*"Equity regarded the performance as the principle intent of the parties to the contract, and the penalty as a mere accessory,...according to the maxim 'Equity looks to the intent rather than to the form'."*

—Maxims of Equity

*"Penalty involves a payment or a loss of a sum of money; forfeiture involves the loss of an interest in property."*

**SYNOPSIS**



## A. PENALTY

### 1. NATURE, DEFINITION AND PRINCIPLE

Before 1863 there was a rule of Common Law that a person was absolutely bound by the obligations he had undertaken and he could not claim to be excused by the mere fact that performance had subsequently become impossible. *Paradine* v. *Jane*[1] and *Thiis* v. *Byres*,[2] are its leading examples. Similarly when the contract provided for a penalty or forfeiture those provisions were strictly enforced regardless of the circumstances, and were never relieved, consequently creating a positive injustice to the promisee.

During the reign of William and Anne the rigour of these rules was softened by passing two statutes[3] whereby relief could be granted by the law courts as well as the equity courts. The Judicature Acts reduced the importance of these

1. (1647) Alyn 26.
2. (1876) 1 QBD 244.
3. 8&9 Will 3 C, 11, 1697 and 4&5 Anne C 3, 1705.

statutes, and the scope of relief given by the Equity Courts thus widened and it applied not only to *money-bonds* but also to a number of other cases.

It is within the competence of the parties to a contract to provide therein as to the extent of liability arising out of its breach.[4] The loss so occasioned may be compensated by a sum liquidated or fixed therein. It may be that the sum so agreed may be far greater than the actual loss sustained; if so it is a penalty. But where the sum so agreed and provided is a genuine pre-estimate of the loss it is not penalty. Snell[5] puts it this way that in cases where a contract provides that on breach thereof, the defaulting party shall pay a sum of money to the other, the sum so agreed may be equal to the damage suffered or loss sustained by the party, or it may be a penalty to punish the defaulting party and called a sum *in terrorem*. A very early money-bond case referred to by Simpson in *Law Quarterly Review*[6] has been cited by Snell wherein it was provided that non-payment of the principal sum with interest within a fixed period would make the debtor liable for a greater sum, usually double. This is obviously a penalty clause and a proper subject for equity courts to intervene.

## 2. ANALYSIS

(*a*) *Existence of a breach.*—Where, however, there is no breach, the question of penalty need not arise. As expressed in *Associated Distributors Ltd.* v. *Hall*[7] (hire purchase agreement case), where an option was given in a contract to put an end to it and to pay the agreed penalty, such a sum cannot be considered to be a penalty because the hirer had exercised his option and thus had to pay the amount which he had made himself liable to pay. There is no breach; but according to Lord Denning and Lord Devlin[8] the question is still open.

(*b*) *Grounds of relief.*—The courts of equity gave relief against penalty on the ground that such a relief is the original intent of the case.[9] In such cases, therefore, the court looked to the intention rather than to the form. In *Sloman* v. *Walter*[10], where the agreement was to allow the use of a particular room when wanted and in default, to pay penalty stipulated in the bond, it was held that as the enjoyment of the object was the principal intent of the deed, and the penalty being only on accessional intent, it could not be recovered; but actual damage could be recovered.

(*c*) *Penalty and liquidated damages distinguished.*—To find out whether a particular provision in a contract is a penalty clause devised to punish a party or is a genuine pre-estimate of the loss that would arise on its breach, the following rules have been framed by the courts.[11]

4. *Wallis* v. *Smith*, (1882) 21 Ch D 243.
5. *Snell's Principles of Equity*, 27th Edn., 1973, p. 534.
6. *A.W.B. Simpson*, (1966) 82 ELQR 392.
7. (1938) 1 All ER 511 CA: (1938) 2 KB 83.
8. *Bridge* v. *Campbell Discount Co. Ltd.*, 1962 AC 600.
9. *Peachy* v. *Duke of Somerset*, (1742) 1 Stra 447.
10. (1784) 1 Bro CC 417.
11. *Snell's Principles of Equity*, 27th Edn., 1973, pp. 535-536.

Ordinarily when the word penalty or liquidated damages is used by parties to a contract, they must be taken to mean what they say. But this cannot be considered to be final and conclusive.[12] The court therefore must find out whether the sum so named is penalty or liquidated damages. Penalty is a sum fixed *in terrorem* to punish the offending party for a default or by way of securing the performance of a collateral object, while liquidated damages is a genuine pre-estimate of damage reduced to dimensions which truly represent the loss. Liquidated damages can be fully recovered. Penalty is extravagant and unconscionable amount in relation to actual loss suffered or following from the breach.[13] As decided in *Kemble* v. *Farren*[14], when payment of a smaller sum is secured by a larger, that larger sum is penalty. But the largeness of the sum does not itself make it a penalty. Solution of the problem therefore depends upon construction of terms of the agreement and the surrounding circumstances of each case[15] *at the time of making the contract, but not at the time when the breach is made.* Breach of an agreement gives rise to a cause of action to recover the smaller amount, because, if it is otherwise, that is not a genuine pre-estimate of damages.

(*d*) *Exceptions*: (*i*) *Default in instalments.*—But where it is agreed that a loan received is to be returned within the appointed time by instalments and that on default in paying a single instalments as agreed, payment of all the remaining instalments would become due, that is not a penalty provision.

(*ii*) *Several breaches.*—The second exception to the penalty provision is expressed in the decision in *Dunlop Pneumatic Tyre Co.*[16]. There it was agreed that "a single lump sum made payable by way of compensation on the occurrence of one or more of all or several events, some of which may occasion serious and others but trifling damage" will not be penal. There is thus a clear provision (of payment of lump sum) for penalty here, but it is no more so, because, where *every possible breach is incapable of being precisely ascertained*, the provision for payment of a particular sum is not necessarily a penalty provision.

(*iii*) *Pre-estimate almost an impossibility.*—Besides, the cases wherein the precise pre-estimate of damage is *almost an impossibility*, it may be probable that the pre-estimate of the damage stipulated by the parties was the true bargain between them. It must be noted that the latter two instances raise a presumption against penalty but such a presumption may also be rebutted.

### 3. SOME QUESTIONS

(*i*) *Damage exceeding penalty.*—A question that has been posed is, what would be the position if the damage exceeds the penalty? Can the plaintiff ignore the penalty clause? Is it not that his only right is to recover the agreed

12. *Price* v. *Green*, 16 M&W 346.
13. *Financing Ltd.* v. *Baldock*, (1963) 2 QB 104.
14. (1829) 6 Bing 141.
15. *Price* v. *Green*, 16 M&W 346.
16. *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.*, 1915 AC 79. See also *Clydebank Co.* v. *D. Jose*, 1905 AC 6. For contra see *Newman, Re*, (1876) 4 Ch D 724.

sum and no more?. The answer to these questions has been given by Snell:[17] "Probably he can[18] (sue), although he clearly cannot do so where the contract shows that if there is a breach of the contract, *the right to recover the specified sum is to be his only right.*"[19]

(*ii*) *Misusing penalty clause.*—When it is agreed to perform or to abstain from doing a certain act, and in default to pay a penalty, can a party in default get rid of the agreement by just electing to pay penalty and consequently justifying his breach? Can he be compelled to act as agreed upon? The answer to this is obviously in the affirmative.[20] The courts cannot allow a party to escape from his liability. In contracts for sale by instalments, there is a provision for forfeiture of instalments when an instalment is not paid as agreed; in such cases the proviso being an integral part of the contract, the contract can be rescinded and the instalments paid can be retained by the vendor. This is not a penalty clause. In such cases, equity granted relief if the purchaser carried out the contract at the time of action.[21]

#### 4. IN INDIA

Section 74 of the Indian Contract Act has abolished the distinction between penalty and liquidated damages as it exists under English law, and contains the equitable rule of the English law as to relief against penalty. It thus gets rid of the questions whether a particular amount is liquidated damages or penalty,[22] but the duty of the courts in India as well as in England is more or less the same for all practical purposes.[23] A court in India will not allow a party to escape from his contractual liabilities simply by paying a penalty in every case.[24] In India, therefore, the courts have powers to allow "reasonable compensation not exceeding the amount so named, or as the case may be, the penalty stipulated for". Under this section, actual proof of loss or damage is dispensed with and the party gets reasonable compensation, but the compensation will not exceed the amount named in the contract. The court is to carry out the primary contract between the parties and is not bound to carry out the secondary contract which comes into existence due to breach.[25]

### B. FORFEITURE

#### 1. NATURE AND MEANING

In cases where on the failure of one party to perform the contract, a specific property is to be transferred by that party to the other, or where as a result of his

17. *Snell's Principles of Equity*, 27th Edn., 1973, p. 536.
18. *Wall* v. *Rederiaktiebolaget Luggude*, (1915) 2 KB 66.
19. *Cellulose Acetate Silk W. Ltd* v. *Widnes Foundry, (1925) Ltd.*, 1933 AC 20.
20. *French* v. *Macale*, (1842) 2 Dr&Ware 269.
21. *Stockloser* v. *Johnson*, (1954) 1 All ER 630 CA.
22. *Panna Singh* v. *Ajban Singh*, 33 CWN 949.
23. *Michel Habib* v. *Sheikh Suleiman*, AIR 1941 PC 101.
24. *Cf.*, *French* v. *Macale*, (1842) 2 Dr&Ware 269.
25. Per Justice Sundara Aiyer in *Muthu Krishnan case*, (1912) 36 Mad 229.

having done or abstained from doing a particular act, the party loses some right, benefit, privilege or property, it is called a forfeiture.

### 2. BASIS AND EXTENSION OF RELIEF

Courts of equity relieved against this, but only in appropriate cases. Where the primary object of the bargain is to secure a stated result and the provision for forfeiture is added as security for the production of that result,[26] equity will grant relief against forfeiture for breach of covenant or condition. But where forfeiture is imposed not by act of parties but by statute, equity will give no relief. The most common instance of forfeiture lies in case of breach of a covenant in a lease. For example, the right of re-entry (on the lease property) of the landlord was considered as security for the payment of rent.

In granting such a relief, the appellant's conduct, graveness of the breach and the disparity between the value of the property forfeited and the damage caused by the breach would be inquired into by the court. Thus in a case where purchase money was payable by instalments and where there was a proviso that the vendor may rescind the contract and retain the instalment's already paid, it was held to be a forfeiture clause against which the court would not normally relieve, but relief could be granted if the purchaser was ready and willing to carry out the contract at the time of action.[27]

Relief against forfeiture also extended to cases of assignment of a lease, and non-payment of rent or fines, lease of land, hiring or lease of chattels; the underlying principle being that a forfeiture in substance was a mere security for the payment of a monetary sum. To ordinary breaches[28] of covenant this jurisdiction did not extend and forfeiture took place, but it is now conferred by statute.[29]

### 3. THREATENED FORFEITURE

As decided in *Barton case*[30], in case of thereatened forfeiture where the lessor did not take possession nor commenced proceedings therefor, the court would not probably exercise this jurisdiction.

### 4. DISTINCTION: FORFEITURE AND PENALTY

The main difference in equity between forfeiture and penalty is that in the former, relief is *not always* given although compensation can be given, while in the latter, relief is *always given* if compensation can be given. Forfeiture involves loss of an interest in property. For example, in case of a lease there is generally a provision that on committing a breach of any covenant by the lessee the landlord

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26. *Snell's Principles of Equity*, 27th Edn., 1973, p. 537, citing *Siloh Spinners Ltd.* v. *Harding*, (1973) 2 WLR 28.
27. *Kilmer case*, 1913 AC 319.
28. e.g. a covenant to repair or to lay out a specific sum on repairs in given time.
29. *Snell's Principles of Equity*, 27th Edn., 1973, p. 538, note 38.
30. *Barton Thompson & Co. Ltd.* v. *Stapling Machines Co.*, 1966 Ch 499.

may re-enter and the lease be forfeited. Insofar as penalty is concerned, in case of failure of performance the payment of a sum of money is stipulated.

**5. IN INDIA**

Section 111 of the Transfer of Property Act, 1882 incorporates the rule with regard to forfeitures and Sections 114 and 114-A incorporate the equitable rule of English law regarding relief against forfeiture for non-payment of rent.

Forfeiture is one of the eight ways to determine a lease as provided in Section 111(*g*). Forfeiture is incurred in three ways: where (*i*) a lessee breaks an express condition, providing for re-entry on land, (*ii*) where a lessee claims a title in the lease land or sets up a title thereof in a third person and renounces his character as lessee as such, and (*iii*) where he is adjudged an insolvent. In any of these cases the lessor must give a notice to the lessee of his intention to determine the lease. Notice by the landlord is thus a condition precedent to a forfeiture and the right of re-entry. On the fulfilment of anyone of the above three conditions, a lease does not automatically come to an end or become void. It only gives a right to the landlord to avoid the lease and to re-enter the land, and for this purpose to give notice to the lessee of his intention to do so.

Section 114 of the Transfer of Property Act incorporates the equitable rule of English law regarding relief against forfeiture of a lease. It lays down that in case of forfeiture of lease incurred due to non-payment of rent where the lessor sues to eject the lessee, the court will pass an order relieving the lessee against the forfeiture if he is prepared to pay within fifteen days the rent in arrears with interest due, and full costs of the suit, or gives security such as the court thinks sufficient. Thereupon the lessee shall hold the property as if the forfeiture had not occurred.[31]

This section indicates the principles that wherever compensation is an adequate remedy or an alternative, relief against forfeiture should be granted. The English principle in this regard is also the same.

In *Namdeo case*[32] it was observed that according to *Debendra case*[33], the court in granting such relief has no discretion and must grant relief to the tenant, but this is not so. Because "in exercising this discretion...under Section 114 a court in India is not bound by the practice of a Court of Chancery in England and I am not disposed to limit the discretion that it possesses. Those who seek equity must do equity, and I do not think merely because a tenant complies with the conditions laid down in Section 114 that he becomes entitled as of right to relief". Thus every case must be judged by relief. Besides he who comes in equity must come with clean hands and must do equity. It is the conduct of the tenant that disqualifies him for such relief in equity. This view is affirmed in various cases.[34]

31. *Dharamtalla Properties* v. *Dhunbai*, AIR 1931 Cal 457.
32. *Namdeo Lokman Lodhi* v. *Narmadabai*, 1953 SCR 1009.
33. *Debendra Lal Khan* v. *F.M.A., Cohen*, 1927 ILR 54 Cal 485.
34. *Appayya Shetty* v. *Mohmed Beari*, 1916 ILR 39 Mad 834; *Ramakrishna Malhya* v. *Baburaya*, (1914) 24 IC 139 and *Rama Brahman* v. *Rami Reddi*, AIR 1928 Mad 250. See also *Stanhope*

Section 114-A gives relief against forfeiture in certain other cases. The section contemplates covenants for repairs, maintenance or insurance of the property leased. It does not apply to breach of the covenant to pay rent and no relief is given by this section where the lessee incurs forfeiture by denying his landlord's title.

Where there are stipulations in contract it is the duty of the Court not to enforce the forfeiture clause, but only to award reasonable compensation which does not exceed the amount specified in the contract as liable to forfeiture. The award of compensation in all such cases should be reasonable.[35] If a stipulation for forfeiture amounts to penalty it is relieved against where the case is covered under Section 74 of the Indian Contract Act.[36] As held in *K.P. Subbarama Sastri* v. *K.S. Raghavan*[37], if on a proper construction of a contract it is found that the real agreement between the parties was to the effect that the whole amount was on the date of the bond a debt due but the creditor for the convenience of the debtor allowed it to be paid by instalments intimating that if default should be made in payment of any instalment he would withdraw the concession, then the stipulation as to the whole amount of the balance becoming payable would not be penal. If however, it appears that the debt itself arises or becomes due and payable by the debtor only on the respective dates fixed for the instalments, the stipulation that on default being made in the payment the whole of the balance should become due and payable would be in the nature of a penalty.[38]

Similarly where there was a clause in the agreement that special benefit of a share in the property at a lower price would be offered to a party under the agreement would not be available in case of default in payment of instalments of the price by the party within stipulated time, the stipulation was held to be valid and not a penalty clause.[39]

A well recognised exception in regard to penalty may be noted. The exception is that where a beneficial right is to arise under a contract, conveyance or a will, upon the performance of some act in a stated manner or at a stated time by the beneficiary, the act must be performed accordingly in order to obtain the enjoyment of the right, and there is no fraud, accident or surprise in the transaction, equity will not relieve against a breach of the terms.[40]

Insofar as the question of forfeiture of earnest money is concerned it may in certain circumstances amount to penalty.

Earnest money is a nominal sum of money sometimes given by the buyer to seller as a token that the parties are bound or are in earnest (eager or sincere to

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v. *Haworth*, (1886) 3 TLR 34.

35. *Fateh Chand* v. *Balkishan Das*, AIR 1963 SC 1405; *Naresh Chandra* v. *Calcutta Stock Exchange Ltd.*, AIR 1971 SC 422.

36. *Maula Bux* v. *Union of India*, AIR 1970 SC 1955.

37. (1987) 2 SCC 424, 427: AIR 1987 SC 1257.

38. Approving *P.K Achuthan* v. *State Bank of Travancore*, 1974 KLT 806.

39. *Sova Ray* v. *Gostha Gopal Dey*, (1988) 2 SCC 134: AIR 1988 SC 981.

40. *Simrathmull* v. *Nanjalingiah Gowder*, AIR 1963 SC 1182.

do something) about the bargain.[41] The amount is legally unnecessary but in practice in most cases of sale of immovable property it is given and taken.

If earnest money is given and the transaction proceed ahead, the same forms a part of purchase price. But if the transaction falls through due to buyer's fault or failure, the amount is forfeited. If the transaction goes through, the amount operates as a part payment.[42] If the amount of earnest is reasonable and if it is forfeited, it is not like imposing penalty.[43] But this depends upon circumstances of a case.

### 6. CASES OF CONCESSION AND PRIVILEGE

Cases of penalties and forfeiture can be distinguished from cases of concession and privilege fixed by agreement. In such cases of concession and privilege, if a required condition is not fulfilled, no relief would be obtainable in case of loss of that concession or privilege. Decisions in *Shanmugam Pillai* v. *Anna Laxmi*[44] and *Burjorji* v. *Madhavlal*[45] explain this principle. For example, *A* covenants to pay Rs 25,000 to *B* within thirty days. If payment is made as agreed, *B* would give up the balance of Rs 40,000, the amount due, but if it is not so made by *A* within the stipulated time, he will have to pay the whole amount of Rs 40,000 and the concession would be cancelled. *A* in such cases acts against the agreement and therefore equity is not on his side. Even the courts of equity in such cases have no power to relieve *A* from the consequences of his failure to act according to the agreement.

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41. Walker: *Oxford Companion to Law*, 1980, p. 387.
42. *Maula Bux*, supra.
43. *Hanuman Cotton Mills* v. *Tata Aircraft Ltd.*, SCC AIR 1970 SC 1986.
44. AIR 1950 FC 38.
45. AIR 1934 Bom 370.

# Chapter VI
# Mortgages, Liens and Merger

*"A mortgage at Common Law was strictly an estate upon condition that the estate will be forfeited upon the breach of the condition... .Equity thus turned an absolute conveyance at Common Law into a real security or a pledge for the repayment of a debt."*

—Williams on Real Property.

*'Security' for the debt, 'Right to Redeem' and 'Right to Foreclose' are the essential characteristics of a mortgage.*

## SYNOPSIS

## A. MORTGAGES

### 1. MEANING AND DEFINITION

What is generally understood by the term mortgage is a conveyance of land or other immovable or other property as security for the payment of money. Such mortgage is made to secure the repayment of money borrowed by the owner of the property mortgaged. In such a case the borrower incurs a debt or personal obligation to repay by whatever means. Where such a personal obligation is not incurred there is an express covenant for repayment. A mortgage at Common Law was strictly an "estate upon condition", that is, the estate was forfeited upon the breach of the condition.

A mortgage can be said to be a *conveyance* of some interest in land or other property "as a *security* for the payment of a *debt* or the *discharge of some other obligation* for which it is given".[1]

### 2. OBJECT

But insofar as a mortgage is a transfer of property, its object is to confer on the mortgagee a proprietory right, by exercising which he will be enabled to raise money payable to him; so that he shall have the means of securing himself from loss in the event of his debtor being personally unable to pay, or of attaining the desired end, where there is no personal liability to payment.[2] In other words, *the object of a mortgage is to secure the performance of the primary obligation.*

### 3. HISTORY

The history of mortgages goes back to Roman Law wherein due performance was secured by "pressurising the debtor's will or causing him inconvenience" by keeping him out of possession or ownership or forcing serfdom upon him so that he would repay the amount early. But this way of dealing with the debtor was hardly satisfactory and by efflux of time, a more concrete type of security whereunder irrespective of the debtor's will, the creditor could put the property to sale and recover his amount, came into vogue. Hypotheca of Roman Law was of this nature.

> "The term mortgage first appears in Glanville[3] in whose time either land or goods might be pledged as security for a debt. A pledge of land was effected by a conveyance thereof to the creditor to hold until the debt was paid, with an agreement either that the creditor should apply the rents and profits in reduction of the debt, or that he should receive them without any liability to account. In the latter case the transaction was called *mortuum vadium* (which in French is mort-deed and gage-pledge, whence mortgage); because although the debtor might redeem the land on payment of the principal sum, in the meantime it was dead or unprofitable to him. The

1. *Santley* v. *Wilde*, (1899) 2 Ch 475.
2. Joshua Williams: *Principles of the Law of Real Property*, 21st Edn., p. 544
3. Glanville Lib. x. c. pp. 6-8.

object of the *mortuum vadium* was to give the creditor the profits of the land in lieu of interest; the taking of which under the name of usury was anciently regarded as an unchristian abomination.[4] But these ancient methods of pledging lands seem to have fallen out of use at an early date, and to have been succeeded by a more stringent contract under which the land was given in pledge until a certain day fixed for payment, with a stipulation that on failure to pay at the appointed time the land should remain to the creditor in fee in the first instance with a proviso for re-entry on payment. Littleton, describing this, states that this is called a mortgage because, if the feoffer, do not pay (the feofee) then the land pledged is taken from him forever and so dead to him. The nature of this mortgage at law was that of a conveyance of land from one to another for an estate in fee, or other estate, which is to be determined or reconveyed on condition of the payment of money by the former on a certain day. If the condition was broken by non-payment of the money at the appointed time, the estate of the person to whom the land was so conveyed becomes absolute or discharged from the condition. So that, at law, he will be entitled to hold the land as his own, for all the estate limited to him. For in the courts of law the parties were held to the terms of their bargain by which the land was to be redeemed on a certain day, or if not, to be forfeited by the debtor."[5]

Courts of equity gave relief to the mortgagor against this strict construction of a mortgage. The relief was first given in cases of failure to pay at the appointed time by accident or of some *trifling default* and was afterwards extended to all cases of *forfeiture* of mortgaged land by failure to pay money when due. During the reign of Charles I this state of affairs was established.[6] Equity granted relief because it considered it unfair that the borrower should lose his land absolutely for default in payment. On its own principles and maxim that "equity looks to the intent rather than to the form", it enforced the original intention of the parties. It was also against the conscience of the lender that he should retain the property which he received from the borrower as a mere security. Equity thus turned *an absolute conveyance at Common Law into a real security or a pledge for the repayment of a debt*, so that if the borrower paid the principal amount with interest and costs within a reasonable time even after he had lost his legal right to redeem, equity granted him an equitable right to redeem, which came to be known as a *mortgagor's equity of redemption*. The effect of this kind of help to the mortgagor by equity caused Maitland to remark that the express words of the proviso for reconveyance as included in the mortgage deed become, "owing to the action of equity" a "long *suppressio veri* and *suggestio falsi*". It does not in the least explain the rights of the parties: it suggests that they are other than really they are.[7] The assurances given by the deed were thus left unaltered by equity, by granting the mortgagor a right to redeem by payment at any time before a sale or foreclosure of

4. Joshua Williams: *Principles of the Law of Real Property*, citing *Plowden on Usury* Part I.
5. Joshua Williams: *Principles of the Law of Real Property*. See also *Snell's Principles of Equity*, p. 376.
6. *How* v. *Vigures*, I Ch Rep 18.
7. Maitland: *Lectures on Equity*, 1969 Edn., p. 182.

the mortgage took place. *The right of redemption is thus a right given by equity contrary to an agreement.*[8]

## 4. CHARACTERISTICS OF A MORTGAGE

The first essential characteristic of a mortgage is the mortgagor's "right to redeem" which had its origin in the idea canvassed by equity that 'stipulation as to time for the payment' was a penalty and was therefore required to be relieved. This one-sided concession granted to a mortgagor, however, could not be allowed to continue indefinitely in point of time and the equity courts were required to set limits to their own generosity, because one has to be just before he professes to become generous. On this principle, after a reasonable time expired, the mortgagee was allowed to foreclose the right of redemption of a mortgagor who not only lost his legal right to redeem but also lost his equitable right to redeem. *This right to foreclose, according to Hanbury, is an equitable right given to a mortgagee to counterbalance the mortgagor's right to redeem and is the second essential characteristic of a mortgage.*

As the Common law judges strenuously resisted the introduction of this new principle and adhered in their courts to the principle of forfeiture,[9] the Judicature Act, 1873,[10] exclusively assigned the redemption and foreclosure of mortgages to the Chancery Division of the High Court.

## 5. MORTGAGOR'S RIGHT: EQUITY OF REDEMPTION

From the characteristics of mortgage enumerated above, it follows that a right to redeem cannot be fettered or circumvented even by express agreement of the parties, and the maxim "*modus et conventio vincunt legum*", that is "the agreement of parties overrides the law" has no application to mortgage. The mortgagor or anyone standing in his place, shall be admitted in equity to redeem a mortgage after the day fixed by the contract for redemption has gone by, and the estate has become forfeited at law.[11] As Coote has explained,[12] it was further laid down as a general rule, subject to very few exceptions, that wherever a conveyance of estate is originally intended as a security for money, whether this intention appears from the deed itself or by any other instrument or even by parol evidence,[12] it is always considered in equity as a mortgage and redeemable; even though there is an express agreement of the parties that it shall not be redeemable or that the right of redemption shall be confined to a particular time, or to a particular description of persons.[13] In other words, it was established that no agreement of the parties to a mortgage, that the mortgage should not be redeemable according to the rules of equity, should have any effect in equity. Upon this principle it was held that any attempt to fetter the

8. *Salt* v. *Marquees of Northampton*, 1892 AC 1.
9. *Snell's Principles of Equity*, 27th Edn., p. 377.
10. Section 34(3).
11. *Tarn* v. *Turner*, 39 Ch D 456 cited in Joshua Williams: *Principles of Real Property*, p. 547.
12. *Coote on Mortgages*, Chap. III, Section 3, cited in Joshua Williams: *Principles of Real Property*, p. 547; see also *England* v. *Cordington*, 1 Eden 169.
13. *Ibid.*, Chap. III, Section 2.

equity of redemption with any other condition than the payment of principal, interest and costs should be void.[14] This principle is summed up briefly in the phrase "*once a mortgage always a mortgage*".[15] Furthermore, it was held that in equity, the right of the mortgagee was to the money secured, and he held the land only as security for his money; so that in equity he had a mere charge for the amount due to him, even though he were absolute tenant in fee at law. It was therefore decided that the benefit of a mortgage should go along with the rest of the mortgagee's personal estate to his executor or administrator, not his heir.[16] And although at law the estate of a mortgagee in fee would go to his heir or devisee, yet in equity the heir or devisee was held a mere trustee thereof for the executor or administrator.[17] Consequently in equity the owner was regarded as the owner of the mortgaged land, subject only to the mortgagee's charge; and the mortgagor's equity of redemption was treated as an equitable estate in the land, of the same nature as other equitable estates.[18]

### 6. MODERN TREND

Thus, what was in the beginning an equitable right became an equitable estate, which amounts to ownership of the property subject to the mortgage and which a mortgagor could settle, devise, mortgage or otherwise dispose of in any way he liked.[19] Even a mortgagee can buy the equity of redemption, and nobody can prevent him.[20] And the collateral benefits if they continue beyond the redemption can be obtained by the mortgagee if they do not prevent free dealings with the property.[21] As decided in *Kreglinger* v. *New Patagonia Meat Co.*[21], this is the modern trend.

### 7. IN INDIA

(*a*) *History.*—The idea of a mortgage witnessed a similar evolution in India, and as a result of its intimate contact with English legal principles we have the Transfer of Property Act, 1882, Sections 58 to 104 whereof cover this topic. Under the Hindu and Muhamedan laws, the system of mortgages was in vogue and it passed through a similar process of evolution as in Roman law. Mortgage by conditional sale and usufructuary mortgage, which resembled Pignus of Roman law, were known to Hindu law. Manusmriti[22] gives details[23] thereof. The ancient Hindu law did not make any distinction between pledge and mortgage. For both pledge and mortgage a common term, Adhi (आधि :) has been used in Smritis. The word Adhi came to be used because the article or

14. *Jenning* v. *Ward*, 2 Vern 520; *Noakes* v. *Rice*, 1902 AC 24; *Howard* v. *Harris*, (1683) 1 Vern 33; *Samuel* v. *Jarrah Timber Corporation*, 1904 AC 323.
15. Lord Nottingham in *Newcomb* v. *Bonham*, 1 Vern 7.
16. *Thornborough* v. *Baker*, 1 Ch Ca 283.
17. *Coote on Mortgages*, Chap. LXXIX, Section 1.
18. *Casborne* v. *Scarfe*, 1 Atk 603, 605.
19. *Snell's Principles of Equity*, pp. 378, 379.
20. *Reeve* v. *Lisle*, 1902 AC 461.
21. 1914 AC 25.
22. Chap. 8, verse 143.
23. *See also* Sir William Jones: *Manusmriti*, Chap. 3, p. 142.

immovable property goes under the Control (adhina) of the creditor. Manu uses the word Adamana for mortgage (Manu VIII 165) and Brihaspati employs the word bhogya (भोग्य) for mortgage.

In laying down the law on the topic of Adhi, the ancient Indian law givers have taken care to incorporate conditions reasonable to both the parties and they are comparable in several aspects to the present laws on the topic.[24]

In Muhamedan law a mortgage is called "bye-bil-wufa" and resembles an English mortgage. The Muslim religion prohibits charging of interest. To counter this religious restraint a mortgagee resold the mortgaged property to the mortgagor at a higher price. If the debtor did not repay the money obtained, the creditor (mortgagee) becomes the absolute owner thereof. The word "bye-bil-wufa" is an Arabic expression meaning a sale based on confidence, i.e. it is a sale with a condition to retransfer the property.[25]

Before the passing of the Transfer of Property Act, 1882 in India, the principles of English law along with the principles of equity were applied. The Transfer of Property Act, 1882 converted equitable rights into legal rights.[26]

(*b*) *Definition.*—Section 58 defines a mortgage as under: "A mortgage is the—

(*i*) transfer of an interest;

(*ii*) in the specific immovable property;

(*iii*) for the purpose of—

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

This definition is a very satisfactory one. Out of various interests in property three are prime and basic: right of possession, right of enjoyment and right to sell the property. In an outright sale, a person transfers all these rights which go to make the other an owner of the immovable property; in a mortgage he transfers any one of these, but not all.

A mortgage is different from a pledge. In a pledge the *ownership of goods or personal chattels* (not immovable property) remains with the pledgor; what is transferred to the pledgee is possession of the property. In a mortgage what is transferred is *an interest in specific immovable property* (not goods or personal chattels), the *ownership and possession* of the property being retained by the mortgagor except in case of an usufructuary mortgage.

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24. Rama Jois: *Legal and Constitutional History of India*, 1985 Edn., Part II, Ch. 5. pp. 115-130 (It gives interesting details on this topic).
25. For details see Mulla: *Transfer of Property Act*, 5th Edn., 1966, p. 364.
26. Lahiri: *Transfer of Property Act*, 8th Edn., 1965, p. 292.

(c) *Classification.*—The Transfer of Property Act recognises six kinds of mortgages: simple mortgage, mortgage by conditional sale, usufructuary mortgage, English mortgage, mortgage by deposit of title deeds and anomalous mortgage. Instead of reproducing their definitions,[27] we shall go through and discuss in brief their important features hereunder.

## 8. SIMPLE MORTGAGE

A simple mortgage which is made without delivering possession of the mortgaged property has the following ingredients:

(1) Possession and enjoyment of the property subject to mortgage remains with the mortgagor.

(2) The mortgagor binds himself personally to pay the mortgage money.

(3) In the event of his failing to pay, the mortgagee shall have a right to put the property to sale only through court and recover his money.

(4) Such a mortgage, irrespective of the amount of consideration, must be effected by a registered document.

In such a mortgage the mortgagee has two ways open to him: either to use his power of sale of the mortgaged property through sale and to recover his amount or to sue on the mortgage and obtain a money decree against the debtor. A simple mortgage has to be distinguished from a charge. As pointed out by Snell,[28] for most practical purposes a charge can be regarded as a species of mortgage; for whereas a mortgage is a conveyance of property, a charge merely gives the chargee certain rights over the property as security for the loan. Where the amount is to be realised from the income of a definite and specified item of property and there is no right to put the property to sale, the transaction is only a charge and not a mortgage.

## 9. MORTGAGE BY CONDITIONAL SALE

In a mortgage by conditional sale there is:

(1) An ostensible sale of the mortgaged property.

(2) There is also a condition that in case of failure to pay the money on a certain date the sale shall become absolute, but on such payment being made the sale shall become void and the mortgagee (the buyer) shall retransfer the property to the seller (the mortgagor).

(3) Such a condition has to be embodied in the same document if the transaction is to be a mortgage.[29]

(4) The remedy of the mortgagee in such a transaction is a suit for foreclosure.

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27. *See* Sections 58(*b*) to 58(*g*) of the Transfer of Property Act, 1882.
28. *Snell's Principles of Equity*, p. 375.
29. *Pandit Chunchun Jha* v. *Sheikh Ebadatali*, (1955) 1 SCR 174.

(5) If the consideration exceeds Rs 100 the registration of the document is compulsory.

Whether a transaction is a mortgage by conditional sale or a sale has to be decided with reference to the "intention of the parties",[30] which can be gathered from the document itself.[31] In every case the question is "what, upon a fair construction, is the meaning of the instrument. No extrinsic evidence or evidence *de hors* the document is allowed, as what the document expresses has to be accepted".

### 10. USUFRUCTUARY MORTGAGE

The salient features of an usufructuary mortgage are:

(1) Delivery of possession of the property to the mortgagee or a binding to that effect.

(2) Till the amount obtained is repaid such possession is authorised to be retained.

(3) Rents and profits accruing from the property are to be appropriated in lieu of interest on the principal amount. On realisation of the amount the property is redeemed.

(4) The mortgagor has no personal liability.

(5) The mortgagee has no power either of sale or of foreclosure.

(6) Registration, if the consideration exceeds Rs 100, is compulsory.

Moreover, a binding to deliver possession of the mortgaged property must be plain and without any condition. The mortgaged property will remain with the creditor as long as the debt is not satisfied; but if the possession is for a definite number of years the transaction is not an usufructuary mortgage but an anomalous mortgage.

### 11. ENGLISH MORTGAGE

In an English mortgage:

(1) The mortgagor binds himself personally to repay the mortgage money on a certain date.

(2) There is transfer of the mortgaged property absolutely to the mortgagee.

(3) Possession is delivered.

(4) The property so transferred is to be retransferred to the mortgagor when there is repayment.

(5) The mortgagee's remedy is only a sale.

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30. *Pandit Chunchun Jha* v. *Sheikh Ebadatali*, (1955) 1 SCR 174; *Bhasker Waman Joshi* v. *N.R. Agarwal*, (1960) 2 SCR 327. See also *State of Kerala* v. *Cochin Refineries Ltd.*, AIR 1968 SC 1361; *Balkishandas* v. *Legge*, 27 IA 58: 22 All 149; *Bapuswamy*, (1966) 2 SCR 1.

31. *Alderson* v. *White*, (1858) 2 DG 97: 44 ER 924, 928.

(6) Such a power of sale can be out of court.

It must be noted that like a simple mortgage, there is a personal undertaking to repay the amount. There is no personal undertaking in a mortgage by conditional sale, but in an English mortgage it is there. Similarly, there is a transfer of the mortgaged property absolutely in an English mortgage, but in a mortgage by conditional sale the transfer is an ostensible sale.

## 12. MORTGAGE BY DEPOSIT OF TITLE DEEDS

A mortgage by deposit of title deeds is restricted to the following towns: Calcutta, Bombay and Madras. Persons residing in these places can avail of its benefits. The recognition of this type of mortgage is for the benefit of the mercantile community to enable them to raise quick money.[32] Its essential characteristics are:

(1) There should be delivery of documents of title to the creditor with intent to create a security thereon. The property can be situate anywhere.

(2) Registration is not necessary, except that a memorandum evidencing the deposit of title deeds is required to be drawn and the terms of the mortgage are incorporated therein.

(3) No possession of property is delivered.

(4) The remedy available to the mortgagee is a suit for sale.

(5) Provisions in respect of simple mortgage are applicable to this type of mortgage also.

## 13. ANOMALOUS MORTGAGE

An anomalous mortgage is an admixture of any two or more types of mortgages mentioned above. However, it is not necessary that whenever a mortgage does not fall within any one of the five categories mentioned in Sections 58(*b*) to (*f*) it must necessarily be treated as an anomalous mortgage. This is so because the classification of mortgages by the Act is not an exhaustive one but projects only a cross-section of the common types of mortgages prevalent in India.

## 14. NATURE OF EQUITABLE MORTGAGES IN ENGLAND AND IN INDIA

In England, where a legal estate in property is conveyed as a security for payment of a debt there is a legal mortgage, and where the estate conveyed is equitable there is an equitable mortgage. What remains with the mortgagor after the first mortgage is made is the equity of redemption which is an equitable estate. This was the position prior to 1926, but even after 1926 there has not been any substantial change and the equitable mortgage continues to remain in vogue, because under the Law of Property Act, 1925, the mortgagor only grants

32. This was a practice prevalent in presidency towns and in moffusil before the passing of the Act. The Privy Council accepted it and experience has justified its retention. *See* Gour, H.S.: THE LAW OF TRANSFER, 8th Edn., 1973, pp. 2301-2302.

a legal term of years to the mortgagee and retains with himself the fee-simple estate, whereon he can create still further legal mortgages.

An equitable mortgage passes only an equitable interest in property unlike a legal mortgage which passes the entire legal interest in property to the mortgagee.

(*a*) *How it comes into being.*—(1) Where a legal mortgagor either by design or by accident does not fully convey the legal estate or does or refrains from doing something which falls short of conveying the legal estate, the resultant mortgage would be an equitable mortgage but not a legal one. This can happen in the following cases too:

(2) Where there is a written agreement to execute a mortgage, the agreement gives rise to a liability in equity which can be specifically enforced. Of course, in India this does not happen.

(3) Where there is a written declaration that the land of the mortgagor is charged with the repayment of a loan, an equitable mortgage comes into existence.

(4) Where title deeds to the property are deposited with intent to create a mortgage, the land concerned being the security for the payment of a debt, it is yet another instance wherein an equitable mortgage is created without a writing, on the principle of implied agreement and part performance.[33]

(*b*) *In India.*—In India all mortgages are legal mortgages.[34] Indian law knows no distinction between legal and equitable estates, rights and mortgages. The right of redemption of a mortgage is a legal right under Section 60 of the Transfer of Property Act, 1882. A mortgagor can therefore create a second mortgage on this right. As could be seen from the definition of mortgages in Section 58, a mortgagor in India does not transfer the whole interest in the property but retains a legal interest in the property which may be further subjected to a subsequent mortgage.

Under English law a legal mortgage takes precedence over an equitable mortgage subject to certain exceptions but in India this is not so, because, according to Section 48 of the Transfer of Property Act, all mortgages rank in order of the time of creation, subject to provisions of Sections 78 and 79.

Mortgage by deposit of title deeds in India differs from an English equitable mortgage, because, whereas the latter is an insufficient security[35] and can be postponed to a subsequent legal mortgage, the former is a sufficient security, a completed transfer, and takes effect and precedence as against any mortgage deed subsequently executed and registered.

A mortgage by deposit of title deeds in England is accompanied by a written memorandum and that memorandum alone determines the scope and extent of the security, as it is the memorandum only which governs the bargain.

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33. Maitland: *Lectures on Equity*, 1969 Edn., p. 198.
34. *Imperial Bank of India* v. *U. Rai Gyaw*, (1923) 1 Rang 637 (PC).
35. "Equitable mortgages are not very safe things", Maitland: *Lectures on Equity*, 1969 Edn., p. 199..

If the memorandum is merely the record of an already completed bargain, its position is not so strong. In India, if such a memorandum is an integral part of the transaction, it is required to be registered and it will not be allowed to be contradicted by extrinsic oral evidence.[36] Moreover on the ratio of *Pranjivandas Mehta* v. *Chan Ma Phee*[37] and per Lord Cairns in *Shaw* v. *Joster*[38] and *National Bank* v. *Nazir & Co.*,[39] per Justice Tayabji one may say that the question of registration depends on the question whether the written memo contains the real bargain between the parties or not. If it contains, it must be registered.

### 15. MORTGAGOR'S EQUITY OF REDEMPTION OR RIGHT OF REDEMPTION

(*a*) *Origin.*—The origin, nature and the elevation of the equity of redemption from an equitable right into an equitable estate has already been discussed in para 5 above.

(*b*) *Description.*—As could be seen from Section 60 of the Transfer of Property Act, *a right of redemption can be described as the mortgagor's right to get retransferred the mortgaged property, free from any encumbrance, on his repaying the mortgage debt with due interest, before his right to redeem is foreclosed or the property mortgaged is got sold by the mortgagee.* It is a right which requires the mortgagee to do three things on repayment of his money:—

(*i*) to deliver all the documents relating to the property;

(*ii*) to deliver possession of the property if he is in possession thereof; and

(*iii*) to retransfer the property as the mortgagor directs or to execute a registered acknowledgement in writing that no rights in derogation of the interest transferred subsist or exist.

(*c*) *Nature.*—A right of redemption in India is a legal right (as discussed before) which a mortgagor can exercise by virtue of his residuary ownership in the property. It has been properly pointed out by Snell[40] that the mortgagor's equitable right to redeem, coupled with his other rights in the property, constitute his "*equity of redemption*". In other words, *it is the sum total of his residual rights and interests in the mortgaged property.* There can be no partial redemption (except in one case under Section 60) because the mortgage security is indivisible. If a piecemeal redemption is allowed the security may depreciate,[41] and the integrity of a mortgage may be broken.[42] Thus the indivisibility of the mortgage security is a statutory concept. The right to redeem, in India, subsists until a final decree of sale or order of foreclosure has been actually passed as per Rules 3 and 5 of Order 34 of the Civil Procedure Code.

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36. *Obla* v. *Narayan*, (1930) 35 CWN 925 (PC); *Rachpal* v. *Bhagwan*, AIR 1950 SC 79.
37. (1916) LR 43 IA 122.
38. 1872 LR 5 HL 32.
39. 34 BLR 784, 751.
40. *Snell's Principles of Equity*, 27th Edn., 1973, p. 378.
41. *Nilkanth* v. *Suresh*, (1886) 12 IA 171.
42. *Ramchand* v. *Prabhu Dayal*, (1942) 69 IA 98.

## 16. DOCTRINE OF CLOG ON REDEMPTION

Though equity of redemption under the English law in the same form is not recognised in India, the doctrine of clog on the right of redemption has been recognised.[43]

(*a*) *Description*.—A clog has been described as *any contrivance or method whereby the mortgagor's right of redemption is impaired*. Explaining this in *Noakes* v. *Rice*[44] it has been said:

> "There are three doctrines of the courts of equity in this country. The *first* is expressed in the maxim "*One a mortgage, always a mortgage*". The *second* is that the mortgagee shall not reserve to himself *any collateral advantage outside the mortgage contract; and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void*. The third doctrine to which I have referred is only a corollary from the first, and might be expressed in this form '*once a mortgage, always a mortgage and nothing but a mortgage*.' The meaning is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest and costs from getting back his mortgaged property in the condition in which he parted with it."

This rule has been applicable in India too as could be observed from *Sherkhan case*[45] decided by the Privy Council. Thus any agreement which directly bars the mortgagor's right to redeem or a stipulation which directly or indirectly may have the effect of making the mortgage irredeemable or the property being still subject to incumbrances after redemption, are clogs on the equity of redemption.[46]

(*b*) *Tests*.—The test whether a particular agreement or stipulation is a clog or not depends on the nature, import and scope of the stipulation and whether the same has been a part of the mortgage agreement itself. The needy mortgagor cannot bargain on equal terms with the mortgagee and it is to save him from pressures of the mortgagee that this rule has been made by equity. *James Fairlough case*[47] and *Reeve case*[48] in England, and *Shankardin case*[49] in India are leading examples on the topic.

(*c*) *Modern Trend*.—Courts in England were at one time inclined to rule even further than this that any benefit or advantage which may endure beyond the period of repayment of the debt with interest and costs (called "the price of redemption")[50] was invalid[51] but the modern trend is not so harsh; it restricts the rule to the clogging of equity and will not allow it to go further. Consequently,

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43. *Gangadhar* v. *Shankar*, AIR 1958 SC 770.
44. 1902 AC 24, per Lord Davey.
45. *Mahomed Sherkhan* v. *Raja Seth Swamy Dayal*, (1921) 20 ALJ 476.
46. *Snell's Principles of Equity*, 27th Edn., p. 379.
47. 1912 AC 565.
48. *Reeve* v. *Lisle*, 1902 AC 461.
49. (1912) 34 All 620.
50. See *Snell's Principles of Equity*, pp. 410-413 for details.
51. *Noakes* v. *Rice*, 1902 AC 24; *Bradley* v. *Carritt*, 1903 AC 253.

in *Kregl'nger case*[52], Lord Mercey described this doctrine as an unruly dog, which if not chained and confined to its own kennel, was prone to wander into places where it ought not to be. It was observed in that case that if the collateral advantage is not unconscionable, unfair, extravagant or oppressive, or in the nature of penalty or inconsistent with the right to redeem, the same is valid.[53] This view finds expression in *Kanahayalal* v. *National Bank of India*[54] and is in line with the construction[55] of Section 60 of the Transfer of Property Act in India.

As to who can exercise this right and how, is laid down in Section 91 of the Transfer of Property Act. It can be exercised before it is foreclosed, or the mortgaged property is sold by the mortgagee or before it becomes time barred.

## 17. FORECLOSURE

As said by Hanbury, the right to foreclose is an equitable right given to the mortgagee to counterbalance the mortgagor's right to redeem. This was a proper move on the part of equity courts because one has to become just before he professes to become generous. Foreclosure can be effected only by an order of the court. The court thereby gives the mortgagor and all the parties interested in the equity of redemption an opportunity to redeem the mortgage. The mortgagor, who in such proceedings is already too late to redeem at law, shall be deprived even of his equitable right.[56] As Strahan puts it, it is simply the right to ask the court to withdraw its relief against a forfeiture which is created by the mortgage. In suitable cases, therefore, a court passes first of all a conditional order of foreclosure, called a *foreclosure nisi*, which if not complied with by the mortgagor will become absolute, and the mortgagor will be barred forever from redeeming his property. Resultantly the mortgagee will hold the land absolutely both at law and in equity. Section 67 of the Transfer of Property Act provides for this. The position of various mortgagees under the Act is that in case of a simple mortgagee and a usufructuary mortgagee, no foreclosure is allowed, while in case of a English mortgagee and a mortgagee by deposit of title deeds the remedy of sale is allowed. It is only in case of a mortgage by conditional sale that a foreclosure is allowed.

An anomalous mortgagee may have, according to the terms of the mortgage, both or any one of the two remedies—foreclosure or sale. A dismissal of the redemption suit on failure of the mortgagor to redeem operates to foreclose his right of redemption; and he will not be allowed to sue for redemption again, as it amounts to harrassment of the mortgagee.[57]

52. 1914 AC 25.
53. *Biggs case*, (1898) 2 Ch 307.
54. (1923) IA 162.
55. *Ambu Nair* v. *Kelu Nair*, (1930) 53 Mad 805.
56. *Snell's Principles of Equity*, p. 401.
57. *Biggs* v. *Hoddinott*, (1898) 2 Ch 307, 312.

## 18. OPENING THE FORECLOSURE

As said before, although the absolute foreclosure order appears to be final, a court will open a foreclosure in circumstances compelling and inducing it to do so. They are, as enumerated by Snell[58]: (*i*) an accident at the last moment preventing the mortgagor from raising the money, (*ii*) any special value of the property to the mortgagor, (*iii*) a marked disparity between the value of the property and the amount lent, (*iv*) the promptness of the application,[59] and (*v*) where the mortgagee pursues another remedy after obtaining an order of foreclosure absolute. It was for this reason that Maitland remarked that "one is not very safe in purchasing a foreclosed estate". In India no such provision for reopening a final decree of foreclosure exists as could be gathered from Order 34, Rule 3 of the Civil Procedure Code.

Besides suing a mortgagor personally and foreclosing his right of redemption, in India, a mortgagee has the remedies of a judicial sale, sale without intervention of court, appointment of a receiver and taking possession of the mortgaged property.

## 19. TACKING

*Tacking is the union of two securities on the same property by the mortgagee who has a legal estate.* This union is achieved in such a manner and with such a result that the intermediate equitable purchaser is prevented from claiming a title to redeem. This contrivance had the effect of modifying the rules of priorities. Putting this principle into practice resulted in injustice as when a subsequent equitable mortgagee might tack his right by getting in the legal estate and could squeeze out a second mortgagee. This is an extreme and unjust extension of the principle underlying the maxim "where there is equal equity, the law shall prevail". This curious doctrine was therefore abolished in 1925,[60] and after 1925 a legal or equitable mortgage was allowed to tack further advances to rank in priority to intervening legal or equitable mortgages.[61] In India, tacking for the purpose of squeezing out an intermediate mortgagee is not recognised.[62] It is expressly prohibited by Section 93 of the Transfer of Property Act. The section enacts that when a third mortgagee pays off the first mortgagee, he is subrogated to the position of the first mortgagee. The section in such cases explains that the third mortgagee cannot join his own mortgage to the first and claim priority over the intermediate mortgagee. Tacking of this nature is prohibited but tacking further advances as set out in Section 79 of the Act is permitted. In short, what a third mortgagee gets by paying off the first mortgagee is not priority, but subrogation[63] or substitution.

58. *Snell's Principles of Equity*, p. 403.
59. *Campbell* v. *Holyland*, (1877) 7 Ch D 166.
60. Law of Property, 1925, Section 94(3).
61. Law of Property, 1925, Section 94.
62. *Gokulnath* v. *L.P. Lal*, (1878) 3 Cal 307.
63. *Imperial Bank of India* v. *U.S.I. and Co.*, 51 Cal 86.

## 20. CONSOLIDATION

The doctrine of consolidation had its origin in the maxim "he who seeks equity must do equity". Where distinct estates have been separately mortgaged by the same mortgagor to the same mortgagee, the mortgagee is in a better position as if the whole of the lands had been mortgaged to him for the total amounts advanced by him. He can therefore consolidate those mortgages against the mortgagor and refuse to allow him to redeem one without redeeming the other. In other words, when a party is entitled to the mortgages he can insist upon the mortgagor to redeem all at a time or none. Redemption here is allowed only upon equitable terms that is, when the mortgagor's right to redeem at law was lost and he seeks to enforce his equitable right to redeem, the mortgagee can subject the mortgagor to an equitable condition of redeeming all the mortgages, because otherwise a mortgagee would be exposed to the risk of deficiency of the other security. He is thus left to his luck, which is not fair.[64] The doctrine applies to real or personal property mortgaged and also to legal or equitable properties. This doctrine was abolished in England. The Transfer of Property Act, Section 61, in India, also enacts to this effect. Section 61 enacts against consolidation[65] but provides that if there is a contract to the contrary consolidation will be permitted.[66] But a mortgagee cannot compel a mortgagor to redeem all the mortgages as is provided in Section 67-A of the Transfer of Property Act. It must be noted that the old unamended section referred to separate mortgages of different properties but the amended section now covers the situation where the same property is mortgaged under successive mortgages. As explained in *Jankinath* v. *Pramathnath*[67], such a situation may arise not due to consolidation but because of making a second mortgage of the same property to the same mortgagee.

## 21. MARSHALLING SECURITIES

To marshall means to arrange, to systematize, to methodize or to place in order.

The doctrine of marshalling represents the concept of natural justice and it is that a mortgagee cannot be allowed to act, either with design or with caprice, whim or rashness, in such a way as to prejudice the rights of the other. *Aldrich* v. *Cooper*[68] lays down the principle thus that "*it shall not depend upon the will of one creditor to disappoint another*". Moreover, "if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take that which paying him will leave another fund for another creditor".[69]

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64. *Fischer on Mortgages*, p. 597.
65. *Shambhu Charan* v. *Harprasad*, (1962) SC CA 11.
66. *Aditya* v. *Rama Ratan*, 1930 PC 176.
67. 1940 PC 38, per Lord Roamer.
68. (1803) 8 Ves 382, per Lord Eldon. See also *Well* v. *Smith*, (1885) 30 Ch D 192; *Lenoy* v. *Duke of Athole*, 2 ATK 446.
69. *Annapurna* v. *Ramranjan*, 40 CWN 1173; see also *National Provincial Bank Ltd.* v. *Katz*, (1959) 3 All ER 740 (equity attempts to do justice among all beneficiaries on an equal footing).

This idea has been incorporated in Section 81 of the Transfer of Property Act thus:

> 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.

The section is clear and enacts that where two mortgagees claim to be satisfied out of the same property, it is for the court to apply this doctrine of marshalling whereunder it will so arrange the securities that both the mortgagees are paid as far as possible. This could be done by directing the first mortgagee (at the instance of the subsequent mortgagee) to satisfy his claim first from the property not mortgaged to the subsequent mortgagee and then to extend his claim to the other. The result would be that it will leave the other security or so much of a part of it, not required for the satisfaction of the first, for the subsequent mortgagee. One has to note that the section includes the words "in the absence of a contract to the contrary", which means that this "right" of the mortgagee can be excluded by contract of the parties. Since the first mortgagee has two estates in his hands he, of his own will, cannot be allowed to act in a way to cause injustice and inflict loss to the other. But, if by marshalling the securities the first mortgagee's interest is prejudiced or persons getting interest through him are put to a loss, this principle will not be applied.[70]

## 22. CONTRIBUTION

The doctrine of contribution is based on the maxim "equity delighteth in equality".[71] The principle underlying this doctrine is equality; for example, where several persons are debtors all shall be equal, and if the creditor does not make them to contribute equally the courts of equity will see that the object is achieved by making them to contribute equally. In other words, it involves the fixation of the proportion or share in which two or more owners of an estate, subject to a common charge, ought to contribute for its redemption. This principle is incorporated in Section 82 of the Transfer of Property Act. Dr Ghose[72] in his treatise has clearly explained thus:".....a mortgage debt is one and indivisible and if several distinct parcels of land are hypothecated to the creditor, which belong to two or more mortgagors, or subsequently pass to different owners, the creditor may, as a rule, proceed against any one of such parcels; and the only way to prevent a sale or foreclosure would be to pay the whole of the mortgage debt. It is but reasonable that in such a case, the person

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70. *Devkinandan* v. *Parmeshwari*, 1941 Punj LW 582. See also Lahiri: *Transfer of Property Act*, 8th Edn., 1965, p. 404 quoting *Jones on Mortgages*.

71. *Craythorne* v. *Swinburne*, (1807) 14 Ves 160.

72. *Law of Mortgages in India*, 8th Edn., p. 415.

who is compelled to discharge the common burden should be permitted to seek indemnification from the others and no fairer rule can be suggested than that each of them should contribute according to the value of he property owned by him or the extent of his interest in it. For the law would not suffer the creditor to select his own victim, and from caprice or favouritism to turn a 'common burden' into a gross personal oppression". Principles of natural justice can be seen working here.

Section 82 of the Transfer of Property Act incorporates not only the case of a property once mortgaged and subsequently divided into several shares but also the case of a mortgage of several properties mortgaged. In other words, where the debt is one and the properties mortgaged are several, and where there are two properties and the debts are several the principle applies. It should be noted that contribution is regulated by the principle of marshalling and where there is a conflict between the two, principles of marshalling shall prevail. Section 82 will apply only up to the time the mortgage continues. Moreover, the liability created by contribution is not personal but it is attached to the property and the liability though statutory can be avoided or excluded by a contract, as the section itself provides. Looked at from a proper angle, one may say that contribution is marshalling in a different form. Leading cases on the principle are *Kidar Lall* v. *Hari Lall*[73] and *Narayan* v. *Nallammal*[74].

## 23. SUBROGATION

(*a*) *Origin.*—The term subrogation is said to be derived from the Latin root *sub rogo subrogatum*—from sub and rogo to ask, meaning substitution. Dr Oglive explains that subrogation is a term of civil law meaning the substitution of one person in the place of another giving him his rights, but in the general sense it implies a succession of the kind either of a person to a person or a person to a thing.

(*b*) *Definition.*—The Law Commissioners in their report[75] say that technically the term is confined to cases where the right arises by operation of law. In Roman law, a creditor who lent money to the debtor for the purpose of paying off a mortgage on condition that he was to be substituted in the place of the mortgagee, was entitled to claim the benefit of the security discharged with his money;[76] and this right has been recognised in all modern systems derived from Roman law.... The principle of subrogation however ought to apply generally to all cases other than those of a mortgagor who pays off his own debt or of a mere volunteer.[77]

This doctrine is a doctrine of equity jurisprudence. As defined by Mukerjee, J. in *Bisseswar Prasad* v. *Lala Sarnam Singh*[78], it does not depend on privity of

73. 1952 SCR 179: 1952 SCJ 37.
74. (1942) 2 MLJ 525.
75. 13th report in 1929.
76. See *Donatt's Civil Law*, Section 1774 and *Hunter's Roman Law*, pp. 441, 443.
77. See *Craythorne* v. *Swinburne*, (1807) 14 Ves 160, 162, per Sir S. Romilly in England.
78. 1907 Cal LJ 134, 137-138.

contract, express or implied, except in so far as equity may be supposed to be imported into the transaction and thus raise contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice. While therefore the doctrine will be applied in general, (*i*) wherever any person other than a mere volunteer pays a debt or a demand which in equity or good conscience should have been satisfied by another, or (*ii*) where the liability of one person is discharged out of a fund belonging to another, or (*iii*) where one person is compelled for his own protection or that of some interest which he represents to pay a debt for which another is primarily liable, or (*iv*) wherever a denial of the right would be contrary to equity and good conscience, it will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities.

(*c*) *Test.*—The test of the right of subrogation[79] is found in an answer to the inquiry (*i*) whether the person who paid the mortgage debt is the one whose duty it was to pay it first of all; (*ii*) if the debt was not primarily his, and he only occupied the position of a surety to the mortgagor, he is entitled to be subrogated to the position of the mortgagee when he has paid the debt; (*iii*) but if the debt is the debt of the person who paid it, or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation, but is simply a performance of his obligation or covenant. This important doctrine of equity, in simple language, means to say that one who removes another's burden is entitled to step into his shoes, the characteristic features being that reimbursement is the foundation of this principle and the encumbrance that is paid off is treated as alive and not as one extinguished.

(*d*) *Types.*—Subrogation is of two types: legal and conventional. Legal subrogation comes into existence when a mortgage debt is paid off by one who has to protect his interest. It is subrogation by law or legal subrogation.[80] Legal subrogation does not end the liability of the property; the liability herein is simply transferred in favour of one who pays off the mortgage debt. A conventional subrogation which may be said to be consensual subrogation or subrogation by agreement is by act of parties.[81]

Payment made to an infant for necessaries,[82] necessaries supplied to a deserted wife and the executor carrying on the business of his testator, are the well-known examples wherein subrogation on principles of equity have been allowed.

The Transfer of Property Act, Section 92 and the Indian Contract Act, Section 69 incorporate this principle. [83]

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79. *Jones on Mortgages*, para 1119.
80. *Gokuldas* v. *Rambux*, (1884) 10 Cal 1036 (PC): 11 IA 126.
81. *Man Mohan* v. *Jankiprasad*, 1945 PC 23.
82. *Marlow* v. *Pitfield*, (1719) 1 P Wims 558. *See* Section 68 of Indian Contract Act, 1872.
83. *Hirasing* v. *Jaising*, 1937 All 588; *Kidari Lall* v. *Hari Lall*, 1952 SCJ 37.

Subrogation can be achieved by redemption only and in no other way.[84] This right is available only from the date of redemption of the mortgaged property and not from the date of the right of redemption.

## B. LIENS AND MERGER

### 24. LIENS

(*a*) *Definition*.—A common law lien is the right of a person to retain possession of the goods of another until his claims are satisfied.[85] Story defines it to the same effect[86] and explains that it is the right of a person to have his claim satisfied out of the property belonging to another. The main elements are right to possess and retain the property until the discharge of a charge. It is good against the world at large so long as it exists.

Lien is either legal or equitable and either particular or general. It differs from a mortgage or a pledge. The point of difference is that a lien does not give any *active right* in regard to the property; the right given is a *mere passive right* to possess.[87]

(*b*) *Legal and Equitable Lien*.—Legal lien is that which is recognized and enforced by the common law courts, while an equitable lien is that which is recognised and enforced in a court of equity only. A legal lien is lost when the possession of the property subject to it is given up. It is however good against the whole world. Equitable lien, for its existence and continuance, does not depend upon retention of possession of the property subject to it; it affects everybody who obtains property with notice thereof. In other words "equitable lien confers a charge on property" and arises by "operation of equity from relationship between the parties rather than by act of parties. It exists independently of possession but will not avail against a purchaser for value of a legal estate without notice of it. It is enforceable by means of an order for sale".[88]

The distinction between a legal and an equitable lien is maintained in Indian Law too, as could be seen from the decision of the Privy Council in *Nippon Kaisha case*[89].

(*c*) *Lien and Pledge*.—A common law lien confers merely a right to possess and retain the property as security, which can be said to be a mere passive right to possess.[90] In a pledge there is a delivery of possession of property and a power of sale is its necessary concomitant.

84. *Gurudev* v. *Chandrika*, AIR 1944 PC 96.
85. *Snell's Principles of Equity* citing *Hammonds* v. *Barelay*, (1802) 2 East 227, 235.
86. Story: *Equity Jurisprudence*, 3rd Edn., p. 331.
87. *Barratt* v. *Gough Thomas (No. 2)*, 1951 Ch 242.
88. *Snell's Principles of Equity*, 27th Edn., p. 438.
89. *Nippon Kaisha* v. *Ramjiban*, (1938) 42 CWN 677 (PC).
90. *Barratt case*, (1951) Ch 242.

(*d*) *Particular and General Lien.*—A particular lien is attached and confined to a particular charge whereas a general lien extends to all claims against the owner, whether or not in relation to particular goods, i.e., it stretches and expands to the general balance due.

(*e*) *Types of Lien.*—Liens are of diverse kinds, as already mentioned. Liens by custom and usage add to this list. The important liens may be listed as follows:

(1) solicitor's lien,
(2) banker's lien,
(3) agent's lien,
(4) vendor's lien,
(5) purchaser's lien
(6) bailee's lien,
(7) stockbroker's lien,
(8) factor's lien,
(9) trustee's lien,
(10) personal representative's lien,
(11) salvage lien,
(12) equitable lien,
(13) statutory lien,
(14) lessee's lien,
(15) lien of finder of goods, and
(16) pawnee's lien.

But these categories of liens are not exhaustive. Nos. 1, 4, 5, 9 and 10 may be cited as examples of equitable lien and Nos. 1, 2, 7 and 8 as those of general lien by custom or agreement. These liens may however, exist concurrently.

### 25. SOLICITOR'S LIEN

A solicitor has as per Common law a lien on his client's property in his possession and an equitable lien on his client's property recovered and preserved through him. The first kind of lien is a passive right to retain the property, while the second kind of lien is an active right which he can assert by taking steps to realise the property by sale. He has also a particular lien on his client's property for his costs of the suit (recognised by Section 28 of the Solicitors' Act, 1860).[91] He has a general lien on all deeds and documents (except a will) of his client with him and until he is paid they can be retained and withheld. This lien extends to the property of his client coming into the

91. Now the Solicitors' Act, 1957, Section 72, replacing earlier provisions.

solicitor's hands as a solicitor, but not otherwise,[92] and is confined to his costs and does not include debts.

### 26. BANKER'S LIEN

Regarding securities deposited, the banker has a general lien. It extends to the general balance of account. As laid down by Section 171 of the Indian Contract Act, bankers, factors, wharfingers, attorneys of the High Court and policy brokers have such a lien to retain the goods bailed to them.

### 27. AGENT'S LIEN

This has been incorporated under the ~~Indian~~ Contract Act, Section 221, whereby the agent is entitled to retain goods, papers and other property, whether moveable or immovable, of the principal received by him until his charges etc. are paid out. The lien is lost as soon as the possession is parted with.[93]

### 28. BAILEE'S LIEN

Under Section 170 of the Indian Contract Act, when a bailee has done some work by his skill which is relevant to or in pursuance of a contract of bailment, he can retain them until he is suitably paid for it. Of course, this is subject to a contract to the contrary. Thus artisans working on goods, packers, carriers and auctioneers are entitled to this kind of lien.[94]

### 29. SALVAGE LIEN

According to the doctrine of maritime law, salvors (those who by their assistance salvage the property, cargo or lives of persons in a ship), by the presumption of law have an implied contract with the owner of the ship whereby they have a retaining lien for their remuneration on the property rescued. The doctrine has been accepted in India, the most important features whereof are two: (*i*) bona fides of the person acting, and (*ii*) preservation of the estate in question.[95] The doctrine of salvage is different and therefore can be distinguished from subrogation.

### 30. PAWNEE'S LIEN

Section 173 of the Indian Contract Act lays down that "the pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged".

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92. *Ex parte Juller*, (1881) 16 Ch D 617; *Tyabji Dahyabhai* v. *Jetha Devji and Co.*, (1927) 29 Bom LR 1196; *Sadanand* v. *Parashram*, (1928) 30 Bom LR 157.

93. *Kishandas* v. *Ganesh Ram*, AIR 1950 Pat 481; see also *Ram Prasad* v. *State of M.P.*, AIR 1970 SC 1818.

94. *Beaven* v. *Waters*, (1828) 3 Carr and P 520, per Best, J. See also *Skinner* v. *Jugar*, (1883) 8 All 1894.

95. *Dakshinamohan* v. *Saroda*, 21 Cal 142 PC.

## 31. VENDOR'S LIEN

The concept of "vendor's trusteeship"[1] has been emphasised by the vendor's lien. This is not an ordinary trusteeship. Cotton, L.J. said that the vendor was a trustee only in a qualified sense. Lord Green, M.R. called him a quasi-trustee and Lord Cairns said that the trustee was entitled to protect his own interest in the property. A vendor becomes the trustee of the property sold to the vendee as the property passes at once to the purchaser, on a specifically enforceable contract for sale having been made. On such a contract having been made the seller has a lien on the property sold for unpaid purchase money. He can therefore retain it until the same is paid.[2] If the vendor parts with the possession both of property and the title deeds thereof, he still has an equitable lien on property in respect of the purchase money unpaid to him. The relationship between the parties contains a number of aspects and facets wherein they are hostile and the vendor self-interested. The terminology of trusteeship therefore must be received with reserve. Maitland explains this idea thus: "Usually there are two distinct acts in law; the agreement on the one hand, the conveyance on the other; and weeks or months elapse between the two".[3] According to him Austin did commit an error[4] when he said that "the mere agreement for sale transfers the *dominium, the jus in re*". The most that it does is that it gives to the purchaser an equitable estate in land, a right good against those who claim under the vendor by gratuitous title, or who have or ought to have notice of it. The purchaser has only an equitable estate in the land, though one which is subject to the vendor's lien for the unpaid purchase money. The vendor has as yet the legal estate in the land, and anyone who purchases from the purchaser must purchase subject to those legal rights. Unless in the case of some very peculiar agreement the vendor may keep the legal estate, and may keep possession of the land until he is paid his price. If you say that the contract passess ownership, be careful to say that it does so only in equity.[5]

As laid down in *Mackreth case* this lien can be enforced against (*i*) the purchaser himself, (*ii*) his heirs or persons claiming through the purchaser as volunteers, (*iii*) subsequent purchasers for value but with notice of the lien, and (*iv*) the assignee in bankruptcy of the purchaser. The vendor may waive or abandon his lien and may lose it by laches or under the statutes of limitation.

## 32. VENDEE'S LIEN

Where a vendee pays the purchases money or a part of it in advance or by way of deposit to the vendor, he has also a lien on the estate in the vendor's hands. This lien exists not only when "the contract goes off for want of title, but

1. *Snell's Principles of Equity*, p. 445 ; Hanbury : *Modern Equity*, p. 233 ; Maitland : *Lectures on Equity*, pp. 314-317. *See also* Jessel, M.R. in *Lysaght* v. *Edwards*, (1876) 2 Ch D 499.
2. *Mackreth* v. *Symmons*, (1808) 15 Ves Jr 329.
3. Maitland: *Lectures on Equity*, 2nd Edn., 1969, p. 314.
4. *Ibid*., p. 106, citing Austin: *Jurisprudence*, p. 388.
5. Maitland: *Lectures on Equity*, pp. 314-315. See also *Mackreth* v. *Symmons*, (1808) 15 Ves Jr 329.

also where he rescinds the contract under a condition enabling him to do so, or the vendor repudiates the contract;[6] but if the contract goes off through the purchaser's default, the lien is gone".[7] In order to bind the subsequent purchasers it is necessary that it should be registered.

When the lien comes into being under an express contract between the parties, it is a charge. As Strahan puts it, a lien and a charge are identical for all practical purposes.

### 33. IN INDIA

(*a*) *Charge*.—Section 100 defines a charge thus: "Where immovable property of one person is by act of the 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,...".

The section recognises that there can be charges both by operation of law and by act of parties. Charges by operation of law are, under Section 55(4)(*b*) which deals with vendee's charges for unpaid purchase money; under Section 55(6)(*b*) which deals with a purchaser's charge for the purchase amount paid in anticipation of delivery of property; under Section 73 with respect of surplus sale proceeds of a revenue sale; and under Section 82 for contribution.[8]

(*i*) *Vendor's lien*.—The right of recovery of unpaid purchase money, called, a non-possessory lien, or vendor's lien, can be enforced by him against the vendee and also against any person claiming through him with notice of sale. But the vendor cannot claim back the possession;[9] he can retain possession by virtue of it and when sued by the vendee for possession the court shall pass a conditional decree, decreeing possession only on payment of the unpaid purchase money.[10] This lien is, however, an equitable lien quite independent of the provisions of Sections 54 and 55 of the Transfer of Property Act. Being purely of personal character vendor's creditors cannot enforce it.[11] It can however be assigned, and the assignees can enforce it.[12]

This lien is available against the purchaser or any other person claiming through him with notice of the sale,[13] or against a transferee without consideration (*see* Section 40), but not against a purchaser's transferee for valuable consideration and without notice of the charge.[14]

(*ii*) Lien: When lost

6. *Lee-Parker* v. *Izzet*, (1971) 1 WLR 1688.
7. *Snell's Principles of Equity*, 448.
8. All under the Transfer of Property Act, 1882.
9. *Valaudha* v. *Govindswami*, 39 Mad 524.
10. *Pranadevi* v. *Satdeo Tiwari*, 111 IC 761; *Subramania* v. *Puran*, 27 Mad 28. For contra see *Kevaldas* v. *Naraindas*, 111 BLR 383.
11. *Motilal* v. *Bhagwandas*, 31 Mad 443.
12. *Dalchand* v. *Ganpat*, 1927 Nag 332.
13. *Ramanand* v. *Shivdas*, 43 All 314.
14. *Gurudayal* v. *Karan Singh*, 38 All 254.

(1) When the vendor accepts a collateral security from the vendee, the lien is lost, but by accepting an additional security it is not lost.[15] There should be evidence of the vendor's abandoning it.

(2) When the vendor by his conduct gives the vendee an impression that it will not be claimed, an eśtoppel is raised against him and the lien is lost.[16] But the lien is not lost because there is a recital in the conveyance that the consideration is fully paid up. This is so because it is the usual practice in India that although no consideration is in fact paid before recital, the documents are executed.[17]

(3) When the purchase money has been left with the vendee for payment to the vendor's creditor, the lien cannot be enforced; but a mere direction by the vendor to the vendee cannot deprive him of his lien.

A vendee's lien is lost when he improperly refuses to accept delivery of property from the vendor.

(*b*) *Charge and Lien.*—A charge differs from a lien in that a charge can come into existence by act of parties or by operation of law, whereas a lien can be created only by operation of law. Moreover, a charge is only with respect to immovable propety, whereas a lien can be with respect to movable as well as immovable property.

(*c*) *Charge and Mortgage.*—(*i*) A charge gives a right to payment out of a particular fund or property without transfer of the fund or property, whereas a mortgage is in essence, a transfer of an interest in specific immovable property. (*ii*) In other words, a charge is a *jus ed rem*, i.e., a right to a thing, whereas a mortgage is a *jus in rem*, i.e., a right against a property. (*iii*) Consequently, a mortgage prevails over subsequent transferees, while a charge cannot prevail against a transferee for consideration without notice of the charge. (*iv*) A charge can be a floating charge over all the assets of a company under the company law, while a mortgage can be created over a specific immovable property. (*v*) A mortgage, like a simple mortgagor, involves a personal liability, in a charge it is not so. (*vi*) A charge can be created either by operation of law or by act of parties, whereas a mortgage can be created only by act of parties. (*vii*) A mortgage gives the power of recovery of money by sale of the mortgaged premises whereas a charge directs the realisation of money from a particular property, without reference to a sale.[18]

(*d*) *Charge by act of parties and by operation of law.*—A charge by act of parties may be oral, if created by a document in writing it must be registered under Section 17(1-*b*) of the Registration Act, but if the amount secured is less

15. *Grant* v. *Mill* 2 V & B 306; *Webb* v. *Macpherson*, 31 Cal 57 PC.
16. *Kettlowel* v. *Walson*, 26 Ch D 501.
17. *Meghraj* v. *Abdulla*, 12 ALJ 1032; *Timalrao* v. *Municipal Commr.*, 3 Bom 172 and per Lord Eldon in *Mackreth* v. *Simons*, 15 Ves 329.
18. Mukerji, J., in *Govinda Chandra* v. *Dwarka Nath*, (1908) 35 Cal 837.

than Rs 100, it need not be registered. The property charged must be definite and specified or else it would be void for uncertainty.[19] As said before, the principles of vendor's lien and vendee's lien are incorporated in Sections 55(4)(*b*) and 55 (6)(*b*) of the Transfer of Property Act in India and they are similar to the corresponding equitable lien under the English law. Besides, Section 39 of the Transfer of Property Act speaks about the floating charge in respect of a Hindu widow's right of maintenance and Section 51 of the Act speaks about the equitable rule regarding improvements made on land by the holder of a defective title. Similarly, government revenue arrears under the local Revenue Acts form a charge under the Transfer of Property Act. A trustee, under Section 32 of the Indian Trusts Act, has a right to reimburse himself from trust property for expenses properly incurred in the execution of his trust, and therefore Section 100 of the Transfer of Property Act rightly excludes this from charge. He can insist and can compel that his charges be paid first before disposition of trust property. While being a trustee he cannot sell or destroy the trust property, he can get it sold after he ceases to become a trustee.[20]

### 34. LIEN OF THF FINDER OF GOODS

A finder of goods has a right to retain the goods found until he receives suitable compensation; if a reward is offered, he can sue for the reward and retain the goods until the same is paid. This is provided in Section 168 of the Indian Contract Act and Section 169 gives him a right of sale when the goods are perishable. When the owner cannot be found in spite of reasonable inquiries and if found refuses to pay, the finder in such cases can sell the goods if his charges amount to two-thirds of the value of the goods.

### 35. MERGER

As explained by Blackstone, according to the common law rule in England, "whenever a greater estate and a lesser estate coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or in the law phrase, is said to be merged, that is sunk or drowned, in the greater". As decided in *Forbes* v. *Moffat*[21], that means that when a charge and ownership of an estate are united in the same person, the charge is automatically extinguished. Of course, this depends upon the intention of the person in whom the interests are united and the same may be express or implied. Equity will find out this intention and consider what is most beneficial for him.

When a mortgage and the equity of redemption both come into the same hand such a question arises. The common law rule, as laid down by Blackstone and explained in *Jorbes' case*, was that the merger was automatic irrespective of the intention of the person, but equity ruled that it depended on the person's

19. *Mohini Debi* v. *Purnashashi*, (1932) 36 CWN 153.
20. *Peary Mohan Mukerjee* v. *Narendra Nath*, (1901) 37 IA 27; *Abkan Sahib* v. *Soranbibi*, (1915) 38 Mad 260.
21. (1811) 18 Ves 384.

intention and where merger was against that person's interest, equity presumed against the same.[22]

Now, after the Judicature Act, 1873, both at law and in equity, merger depends on intention.[23]

In India, the Transfer of Property Act before its amendment in 1929 accepted the rule laid down in *Toulmene v. Steere*[24] under which "extinguishment" (of a lesser estate into a bigger one) was the rule and "keeping alive" (both the estates, lesser and bigger) was the exception. But the Privy Council[25] declined to follow this rule of automatic merger. The amended Section 101 of the Transfer of Property Act, therefore, lays down that the court presumes that the person who discharges an incumbrance, kept it alive if it would be for his benefit, i.e., where a property is mortgaged once and there is a subsequent mortgage, the prior mortgagee if he purchases the equity of redemption will not bring about a merger because it would be in his own benefit to keep it alive. If he keeps it alive then and then the subsequent mortgagee will be able to redeem the prior mortgage, otherwise not. It is therefore the rule that there will be no merger and the application of the doctrine of intention is no longer required. Section 92 of the Transfer of Property Act lays down that the mortgagee's interest is not merged by reason of the fact that the mortgagee's interest and the mortgagor's equity of redemption have been united in the same person. Section 101 represents the converse case. According to Mulla, this right which is statutory can be waived by contract and therefore it is unnecessary to apply the equitable principle in India.

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22. *Ingle* v. *Vaugham Jenkins*, (1900) 2 Ch 368.
23. *Snell's Principles of Equity*, p. 406.
24. (1817) 3 Mer 210.
25. *Gokuldas* v. *Rambux*, (1884) 10 Cal 1036 (PC): 11 IA 126.

## Chapter VII

# Married Women, Infants, Idiots and Lunatics

*"At common law, a wife's separate and distinct personality was considered to be merged into that of her husband who enjoyed power and domination over her... ."*

*"In India 'the wife got an honoured position on marriage', and as the old writers put it, 'a woman is half her husband and completes him, and the highest law for husband and wife was mutual fidelity'."*

—*Vedic Index I*, pp. 484-486

*Manu IX*, p. 96; *Manu III*, pp. 55-56

*"An infant is not absolutely incapable of binding himself by contract, but is, generally speaking, incapable of absolutely binding himself."*

—An Irish judgment

**SYNOPSIS**



## A. MARRIED WOMEN

### 1. HISTORY

To appreciate the modern law in respect of the legal position of married women, it is necessary to go through, though succinctly, into the history of the penetration, invasion and inroads upon the harshness of the Common law rules made, first by equity and later by statute.

At Common law, on marriage and during marriage, all rights of a woman were suspended, incorporated and consolidated into that of her husband with the result that she could neither acquire nor hold property independently of her husband. As the husband provided her with protection and cover and as he was considered to be the ablest and the fittest to govern the family, the wife's distinct and separate personality was considered to be merged into that of her husband who enjoyed power and domination over her. On marriage therefore the husband was entitled to all her property whether it belonged to her at the date of marriage or came to her after marriage. Consequently *she lost her property and distinct personality*. She could not contract with her husband. She could not sue or be sued either in tort or in contract without joining her husband as a party. Against her husband's neglect she was remediless. The husband had full power to alienate her chattels without her consent and to alienate her real property with her consent. He was entitled to receive rents and profits of her realty during coverture. If he survived the wife he could take the property absolutely. The wife was thus without remedy against such rigid practices of the Common law and was reduced to the status of a beneficiary under a trust or a mortgagor in a forfeited mortgage.

### 2. EQUITABLE RELIEF

But the courts of equity, although on the principle that "equity follows the law", in general protected the interests of the husband, thought it fit to depart from these rigid rules of Common law in three instances. This it did by innovating new ideas based on principles of natural justice and reciprocity.

(*a*) *Wife's equity to a settlement.*—If the husband wanted to enforce his rights regarding property of the wife and in doing so if he took proceedings and sought assistance from the courts of equity, the courts could compel him to make provision out of that property for his wife and children. This it did on the principle "he who seeks equity must do equity".[1] This principle was also pressed into service in a case where the wife died and her children initiated the action.[2]

(*b*) *Wife's separate estate.*—By ante-nuptial agreements when real or personal property was given or settled upon a woman, at Common law such agreements did not survive on marriage. But equity enforced such agreements in furtherance of their common intention and object. Similarly, where a husband abandoned his rights to the wife's property, where he gave his own property to her, or some stranger gifted property to the wife, that property together with her earnings, savings, pinmoney and cash investments in land formed her separate property, which she could dispose of without her husband's consent either *inter vivos* or by will,[3] whether the interest therein was in reversion or possession.[4] This idea was an innovation whereby the wife was considered to be a *femme sole*, capable of possessing independently of her husband's control, property within her complete control, for her separate use, without the intervention of trustees. An intention to reserve or keep apart such property was sufficient and no particular form of words was necessary to create the separate use.

By recognising and injecting into practice these two novel ideas, equity modified the Common law rights of a husband so that the position of a married woman in society could be raised to a respectable level. A married woman now could contract as her husband's agent and her debts could be satisfied out of her separate estate only. But one thing is to be noted here, that when she died during coverture and left her separate property undisposed, the husband's Common law right to this extent was revived.[5] The Married Women's Property Act, 1882 converted these equitable rights into legal rights which brought into vogue a popular aphorism that a husband could "break his wife's neck but not her

1. *Elibank* v. *Montolieu*, (1801) 5 Ves 737.
2. *Murray* v. *Lord Elibank*, (1804) 10 Ves 84.
3. *Fettiplace* v. *Gorges*, (1789) 1 Ves Jun 46.
4. *Sturgis* v. *Corp.*, (1806) 13 Ves 190.
5. Before 1926 the husband took such rights.

watch" which was her separate property. By the Administration of Estates Act, 1925, Section 46 as amended[6] from time to time the husband's rights are now regulated. Neither spouse, however, has any rights consequent on the death intestate of the other spouse while a decree of judicial separation is in force and the separation is continuing, for the property of the intestate spouse devolves as if the other spouse were already dead.[7]

(c) *Restraint on anticipation.*—The third step to secure and protect the married woman's property rights against her husband's imperceptible but powerful persuasion or coercion was the invention by Lord Thurlow[8] of the doctrine of "restraint on anticipation". This doctrine was a creation of the equity courts and was especially brought into existence for guarding the wife's property. In course of time, the married woman's "separate property" became her "property"[9], and the fetters of "restraint on anticipation" attached by equity courts to it, which would otherwise be—in case of restraint on property of a man—void, as being repugnant to the nature of property, were modified as circumstances required in order to further the object for which it was created. This restraint was attached as soon as she married and would cease on her husband's death or on divorce. On remarriage it again attached. Thus it attached and reattached *toties quoties*[10]. As this restraint on anticipation, whereby a woman was prohibited or disabled during coverture from alienating the property or anticipating the future income out of the property, and which was recognised by the Married Women's Property Act, 1882, worked against her creditors, in 1935[11], new restraints were prevented from taking form and the existing restraints were abolished from December 16, 1949,[12] thus bringing and raising her position to that of a man. It has therefore been rightly said that on account of successive Married Women's Property Acts the old status of a married woman and the principle of the fictitious unity of the husband and wife now no more exists; they stand abrogated and therefore the subject can be said to be obsolete here being a fit subject for discussion under the Law of Property generally.

(d) *Modern position.*—As presented by Snell[13] the modern position in general is that a married women is now,

(*i*) capable of acquiring, holding and disposing of, any property;

(*ii*) capable of rendering herself and being rendered, liable in respect of any tort, contract, debt or obligation;

6. By the Intestates' Estates Act, 1957, the Family Provision Act, 1966 and the Family Law Reforms Act, 1969.
7. Matrimonial Proceedings & Property Act, 1970, Section 40(1), cited in *Snell's Principles of Equity*, 27th Edn., 1973, p. 516.
8. In *Pybus* v. *Smith*, (1791) 3 Bro CC 340; *Brandon* v. *Robinson*, (1811) LC 18 Ves 429 at Nathan No. 72 on p. 314.
9. *See* Law Reforms (Married Women and Tortfeasors) Act, 1935. Ss. 1 and 2.
10. For detailed account see *Snell's Principles of Equity*, 24th Edn., 1954, pp. 457, 462.
11. Law Reforms (Married Women and Tortfeasors) Act, 1935.
12. Married Woman (Restraint upon Anticipation) Act, 1949.
13. *Snell's Principles of Equity*, 27th Edn., 1973, p. 517. For detailed account *see* p. 517-530.

(*iii*) capable of suing and being sued, either in tort or in contract or otherwise; and

(*iv*) subject to the law relating to bankruptcy and to the enforcement of judgements and orders, in all respects as if she were a *femme sole*. Moreover, she is no longer able, as her husband's agent of necessity, to pledge his credit or borrow money on his credit.

### 3. IN INDIA

The fictitious principle of unity of persons between husband and wife as recognised in England in the beginning and abrogated at present, is not accepted in India[14] as is evident from the Indian Succession Act, 1925, Section 20. The section provides:

> "20. *Interests and powers not acquired nor lost by marriage.*—(1) No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, or become capable of doing any act in respect of his or her property which he or she could have done if unmarried.
>
> (2) This section—
>
> (*a*) shall not apply to any marriage contracted before the first day of January, 1866;
>
> (*b*) shall not apply and shall be deemed never to have applied to any marriage, one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jain religion."

The Transfer of Property Act, Section 10, which enacts that a condition restraining alienation is void provides in case of a married woman by making an exception, that property may be transferred for the benefit of a woman (not being Hindu, Muhammadan, or Buddhist) with a condition that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

**Non-Hindus and Non-Muhammadans.**—Limited to persons other than Hindus and Muhammadans, the Married Women's Property Act, 1874, by its Sections 4, 7, 8, 9 and 10, provides on this point as follows.

*Purpose.*—The preamble states that, "And whereas by force of the said Acts all women to whose marriages it applies are absolute owners of all property vested in or acquired by them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage and does not expressly provide for enforcement of claims by or against such wives".

*Separate property.*—According to Section 4, a married woman's earnings, together with all the savings therefrom and investments thereof, from any

14. *Proby* v. *Proby*, 5 Cal 357.

employment, occupation or trade carried on by her or through the exercise of any literary, artistic or scientific skill, shall be her separate property.

A married woman, according to Section 7, can sue and be sued in her own name with regard to the separate property in the same way as if she were unmarried. Section 8 provides for liability in respect of contracts based on such property and at the same time it enacts a proviso for restraint on anticipation and explains that no person who enters into a contract with her will be entitled to recover anything by attachment and sale or otherwise out of any property which has been transferred to a woman or for her benefit on condition that she shall have no power during her marriage, to transfer or charge the same or her beneficial interest therein. Sections 9 and 10 provide for the husband's non-liability in respect of the wife's ante-nuptial debts or unless he intermeddles therein, for any breach of trust or devastation committed by her.

Sections 56, 58 and 68 of the Indian Trusts Act also refer to and provide with regard to restraint on anticipation. A Muhammadan woman on her marriage does not merge her separate existence or entity into that of her husband, but retains it. She can therefore deal with her separate property in any way she likes and her husband has no control over it. This is so because of the fact that the doctrine of coverture is not recognised under Muhammadan law. Thus a Muhammadan marriage does not invest a husband with power over the property of his wife.

The position of a Hindu woman in regard to her personal property may be succinctly stated as follows:

"From the commencement of the Rigvedic age marriage was a well-established institution.[15] The wife got an honoured position on marriage and as the old writers put it, "*a woman is half her husband and completes him*"[16], and the highest law for husband and wife was "mutual fidelity".[17] Stridhana or woman's peculiam literally means woman's property.[18] In its etymological sense it includes all kinds of property of which a woman has become the owner. In modern Hindu law it denotes not only the specific kinds of property enumerated in the Smritis but also other species of property acquired or owned by a woman over which she has either absolute control or control subject only to her husband's dominion.[19] It devolves on her own heirs."

This shows that unlike the English law, a woman's right to hold separate property was recognised from the very early times.[20]

Stridhana can be of a number of kinds, namely—

(1) What is given before the nuptial fire (अध्याग्नि).

15. C. H. I. Vol. I, 88, Madlik, 396; Mahabharat, Adi Parva Ch. 122 cited by Mayne: *Hindu Law*, 10th Edn., 1938, Chap. IV, p. 105.
16. *Vedic Index I*, 484—6; Manu IX 96.
17. *Manu III*, 55—76.
18. Jolly, Tagore Law Lectures, p. 228.
19. Mayne: *Hindu Law*, 10th Edn., 1938, Chap. XVI, p. 734 by S. Srinivas Iyenagar.
20. *Ibid.*, p. 735.

(2) What a woman receives while she is conducted from her father's house to her husband's dwelling (अध्यवाहनिक).

(3) What is bestowed in token of love (प्रीतिदत्त or भर्तृदाय).

(4) What is obtained through affection from, mother-in-law, father-in-law and also what is termed as, पादवंदनिका, what is obtained at the time of bowing at the feet of elders.

(5) What is gifted by father, mother or brother.

(6) Gifts subsequent, that is that which is received from her husband's family or her father's family subsequent to marriage (अन्वधेयक).

(7) Gifts on supersession (अधिवेदनिका), a gift on her husband's marriage to another wife.

(8) Gifts by bandhus (बंधुदत्त), gifts by relations of her mother or father.

(9) शुल्क or the fee which a girl receives as the price of household furniture, conveyance, milch cattle and ornaments. Moreover, according to Devala (देवल) cited in स्मृतिचंद्रिका, "Her subsistence (वृत्ति), ornaments, fee or शुल्क or her gains (लाभम्) are the separate property of a woman".[21]

(10) All saving made by stridhana and all purchases made by it are of course stridhana.

(11) All gifts made by strangers, whether during covertrue or when she is a widow, will be stridhana.

(12) Money or property given to a woman absolutely in lieu of maintenance and all income of her husband's estate and investments and purchases out of it are stridhana.[22]

From the above it is clear that the doctrine of coverture is accepted in Hindu law. A woman has a right to hold separate property and she has complete control over it. During maidenhood, coverture and widowhood she has unrestricted power over stridhana acquired through gifts and bequests from relations but regarding other types of stridhana, during coverture a married woman cannot dispose of it without her husband's consent. After her husband's death her power over this is absolute, so that she can give it by transfer *inter vivos* or through a will. Before the Hindu Succession Act, 1954, she could inherit her husband's properties and had a widow's estate or a limited property therein. She could not dispose of the corpus of the property and on her death the property did not go her heirs, but to the reversioners. But now under Section 14 of the Hindu Succession Act, 1956, a woman takes through inheritance her husband's property as an absolute owner, except some land tenures in U.P. in certain cases, where her life interest is still retained.

Thus under Muhammadan law, a wife has complete control over her separate property and it is independent of her husband's control. Under Hindu

21. *Ibid.*, pp. 737-738 .
22. Mayne: *Hindu Law*, 10th Edn., 1938, Chap. XVI, p. 734 by S. Srinivas Iyengar, pp. 744-745 .

law also the position is very clear that she is the full owner of her separate property. Regarding the non-Hindu and non-Muhammadan women, the Indian Succession Act, 1925, Section 20, the Transfer of Property Act, 1882, Section 10 and the Married Women's Property Act, 1874, Sections 4, 7, 8, 9 and 10 clear the position which comes as near as that under the English law.

## B. INFANTS

### 1. JURISDICTION

The origin of the jurisdiction of the Chancery Courts over infants or minors, though a subject of much discussion,[23] remains undisputed that from the earliest times it was exercised by the Court of Wards on the prerogative of the crown as *parens patriae*. In course of time it was delegated to the Chancellor.[24] The Court of Probate also had such jurisdiction.

Guardianship is a right, a duty and a trust. The persons having the care of a minor and the custody of the estate of an infant are called their guardians. Under the Common law a father is his child's natural guardian up to the age of 21 years. A mother is the guardian of her illegitimate child and she has the same right as the father. It is very difficult to remove a natural guardian unless a very strong case is made out against him. Where a natural guardian is insolvent or his conduct is loathsome or he is ill-treating the child, he can be removed. The court will thereafter appoint a guardian who will protect the person and property of the infant.

### 2. PURPOSE AND PROCEDURE

The purpose of such jurisdiction was to protect minors and lunatics against their mental unripeness, defects and deficiencies. Appointment of a guardian is therefore of paramount importance. As a delegation of the rights and duties of the Crown, the Court of Chancery supervises the person and property of infants. In short, the courts have authority to appoint and remove guardians, to maintain infants, to get infants married and to manage and dispose of their property.

As Snell[25] notes, in the list of matters specially assigned to the Chancery Division by the Judicature Act, 1873, "the wardship of the infants and the care of infants' estates" were of great importance and in matters "relating to the custody and education of infants the rules of equity should prevail over the rules of Common law".

A father has a right to appoint the guardian by his deed or will but when the court appoints one, the father's wishes ought to be regarded as far as possible.

A ward of court is a person who is under a guardian appointed by the court. All dealings with the person and property of the ward of court are subject to sanction and approval of the court. Disregard of the court in this connection will

23. Family Law Reforms Act, 1969, Sections 1 (2), 12.
24. *Snell's Principles of Equity*, 27th Edn., 1973, p. 531; *Official Solicitor* v. *K.*, 1965 AC 201.
25. *Ibid.*

amount to contempt of the court. For example, to marry a ward without the courts's previous permission is a gross disrespect to the court. Not only the persons committing the contempt but those who aid and abet it are liable to punishment.[26]

As a natural guardian a father has a legal right to control and direct the education and to bring up and maintain his child. Courts will not interfere with this parental authority except when the guardian forfeits this right by his conduct or tries to remove the child being the ward of court, out of the court's jurisdiction without its permission. As regards the maintenance, marriage and management and disposal of the property of the ward, the court has complete power of superintendence and vigilant care.

By the Law Reform (Miscellaneous Provisions) Act, 1949 it is now provided in England for making an infant a ward of court even though no property was involved. This goes to explain that the jurisdiction is now concerned more with the welfare of an infant than with his property. This is a changed trend. According to Snell[27] since the Probate, Divorce and Admiralty Division has been replaced by the Family Division of the High Court, the Chancery jurisdiction over the infants was transferred to that division from October 1, 1971. As a result this subject now falls outside the scope of this book.[28]

### 3. IN INDIA

Unless the personal law of an infant or a party provides in this regard the law on this point is represented by the Guardians and Wards Act, 1890, the Indian Majority Act, 1875 and Section 491 of the Criminal Procedure Code, 1973. The British Minors Act, 1874 (on which is based our Guardians and Wards Act) is now repealed. Hindu law determines who is entitled to an infant's custody and care, but since the subject has been codified the Hindu Minority and Guardianship Act, 1956 governs the same. Under Muhammadan law, the father, paternal grandfather, their executors and executors of such executors are near guardians who are entitled to management of an infant's property. The rest of the persons being remote guardians, are not entitled to it. A court in India may appoint a guardian for an infant or for his property or for both, but in doing so it will look to the welfare of the child. The proposed guardian's age, sex, character, religion, nearness of relation and wishes of the deceased parents and near relations are matters which will be looked into for this purpose.

The High Courts in India can appoint guardians of the person or property of minors, lunatics and idiots, irrespective of the Guardians and Wards Act. This power is conferred upon the High Courts by the Letters Patent establishing them. Under Article 226 of the Constitution of India, High Courts can issue a writ in the nature of habeas corpus for production of any person detained within

26. *Eyre* v. *Countess of Shaftsbury*, (1772) 2 P Wms 103. *See also* Guardianship of Infants Act, 1925 in England.

27. *Manu* III, 55—76.

28. *Snell's Principles of Equity*, 27th Edn., 1973, p. 531.

its jurisdiction. Under Section 491 of the CrPC, High Courts can also direct to set free a minor who has been illegally or improperly detained in private custody within the limits of its appellate criminal jurisdiction. A person seeking to recover the custody of a minor may proceed under Section 25 of Guardians and Wards Act, or by a regular suit or under Section 498 of the CrPC.

## C. PERSONS OF UNSOUND MIND

Under the Mental Health Act, 1959, "idiots and lunatics", being incapable by reason of mental disorder to manage their person and property, are now known as "patients" or "mental patients".[29] Lunatics are persons *non compos mentis*.

Jurisdiction over such persons and their property was the prerogative of the Crown and it existed long before the existence of the Chancery Courts. Originally it is based on the so-called statute of the crown known as *De Praerogativa Regis* dating between 1255 and 1290. As noted by Holdsworth[30] the ninth and tenth chapters related to idiots and lunatics.[31] The Crown by sign manual especially delegated his authority to the Lord Chancellor. From his decision an appeal lay to the King in Council and to none else.[32] In 1851 a court of appeal was established and in 1853 the Lunacy Regulation Act was passed, which was reenacted with some modifications as the Lunacy Act, 1890. This jurisdiction was continued as before by the Judicature Act, 1873 and it was then entrusted to the High Court of Justice or court of appeal. It is now exercised by the Lord Chancellor, the Master of Rolls and the Lord Justices.[33] In practice, nearly all the work is done by an office of the Supreme Court, called the Court of Protection (formerly the Management and Administration Department) under a Master and a Deputy Master, subject to appeal to the judge, and thence to the court of appeal and the House of Lords. The jurisdiction is exercisable over any person "incapable, by reason of mental disorder, of managing and administering his property and affairs".[34]

Insofar as the interest of a lunatic in trust property is concerned, the Chancery Division will exercise its jurisdiction only when the following three conditions are fulfilled. It will then be rendered unnecessary to file proceedings in the Court of Protection.

(*a*) The income from the fund is so small that all of it will be used for maintaining him.

(*b*) Proceedings in this regard before the Courts of Protection are not contemplated.

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29. Section 101, Mental Health Act, 1959, in England.
30. *History of English Law*, p. 473.
31. *Ibid.*, p. 533, cited in *Snell's Principles of Equity*.
32. *Story's Equity Jurisprudence*, p. 560.
33. See *Smith's Principles of Equity*, 4th Edn., p. 475; *Snell's Principles of Equity*, 27th Edn., p. 533.
34. Sections 100 and 111 of the Mental Health Act, 1959.

(*c*) Proceedings in Chancery Courts are already pending.

**IN INDIA**

The Indian Lunacy Act, 1912, which is mostly based on English law, covers this subject and its provisions can be broadly divided into—

(*a*) the reception, care and treatment and discharge of a lunatic,

(*b*) judicial inquisition as to lunacy, and

(*c*) custody of the lunatic and management of his estate.

In presidency towns the High Courts of Bombay, Calcutta and Madras have jurisdiction, and outside the presidency towns the magistrates (as defined therein) have such jurisdiction. Upon an application by any relative of the lunatic or by the Advocate General, the court may make an order for inquisition to find out whether the alleged lunatic is of unsound mind or is incapable of managing himself and his affairs. It will also conduct inquiry as to the time during which he has been of unsound mind, as to his relatives and as to the property belonging to him. After he is adjudged a lunatic, orders for management of his property and his custody will follow. A manager appointed for his property shall not sell, charge, gift, exchange, mortgage or lease for more than ten years, the property of the lunatic. But the court for just reasons and for the benefit of the lunatic has such powers provided the money so secured, obtained or raised is to be applied or has been applied to paying out the lunatic's debts, or in discharging the incumbrances on his property or for maintenance of the lunatic or his dependents. When the unsoundness of mind has ceased, the proceeding in lunacy shall also cease or be set aside. Outside the presidency towns an application in this regard can be made by the husband or wife of the alleged lunatic, or by the nearest relative of the alleged lunatic. If there is no husband or wife, or if the husband or wife is prevented due to lunacy or is absent from India, the nearest relative can apply.

# Chapter VIII
# Accident, Set-off, Fraud and Undue Influence

ACCIDENT

*"The doctrine cannot be precisely formulated, since of its very nature it contemplates the undefined case: the case where through the happening of some unforeseen event, or through the omission or misstatement of some term, an obligation good in its essence stands in danger of being thrown away. The cause of the defect must be purely accidental, in the sense that it could not have been foreseen by reasonable prudence. Equity is not procurator fatuorum, and no man has a claim to be relieved from his own weakness, unless he was from the first at a disadvantage or his disability was deliberately exploited. Out of this doctrine grew the equicable jurisdiction in regard to mistake, and, as a corollary, the rectification and rescission of documents."*

—C.K. Allen: *Law in the Making*

FRAUD

*". . . . Equity did not pose as pure morality. It could not, for example, reject a defence based on a strict statutory rule merely because it was morally unmeritorious. It could sometimes find a way round technical common law rules in the interest of conscience . . . . But for the most part equitable fraud came within the domain of things of confidence, resolving itself into cases—Generically undue influence and catching bargains—where there was some special relationship of trust or confidence between the parties."*

—C.K. Allen: *Law in the Making*, pp. 411-412

**SYNOPSIS**



## A. ACCIDENT

### 1. NATURE OF JURISDICTION

Due to the rigid application of the Common law rules in case of accident, mistake, misrepresentation, undue influence and fraud, courts of equity in their concurrent jurisdiction intervened and granted relief. "There were many frauds which the stiff old procedure of the courts of law could not adequately meet and 'accident', in particular, the accidental loss of a document, was a proper occasion for the Chancellor's interference. No one could set any very strict limit to his power, but the best hint to its extent that could be given in the sixteenth century was given by the words 'fraud, accident and breach of confidence'. On the other hand the Chancellor was not to interfere where a court of Common law offered an adequate remedy".[1]

In cases of accident or mistake when a bond, or document under seal, or title deeds, or a negotiable or a non-negotiable instrument was lost or destroyed, there could be no profert (production) and over (reading) of the document. To prevent injustice in such cases from taking shape, equity courts came forward. Executors were relieved when the estates in their hand were lost without their default, but unless they could show that they had duly administered them, or that they were lost due to some accident without their fault, they were answerable for their loss or destruction. If goods of the deceased are stolen,[2] or being perishable, depreciate,[3] or are reduced in value by act of parliament,[4] the executors were not liable, but they were liable for their *devastavit*.[5] At the same time one has to note that accident was no excuse for not fulfilling obligations of a contract.

### 2. TYPES OF RELIEF

In cases of accident equity granted relief in the following three instances—

(*a*) where a document was lost or destroyed by accident,

(*b*) where payments are erroneously made but in good faith and accidently, and

(*c*) where there was an imperfect or defective execution of powers.

An accident for this purpose has been defined as an uncontrollable, unforeseeable and injurious occurrence, which is not attributable to mistake, neglect or misconduct.

(*a*) *Documents lost or destroyed* —Lost or destroyed documents could not be offered or produced in evidence as support of title or interest. In order to get relief in equity for this purpose a special loss or inconvenience to the party concerned was to be shown. For this a desire to get into possession of some property or a desire to assert a right or claim in future was to be shown which moved the conscience of the Chancellor to intervene. In India, Section 65(*c*) of the Indian Evidence Act, 1872 makes provisions for offering secondary evidence in such cases and acceptance of such evidence is a secondary evidence

1. Maitland: *Lectures on Equity*, 1969 Edn., p. 7.
2. *Jones* v. *Lewis*, (1750) 2 Ves Sen 240.
3. *Clough* v. *Bond*, (1837) 3 Mys & CR 490.
4. *Davies* v. *Wattier*, (1823) 1 Sim & St 463.
5. *Snell's Priciples of Equity*, 27th Edn., 1973, p. 340.

of the original registered document.[6] Order 7, Rule 16 of the Civil Procedure Code lays down the procedure in this respect.

(*b*) *Erroneous payments*.—Insofar as administration of estates of a deceased person was concerned, equity exercised a concurrent jurisdiction over such matters. Where the executor or administrator pays off a debt or legacy completely misconceiving a deed erroneously in an honest belief that the property in question is sufficient to discharge all the debts or legatees, and it later on turns out that it is not so, because some new claims so far unknown have come to light, or because there is a depreciation in the value of the property, equity in such unforeseen and injurious occurrence granted relief. But it must be noted that mistake of law is not an accident.[7] Similarly, accident is no excuse for not fulfilling the obligations of a contract and equity did not intervene in such cases, e.g., a lessee had to pay his rent even if the premises were destroyed.

In India, the Indian Succession Act, 1925, Section 359 provides that when the executor or administrator has paid away the assets in legacies and he is afterwards obliged to discharge a debt of which he had no previous notice he is entitled to call upon each legatee to refund in proportion.

As in England so in India, no relief is granted by equity in case of positive contracts because it is presumed by equity that the parties must have contracted subject to those future events or contingencies. Section 13 of the Specific Relief Act, 1963 makes provision to this effect.

(*c*) *Defective execution of powers*.—A power is an authority vested in a person to deal with or dispose of property not his own.[8] In order that equity could intervene and grant relief in suitable cases, first of all it is necessary that power must be exercised or executed. If it is not executed, equity cannot help. For example, properties are transferred by *P* to *Q* with a power of appointment granted to *Q* which he was to exercise. Now, if *Q* does not exercise this power or exercises it in a manner unauthorised by the instrument creating the power, in each case the power will prima facie be treated as unexercised and consequently the object of the power will take nothing. This was the rule at Common law. In the above example if *Q* was required to exercise the power by deed but he exercises it through a will, the exercise though technically improper, was treated by equity as proper and effective. Now the Law of Property Act, 1925, Sections 159(2) and (3) has made provision to this effect and dispensed with the requirements of two witnesses and the requirement of a deed if the appointment complies with the terms of the power. To the same effect are the provisions in Section 2(2) of the Wills Act, 1963.

One has to note further that a defect such as this should not go to the root, or in other words it should not hit the very essence and substance of the power. Where consent to the execution of power is necessary but it is executed without

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6. *Nanibai* v. *Gitabai*, AIR 1958 SC 706.
7. *Milliard*, 4 Ch D 389.
8. *Jreme* v. *Clement*, (1881) 18 Ch D 499.

obtaining consent, equity cannot help, unless it was impossible to obtain the same. Thus accident would be relieved against all the formal defects (by equity supplying the same) which do not go to the root and therefore are not of the essence of the transaction and which are not irremediable by the statute.[9] Such relief was granted only in assistance of certain favoured persons provided a clear expression of an intention to execute power is manifested: they were purchasers for value, creditors, charities, children and wives. This was so because these persons are regarded to have supplied good consideration and therefore a sort of moral obligation. But in case of husbands, illegitimate children, remote relations and volunteers, no such consideration existed and therefore no relief was granted by equity.[10]

Abridging the foregoing details we may note that accident will not be relieved against where (*a*) there is a positive contract to the effect, the injury in the case not being unforeseen, (*b*) the concerned parties themselves are thoughtless and unprepared against future uncertain events, (*c*) the accident took place due to the gross negligence of the applicant, (*d*) the party seeking relief has an expectancy only and not a vested right, and (*e*) the party against whom the relief is applied for has equal equities.

## B. SET-OFF

*See* under maxim 3, para (*b*)(*viii*) in Chap. III.

## C. MISTAKE

As Snell's editors Meggary and Baker note in their 27th edition (at p. 539): "Mistake is not now regarded as exclusively resting on equitable principles, but has been absorbed by the Common law; and the remainder of the jurisdiction of equity to grant relief against accidents is of little importance." It is therefore not very necessary to discuss those principles here but we may consider the Indian position.

### IN INDIA

Sections 20, 21 and 22 of the Indian Contract Act incorporate the law relating to the effect of mistake on contracts:

> 20. Where *both the parties* to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void.
>
> 21. A contract is not voidable because it was caused by a mistake as to any law in force in India. But a mistake as to a law not in force in India has the same effect as a mistake of fact.
>
> 22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

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9. *Cockerell* v. *Cholmeley*, (1830) 1 Russ & M 418.

10. *Mansell*, 2 Bro CC 450.

Thus a contract is vitiated by a mutual mistake and the same should be essential to the agreement.[11] Mistake of law does not make a contract voidable, it does not afford a relief. *Ignorantia juris non excusat*. If a mistake of law was allowed as a defence or a ground of relief one does not know or cannot imagine how far it would be carried. But to this maxim there are three well-known exceptions:

(*a*) The maxim applies to the general law of the land and not to a mere private right.[12]

(*b*) Mistake as to a law not in force in India has the same effect as a mistake of fact.[13]

(*c*) Mistake as to a plain and established rule of law raising a presumption of undue influence, fraud and the like.

In all these cases, equitable relief as could be contemplated by the relevant sections of the Indian Contract Act may be given.

Section 72 of the Contract Act lays down:

> 72. A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

The right granted under this section is a statutory right. The question of granting equitable relief is therefore solved by it, but this right cannot be rejected on equitable considerations, unless the plaintiff by estoppel or other statutory bars, disentitles himself. Such relief is available in case of money paid under coercion. The word 'coercion' does not have the same meaning as defined in Section 15 of the Contract Act but it should be taken in the ordinary and general sense: for example, money paid under protest in order to obtain a release of property under attachment can be recovered under this section.[14]

Sections 18(*a*) and 26 of the Specific Relief Act, 1963 also afford relief in case of mistake.

In case of "family arrangements" where the members of a family claim an interest in the family property, claims which if not settled or set at rest at the earliest would create disputes that tarnish the reputation of the family, rules of equity and justice are applied. In arriving at such compromises full disclosure of the facts has to be made by all, and the claims advanced must be bona fide and honest. One should not take advantage of the ignorance of the other party. Moreover, there should be no imposition or surprise exercised by one over the other. In short, the claims must be bona fide, the solidarity of the right being of no worth. Leading English authorities on this point are *Westby* v. *Westby*[15],

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11. See *Raffles* v. *Wichelhaus*, (1864) 2 H&R 906; *Cooper* v. *Phibbs*, (1867) 2 HC 149; *Kalyanpur Lime Works* v. *State of Bihar*, AIR 1954 SC 165.
12. *Cooper* v. *Phibbs*, (1867) 2 HC 149.
13. Section 21 Indian Contract Act, 1872.
14. *Kanhayalal* v. *National Bank*, (1923) 40 Cal 598 (PC).
15. (1842) 2 D&W 503.

*Stapilton* v. *Stapilton*[16] and *Gordon* v. *Gordon*[17]. The Privy Council in the case of *Cashin* v. *Cashin*[18] has explained the principle in the following words:

> "Where family arrangements have been fairly entered into, without concealment or imposition on either side, with no suppression of what is true, or suggestion of what is false, then although the parties may have greatly *misunderstood* their situation, and mistaken their rights, a court of equity will not disturb the quiet, which is the consequence of that arrangement; but when the transaction has been unfair, a court of equity would have very great difficulty in permitting such a contract to bind the parties."

Minors cannot challenge an arrangement when they come of age unless there was a fraud.[19] A person not authorised in this behalf cannot enter into such an agreement and call them a family settlement or family arrangement.[20] Section 15(*c*) of the Specific Relief Act, 1963 also provides in this connection, that a compromise of doubtful rights between members of the same family may be enforced by any person beneficially entitled thereunder.

## D. FRAUD

Fraud is far-reaching—for centuries the rule has been that fraud unravels all.[21] The idea of fraud in equity embraces a very large cross-section of human behaviour. It includes fraud in law or actual fraud and fraud in equity or constructive or equitable fraud.

### 1. ACTUAL FRAUD

Actual fraud has been defined as a false statement of fact, made before another, without belief in its truth or recklessly, whether it be true or false, with the intention that the person before whom it is made may rely upon it and act to his disadvantage or loss. Fraud is thus composed of (*a*) a false misrepresentation,[22] or (*b*) a concealment of a material fact fitted to deceive. As decided in *Polhil* v. *Walter*[23] it consists in knowingly asserting that which is false to the injury of another. It is not necessary that the person representing should profit out of it, but there is always a design to do evil present therein.[24] It is practised by either suppressing the truth (*suppressio veri*) or by suggesting the untruth (*suggestio falsi*) or by the combination of both. It is therefore "something said, done or omitted with the design of perpetrating what the party must have known to be a positive fraud".

16. (1739) 1 Atk 27.
17. (1816) 3 Swan 400.
18. AIR 1938 PC 103.
19. *Binda* v. *Lalita*, (1936) 41 CWN 161 (PC).
20. *Pratap* v. *Sant Kaur*, (1938) 42 CWN 817 (PC).
21. *Master* v. *Miller*, (1791) 4 TR 320.
22. *Derry* v. *Peek*, (1889) 14 AC 337.
23. (1832) 3 B & Eld 116, per Creswell, J.
24. *Nocton* v. *Ashburton*, 1914 AC 932: 30 TLR 602 HL.

## 2. DOCTRINE OF CONSTRUCTIVE FRAUD

Constructive fraud encompasses all types of behaviour or conduct which falls short of the standard demanded by equity courts. This extension of the Common law definition and its practice was so wide that it prevented Lord Chancellor Hardwicke from defining it, because, in his own words, "Fraud is infinite and were a court of equity once to lay down rules, how far they would go and no further in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive".[25]

As Walker puts it, at Common law in England, fraud was limited to actual deceit. Equity, however, gave a more extended meaning to the concept of fraud, by developing the doctrine that if one man enters into a transaction with another in circumstances in which the latter is not a free agent and not fully able to look after his own interests, the latter is entitled to the protection of the court and may rescind the transaction. This principle applies where a confidential or fiduciary relationship exists between the parties, where a party has placed himself in such a position that it has become his duty to act fairly towards and have regard to the interest of the other party, where the bargain appears clearly unconscionable and inequitable, and where the principle of undue influence applies.[26]

## 3. TYPES OF FRAUD

It has therefore been rightly described by John Tiley[27] that "the equitable jurisdiction to intervene on the ground of fraud is very broad. It ranges from the doctrine of fraud on power to fraud inducing a contract. It covers conduct of a sort that offends conscience once a relationship has been established (e.g., under the doctrine of equitable estoppel) as well as untruths inducing the formation of the relationship. The interference with the normal rules of priority between interests in property is another example of this jurisdiction. . . . The expression "equitable fraud" may, however, still be used to indicate the doctrine whereby equity will prevent the abuse of a confidential relationship".[28]

In *Earl of Chesterfield* v. *Janssen*[29], however, the same Lord Chancellor tried to lay down the classification of fraud as—(*a*) fraud in which evil design is actual and plain, (*b*) bargains which are unequitable and unconscientious, (*c*) taking advantage of the weakness, ignorance and necessity of another, (*d*) imposition and deceit on the other persons, not parties to the agreement, and (*e*) catching bargains with heirs, reversioners and expectants, and mixed cases of these species. In his own words:

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25. Parkes: *History of the Court of Chancery*, p. 508, quoted in *Snell's Principles of Equity*, 27th Edn., 1973, p. 546. A letter to Lord Kames dated June 30, 1759 by Lord Chancellor Hardwicke.
26. *The Oxford Companion to Law*, 1980 Edn., p. 489.
27. *A Casebook of Equity & Succession*, 1968 Edn., p. 44.
28. *Ibid.*
29. (1750) 2 Ves Sen 125.

"1. Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the Common law has taken notice; for which if it would not look a little ludicrous might be cited, *James* v. *Morgan* [(1663) 1 Lev 111].

3. A third kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting and this goes farther than the rule of law; which is, that it must be proved not presumed; but it is wisely established in this court to prevent taking *surreptitious advantage of the weakness or necessity of another*; which knowingly to do is equally against the conscience as to *take advantage of his ignorance*: a person is equally unable to judge for himself in one as the other.

4. A fourth kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction, as being an *imposition and deceit on the other persons not parties to the fraudulent agreement.* It may sound odd that an agreement may be infected by being a deceit on others not parties: but such there are, against such there has been relief. Of this kind have been marriage-brokerage contracts; neither of the parties herein being deceived: but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. So in a clandestine, private agreement to return part of the portion of the wife or provision stipulated for the husband to the parent or guardian. In most of these it is done with their eyes open, and knowing that they do: but if there is fraud therein, the court holds it infected thereby, and relieves. So where a debtor enters into a deed of composition with his creditors for 10s. in the pound, or any other rate, attended with a proviso that all creditors pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor to induce him to sign this deed, that he will pay or secure a greater sum in respect of this particular debt: in this there can be no particular deceit on the debtor, who is party thereto: but it tends to deceit of the other creditors, who relied on an equal composition, and did it out of compassion to the debtor. This court therefore relieves against all such underhand bargains [*Spurret* v. *Spiller*, (1740) 1 Atk 105: 1 Wms 768]. So of premiums contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons, having the legal appointment of these offices are or may be deceived thereby: or if any person agreeing to take the premium has authority to appoint the officer, it tends to public mischief by introducing an unworthy object for an unworthy consideration. These cases show what courts of equity mean, when they profess to go on reasons drawn from public utility . . . (If the word politics is taken in its original meaning these are not political arguments. In its true original meaning, it comprehends everything that concerns the government of the country; of which the administration of justice makes a considerable part). To apply this and

in this sense, is relief in a court of equity founded on public utility. Particular persons in contracts shall not only transact *bona fide* between themselves but shall not transact *mala fide* in respect of other persons, who stand in such a relation to either as to be affected by the contract or the consequences of it; and as the rest of mankind beside the parties contracting are concerned, it is probably said to be governed on public policy.

5. The last head of fraud, on which there has been relief, is that which infects catching bargains with heirs, reversioners or expectants, in the life of the father, against which relief always extended. These have been mixed cases compounded of all or several species of fraud; there being sometimes proof of actual fraud which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness . . . ."[30]

## 4. JURISDICTION

Courts of Chancery and Common law courts exercised a concurrent jurisdiction in cases of actual fraud from the earliest times. For some of these cases, the greater freedom which in early days the court of chancery exercised in admitting the testimony of parties to the proceedings, made it a more suitable tribunal. Moreover its remedies were more elastic. Operating *in personam* as a court of conscience it could order the defendant, not indeed, in those days, to pay damages as such, but to make restitution, or to compensate the plaintiff by putting him in as good a position pecuniarily as that in which he was before.[31]

In its exclusive jurisdiction it dealt with cases which did not involve an element of *dolus malus* and thus the term "fraud" in chancery courts came to be used to describe what fell short of deceit, but imported a breach of duty to which equity had attached its sanction.

## 5. DISTINCTION

The fundamental distinction between actual and constructive fraud may be drawn as, that in the former there is necessarily "a design to do evil", in the latter it is not so; but equity would not allow that position to stand or prevail as it would do greater injustice by opening the door for all possible evils in other cases. As could be seen from what has been said before, equitable fraud is but an extension of the legal doctrine of actual fraud. We may thus lay down the definition of equitable fraud as something said, done or omitted which from the viewpoint of equity would operate to the prejudice of public welfare and of an individual even though a design to do evil is absent.

Fraud in equity therefore resolves itself into the following chief species:

(1) Undue Influence.

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30. Per Lord Chancellor Hardwicke in *Earl of Chesterfield* v. *Janssen*, High Court of Chancery, (1750) 2 Ves Sen 125: Atk 301: Wils Ch 286: 1 W&T LC 248, quoted in John Tiley: *Casebook on Equity & Succession*, Chap. 4.
31. *Nocton* v. *Ashburton*, 1914 AC 932 (HL).

(2) Abuse of Confidence.

(3) Unconscionable Bargains.

(4) Fraud on Power.

### 6. UNDUE INFLUENCE

Undue influence has been said to be constructive fraud. It is either express or presumed. The latter category arises out of fiduciary relationships. In *Mehboobkhan* v. *Abdulrahim*[32] it has been laid down that "undue influence is said to be a subtle species of fraud whereby mastery is obtained over the mind of the victim by insidious approaches and seductive artifices. Sometimes the result is brought about by fear, coercion, importunity or other domination calculated to prevent expression of the victim's true mind. It is a constraint undermining free agency overcoming the powers of resistance, bringing about a submission to an overmastering and unfair persuasion to the detriment of the other". Equity granting relief not only in such cases where the actual proof of undue influence was available but also in cases where such influence was presumed. *Huguenin* v. *Baseley*[33], *Allcard* v. *Skinner*[34] and *Inche Noriah* v. *Sheikh Allie*[35] are leading cases on the point.[36] Such bargains were set aside by equity. Where sales are made at an excessive price or purchases are made at an undervalue such presumption arises. Undue influence is presumed to arise between a parent and a child, a guardian and his ward, a trustee and a beneficiary, a spiritual adviser and his follower, an advocate and his client and a dcotor and his patient. But it should be noted that it is no monopoly of equity courts to save people from consequences of their own follies.[37] In other words, *extravagant liberality and immoderate folly do not themselves provide a passport to equitable relief.*[38]

But where it can be proved that the will was exercised spontaneously by the donor without anybody's advice or that the exercise of it was by the donor as a free person, no presumption of exercise of undue influence can stand. Moreover, steps to obtain relief by the party, whose will, was so overpowered and guided should be taken during the period so long as such influence exists. If steps are taken after that period is over, they should be within a reasonable time. In India, Section 16 of the Indian Contract Act provides in this regard, its first part laying down the general principle about undue influence and the second part laying down a presumption against such persons who are capable of dominating the will of others,[39] thereby guiding and streamlining it in a direction desired by them. The third part of Section 16 explains that since such dominating persons

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32. AIR 1964 Raj 250.
33. 1807 14 Ves 237.
34. (1887) 36 Ch D 145.
35. 1929 AC 127: AIR 1929 PC 3.
36. See also *Tungabai Kumbhojkar* v. *Yeshwant Jag*, AIR 1945 PC 8.
37. *Allcard* v. *Skinner*, (1887) 36 Ch D 145.
38. Sir Raymond Evershed, M. R. in *Tufton* v. *Sperni*, (1952) 2 TLR 516.
39. *Mohd. Buksh* v. *Hossaini*, (1888) 15 Cal 684 (PC).

are able to suppress the evidence of undue influence it lies on them to prove that the contract was not obtained by them through undue influence. The court under Section 19-A may set aside the contract, or the contract may be voidable at the option of the party whose consent was so obtained.

In English law[40] there is a modern trend to recognise the economic situation and circumstances wherein the parties are placed, as a variety of coercion and duress[41] liable to such relief.

### 7. ABUSE OF CONFIDENCE

It is difficult exactly to distinguish and therefore draw a line between the permissive forms of coercion and persuasion on the one hand and undue influence on the other. The line of distinction between them is regulated by public policy. Similarly, the principles of undue influence and abuse of confidence may seem to overlap but as Snell notes, they do not coincide. In the case of a person who is in a fiduciary position to the other and thereby obtains and procures a benefit for himself from that position in disregard of that duty, the transaction will be set aside.[42] Similarly, a trustee purchasing from the beneficiary at an undervalue is liable to be proceeded against under this principle.

### 8. UNCONSCIONABLE BARGAINS

Bargains against morality, which are improper and unreasonable and unconsiderable in particular circumstances are unconscionable bargains.[43] They resolve themselves into the following sections—

(*a*) bargains with the ignorant and the poor, who are without independent advice;

(*b*) bargains with expectant heirs;

(*c*) moneylending transactions;

(*d*) transactions contrary to the policy of the law.

An expectant heir is a person who is expecting either some reversionary interest or a benefit under a will or intestacy of a person still alive. If a bargain is made with a person, the person enforcing the contract has to prove that he did not misuse or take advantage of the circumstances, situation and the urgent need of the expectant heir so that he was induced to sacrifice his future. He must have paid a fair price without exercising any kind of oppression or extortion. "Fraud here does not mean deceit or circumvention; it means an unconscientious use of the power arising out of the *circumstances* and conditions; and when the relation of the parties is such as prima facie to raise such presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repeal the

40. See *Law Quarterly Review*, 1979, Vol. 95, pp. 475-77; Anson: *Law of Contract*, 25th Edn., 1979, p. 270

41. Doctrine of economic duress, *North Ocean Shipping Co.*, (1978) 3 All ER 1170.

42. *Nocton* v. *Ashburton*, 1914 AC 932.

43. *See also* Walker, D. M.: *The Oxford Companion to Law:* 1980 Edn., p. 1247.

presumption by contrary evidence, proving it to have been in fact fair, just and reasonable''.[44] Here again application to the court for help (to set aside the transaction) must be made within a reasonable time after coming into possession of the property. If the transaction is confirmed, it will not be relieved against.[45]

*Post-obit Bonds.*—Under such bonds a borrower agrees to pay a lump sum, higher than the amount obtained by borrowing, if and only if he gets some property on the death of some definite person.[46]

The doctrine of unconscionable bargains has nothing of fraud in it, but looking from the point of view of reasonableness and the unequal position of the parties, it is very plain that a party in a dominating position cannot be allowed to extract undue profit or benefit by transacting a hard and cruel bargain. Sales of reversions at undervalue are also fitting examples of the situation. The court in such cases will not set aside the whole transaction but order the repayment of what is due, *ex aequo et bono*, i.e., the sum actually advanced with reasonable interest.

*Pardanashin woman.*—In India the position of a pardanashin woman is open to undue influence.[47] Such a woman observes a pardah i.e. a complete seclusion from others. To observe pardah is a custom in some castes or classes in India. As the woman does not come out in society, she is not in contact with persons in society, meaning thereby that she is in contact with only a few persons and these persons can easily influence her. Her position therefore is to a certain extent analogous to that of the expectant heir who by force of circumstances is susceptible to force, advice, persuasion and influence. Law therefore throws around her a special cloak of protection whereby those who deal with her have to prove affirmatively and conclusively that the deed was not only executed by, but was explained to and was readily understood by her; she signing it, not under duress but as a free and independent agent.[48] But it is not absolutely necessary to prove that she had independent and disinterested advice from outside.[49] In short, she must have understood the bargain ''substantially'' so that it may be said to be her own ''mental or conscious act''.[50]

There is no such class as a quasi-pardanashin woman and therefore the question of protection of law depends upon the facts and merits of each case.[51] A woman who comes out in society as often as needed, goes to the court, gives

44. *Earl of Aylesford* v. *Mörris*, (1873) 8 Ch 484.
45. *Earl of Chesterfield* v. *Janssen*, (1750) 8 Ch App 484.
46. *Ibid.* Walker, D.M.: *The Oxford Companion to Law*, 1980 Edn., p. 972. In Gujarat an aphorism explains this. It is बाप मरे बमणा —It means that the borrower will pay double the amount on his father's death. Only on this condition he borrows.
47. *Kaminisundari* v. *Kali Prossunno Ghose*, (1885) 12 Cal 225: 12 IA 215.
48. *Kalibux* v. *Ramgopal*, (1914) 36 All 81 (PC); *Ismail* v. *Hufizboo*, (1906) 33 Cal 773, 783 (PC).
49. *Ibid.*; *Faridunnisa* v. *Mukhtar*, (1925) 30 CWN 337 (PC).
50. *Faridunnisa* v. *Mukhtar*, (1925) 30 CWN 337 (PC).
51. *Hodges* v. *Delhi & London Bank*, (1901) 23 All 137 (PC).

evidence, fixes rents with tenants and collects rents and communicates with men other than members of the family in matters of business, is not pardanashin lady.

In money-lending transactions where the terms of the loan were unreasonable, equity relieved against the transaction and the lender had to remain satisfied with the repayment of the amount advanced plus a fair interest. This situation of unconscionable money-lending transaction prevailed and existed up to the pre-1900 period. After the coming into operation of the Money-lenders Act, 1900 and 1927, the equitable doctrine of catching bargains with expectant heirs has lost importance because the transactions are regulated by the Act, particularly in case of those whose business is to lend money. Banking and insurance companies are excluded from its scope. The Act also provides for reopening settled accounts if the transaction is harsh and unconscionable.[52] Under the Act, money-lenders are required to take a licence,[53] and an unlicenced money-lender cannot sue the borrower.

In India, the Usurious Loans Act, 1918 governs the transactions of money-lending. It is based on the analogy of English law. States in India have also passed their own Acts to this effect. If the transactions is substantially unfair and the interest is excessive, the transaction may be reopened or set aside. It is for the court to decide whether the interest is excessive or not. Thus the equitable relief as provided in England is available in India through the Central and States' legislation on money-lending business.

As explained in *Chesterfield* v. *Janssen*[54], imposition and deceit on other persons not parties to the contract are relieved by equity in so far as they constitute fraud on third parties or upon the public generally. Under this category are included, marriage brokage contracts, payment to a parent to consent to the marriage of his child (called वर विक्रय sale of a bridegroom or कन्या विक्रय sale of a bride), loans to a woman to swell her dowry and thus deceive her husband, rewards for influencing a testator and contracts in restraint of trade and a clandestine deed by a debtor with one of his creditors to the disadvantage of other creditors. Being against public policy such agreements are void but on principles of public interest suitable relief may be granted by equity.

### 9. FRAUD ON POWER

A power is an authority vested in a person to deal with or dispose of property not his own.[55] Where the power is special the donee is to exercise it subject to restrictions as to its objects or persons. It should thus be exercised *bona fide* for the end designed and not for any purpose foreign to the power. One who exercises it beyond the scope of the instrument or for a purpose not justified by it commits a fraud on power, which equity will relieve. As pointed out by Snell, there are three main types of such fraud. Here also it should be noted that the word 'fraud' has a special connotation or meaning, differing

52. *B.S. Lyle Ltd.* v. *Peasson*, (1941) 2 KB 391.
53. Section 1, Money-lenders Act, 1927.
54. (1750) 2 Ves Sen 125.
55. Walker D.M.: *The Oxford Companion to Law*, 1980 Edn., pp. 973-974.

widely from actual fraud. The three main categories are (*a*) appointment made with a corrupt purpose,[56] (*b*) or for purposes foreign to the power,[57] or (*c*) for the benefit of non-objects.[58] Such appointments are void and will be set aside, but a *bona fide* purchaser for value from such an appointee has been protected (up to the value of appointee's share only) by the Law of Property Act, 1925. Section 157 lays down that the purchaser must show that he purchased after 1925, for value without notice of the fraud and that the appointee from whom he purchased was not less than 25 years. There are certain well-recognised exceptions to the fraud on power, as revocation of power, release of power and power to jointure.[59]

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56. *Lord Hinchinbroke* v. *Seymour*, (1789) 1 Bro CC 395.
57. *Dick, re*, 1953 Ch 343.
58. *Nicholson's Settlement, re*, 1939 Ch 11.
59. For details see *Snell's Principles of Equity*, 27th Edn., 1973, pp. 559-60.

*Chapter IX*

# *Administration of Assets, Equitable Estoppel and five great Doctrines*

*"Prepare for death if here at night you roam,*
*And sign your will before you sup from home."*

—Dr Samuel Johnson: *"London"*

*"Estoppel is a rule of equity flowing out of fairness striking on behaviour deficient in good faith. It operates as a check on spurious conducting by preventing the inducer from taking advantage and assailing forfeiture already accomplished. It is invoked and applied to aid the law in administration of justice. But for it great many injustices may have been perpetrated."*

—Sahai, J., in *Indira Bai* v. *Nand Kishore*, (1990) 4 SCC 668 at 670.

*"There is no estoppel against a statute."*

—K.N. Saikia, J., in *Plasma Machine Mfg. Co.* v. *Collector of Central Excise*, 1991 Supp (1) SCC 57 at 59.

**SYNOPSIS**

**A. Administration of Assets**
1. Assets: Meaning of
2. Jurisdiction
3. The rules
4. Collection
5. Payment
6. Distribution
7. In India

**B. Equitable Estoppel**

**C. Five Great Doctrines**

## A. ADMINISTRATION OF ASSETS

### 1. ASSETS: MEANING OF

The administration of assets is the function that an heir, executor or an administrator is required to discharge. The word 'asset' has been derived from the french word 'assez' (meaning 'enough') and the Latin word "*ad satis*" (meaning 'to sufficiency'). As the connotation of the word denotes, assets is the property of the deceased which is available to meet the deceased person's debts and other liabilities. These assets include personalty as well as realty. So that an executor or administrator can administrate well, it is necessary that the assets be collected and realised and are available for the payment of debts and distribution of the surplus among the beneficiaries entitled under the will or intestacy.

The combination of three functions—

(*a*) collection,

(*b*) payment, and

(*c*) distribution,

is called "administration of assets". These are the duties, therefore, of the deceased's personal representatives i.e. his executors (appointed by the deceased) and otherwise his administrators (appointed by court). As expressed by Bowen, L.J. in *Stanhope* v. *Stanhope*[1], the executor or administrator "does not act for a dead man or in his name but for the estate of the dead man". Snell has rightly pointed out[2] that the administration is normally conducted by the personal representatives out of court, but difficult or complex administrations may take place in court.

### 2. JURISDICTION

Formerly, i.e., before 1925, ecclesiastical courts, courts of probate and the High Court dealt with the problem of administration of the assets of a testator or intestate. At the end of the seventeenth century the chancery courts practically took over this jurisdiction from the ecclesiastical courts and slowly but certainly acquired a concurrent jurisdiction with the Common law courts. In the beginning it followed, and in suitable cases supplemented, the law of the courts but gradually and steadily it modified this law and developed its own rules. As has been pointed out[3], "its success in acquiring jurisdiction was in large part due to its superior administrative machinery and not least its ability to take complicated accounts. A Common law court would merely resolve the particular dispute brought before it by the parties to it, whereas the Court of Chancery looked at the estate as a whole; if it interfered at all, it would administer the entire estate for the benefit of all the creditors and beneficiaries alike. The result is that the law of administration of assets, though based in part on the principles of ecclesiastical and Common law, is largely equitable".

### 3. THE RULES

Before 1926, only the chattels or personalty of the deceased were available for the payment of debts. Realty was usually not available for the deceased's creditors. Chattels were the legal assets of the deceased. The executor had complete control and power over these assets and could give a valid discharge in case of debts due to the testator and in case of a sale, mortgage or a pledge[4] by him, the purchaser obtained a valid legal title. Moreover, against his giving away without consideration any part of the assets to the donee, creditors and legatees had no claim or remedy at Common law. Looked at from this point of view at equity courts, the equitable estates were also available for distribution. Equitable estates included also the realty of the deceased.

The Administration of Estates Act, 1925 superseded the foregoing old rules and made available the real as well as the personal estate of the deceased for payment and distribution. Personal representative has been defined therein to include "the executor, original or by representation, or administrator for the time being of a deceased person" and for liability regarding estate taxes, an

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1. (1886) 11 PD 103.
2. *Snell's Principles of Equity*, 27th Edn., 1973, p. 295.
3. *Ibid.*, p. 296.
4. *Oceanic Steam Navigation Co.*, (1880) 16 Ch D 236.

"executor *de son tort*" is also included. Chattels real (i.e., leaseholds) and land in possession, remainder or reversion, and every interest in or over land, to which the deceased was entitled at his death is included in asset. With some exceptions, "real estate held on trust, including settled land, realty appointed by the deceased's will under power of appointment and an entailed interest disposed of by the will" formed part of the real estate. In so far as payment of debts is concerned, all real and personal estates whether they be legal or equitable, form part of his assets. Any real or personal estate appointed by him under his will under a general power of appointment is a part of his assets.

**4. COLLECTION**

The personal representative has to take possession of the property and for this purpose he is to collect the same by suitable means within a reasonable period. He must first pay, before he proceeds further, from the ready money available for the following—

(*a*) funeral expenses,

(*b*) testamentary and administrative expenses, and

(*c*) debts and liabilities, so far as the ready money amount permit according to the rules in this behalf.

The residue is to be distributed in the manner provided in Section 46 as amended from time to time, or is to be held in trust as the section requires.

So far as the powers of disposition are concerned, an administrator derives his title solely from the grant of letters of administration from the court; whereas an executor derives the title from the instrument of the will itself, so that where an administrator has no power before a grant is made, the executor has wide powers as per the instrument even before his title is confirmed by the grant of probate by the court. Powers of disposition of a personal representative are wide as conferred by the Land Transfer Act, 1897 and the Administration of Estates Act, 1925. The latter Act provides for the protection of purchasers from the personal representatives for money or money's worth. With certain exceptions the personal representatives can conduct and carry on the business of their testator, though *virtue officii* they cannot.

**5. PAYMENT**

Within the executor's year[5] the personal representative has to pay the debts of the deceased with interest and perform "all enforceable contracts" of the deceased, even though to break them and pay damages would be more beneficial to the estate. All the debts are to be paid without distinction. Partiality and preference in payment will make him personally liable. The Act[6] lays down rules as to the order in which they must be paid[7], the funeral and other administrative expenses taking priority. If the estate is able to pay debts but is

5. Administraton of Estates Act, 1925, S. 44—Generally one year from the death of the deceased.
6. Administration of Estates Act, 1925.
7. For details see *Snell's Principles of Equity*, pp. 310 to 322.

unable to pay administrative charges, it is termed insolvent and in such cases the court will make a suitable inquiry to find out whether it is so or not. Formerly a person entitled to land could require the personal representative to pay it off, out of the deceased's estate but now by a series of statutes known as the Locke Kings Act or the Real Estate Charges Acts and the Administration of Estates Act, 1925, the beneficiary takes the property subject to the charge, and if the charge exceeds the value of the property he is not allowed to call on the estate to pay off the charge. The rule, of course, is subject to certain details.

#### 6. DISTRIBUTION

After the debts of the deceased have been paid off and liabilities discharged, the remaining estate has to be distributed to the persons beneficially entitled, provided, of course, no proceedings under the Inheritance (Family Provision) Act, 1938 are pending. But in no case can a personal representative be compelled to distribute before the expiration of the executor's year. After this is cleared off, he holds the residue in trust for the residuary legatees or next of kin.

#### 7. IN INDIA

In India, the Indian Succession Act, 1925, by Part IX, Sections 217 to 369 makes provisions with regard to probate, letters of administration and administration of assets of the deceased.

For Administration suit and its details see Civil Procedure Code, Order 20, Rule 13. The Indian Succession Act contains provisions relating to executors and administrators and their powers, duties and liabilities.

## B. EQUITABLE ESTOPPEL

[*See* maxim 3, para (*b*)(*vi*) in Chap.III]

## C. FIVE GREAT DOCTRINES

1. Conversion [*See* maxim 8, para (*b*)(*i*) in Chap. III]
2. Reconversion [*See* maxim 8, para (*b*)(*i*) in Chap. III]
3. Election [*See* maxim 3, part (*b*)(*ii*) in Chap. III]
4. Performance [*See* maxim 9 para (*b*)(*i*) in Chap. III]
5. Satisfaction [*See* maxim 9 para (*b*)(*i*) in Chap. III]

# PART III
# TRUSTS

# Chapter X
# History of the Trusts

*"Invention of trust has been 'a most powerful instrument of social experimentation'."*

*"The trust has given us a liberal substitute for a law about personified institutions . . . (and) a liberal supplement for a necessarily meagre law of corporations."*

—C.K. Allen: *Law in the Making*, pp. 415-416,

citing Maitland: *Lectures on Equity*

*"A trust is the binding of the conscience of one to the intention of another."*

—Bacon.

*"A trust is the very centre and kernel of equity."*

—Hanbury: *Modern Equity*

*"Of all the exploits of equity the largest and the most important is the invention and development of the trust. It is an 'institute' of great elasticity and generality; as elastic as general as contract . . . it involves the conception of obligation and ownership."*

*"The modern trust developed from the ancient use."*

—Maitland: *Lectures on Equity*, p.23

*"Parents of trusts were FRAUD and FEAR and a court of conscience was the nurse."*

—A.G.V. Sands, (1669) 2 Freem 129

**SYNOPSIS**

1. Concept of a Trust
2. How a Trust Arises
3. Origin
   (a) In English law
   (b) In Roman law
4. Use and Fidei Commissum
5. Use Develops into a Trust
   (a) Before 1535
   (b) After 1535
6. In India
7. Institution of Trust—Its Benefits and Hazards

## 1. CONCEPT OF A TRUST

All efforts for defining a trust have remained unfruitful in so far as no complete definition of it has been produced. According to D. Hanbury, therefore, it is better to describe what a trust is and to compare the idea with other like concepts in order to understand its nature. A trust may be described as an *equitable obligation* binding a person (called trustee) to deal with the property over which he has control (called the trust property) for the benefit of persons (called the beneficiaries or *cestuis que trust*) of whom he may himself be one and anyone of whom may enforce the obligation.[1]

1. Underhill: *Law of Trusts*, 12th Edn., 1970, p. 3.

From the above descriptive definition it is very clear that a trust is an obligation—An equitable obligation binding a person's conscience. It is concerned with property which is to be held in confidence and managed for the benefit of certain persons called beneficiaries.

**2. HOW A TRUST ARISES**

A trust may come into being in various ways but a very simple way in which it arises may be, when *A* transfers his property to *B* for the 'use' of and in trust for *X*. *A* is the owner of property, *X* is the beneficiary and *B* is a trustee in whom confidence by the owner of the property is reposed. According to Common law, *A* was the legal owner and *B* was to look after the property and manage it for the benefit of *X*. These were *B*'s moral obligations. English Common law could not enforce this arrangement because enforcing moral obligations was not within its competence which was its prominent drawback. In the equity courts also it was quite difficult in the beginning to enforce this obligation as 'equity followed the law', but in course of time ingenuity of the chancery lawyers and judges found a way out, so that *B* was recognised as the legal owner and an obligation was attached to his title whereby his conscience was bound to carry out the moral obligations in favour of *X*. *B* was thus bound to hold and manage the property, and not to give it away to anybody or damage it. If he did it, he was punishable. In other words, equity converted moral obligation into equitable obligation by dissociating beneficial interest from legal title and gave the essence or the kernel to *X* and the husk to *B*. *A trust thus arises when beneficial interest is dissociated from legal title and confidence is reposed in the legal titleholder.*

**3. ORIGIN**

**(a) In English law.**—Regarding the origin of trust, opinions are divided. Some authorities hold that the English trust is connected with the Roman *Fidei Commissum* while others hold that it is of indigenous growth. Maitland maintains that it did not come from outside England but developed from ancient use. Story holds the opposite view. Pomeroy joins Maitland and explains that "these essential differences are as marked as their superficial similarity and it is a grave error to represent the entire equity jurisprudence concerning uses and trusts as derived from Roman law".

Maitland supports his thesis by advancing the following arguments.[2]

(*i*) The word 'use' is not derived from Latin *usus* but from the Latin word *opus*. Owing to the similarity of terminology and its pronounciation one may be tempted to draw an inference that the term 'use' is derived from *usus*, but it is not so. In Latin *ad opus* means 'on behalf of' and this terminology was in vogue as could be seen from the ancient Lombard and Frank legal documents. It was due to the transliteration of the phrase *ad upus* that it was alternatively used for *usus*. Maitland points out that in the 13th century when land was held

2. *Lectures on Equity*, 1969 Edn., pp. 23-32.

permanently by one man on behalf of another, the term *ad opus* came to acquire its modern connotation and significance.

(*ii*) The Roman terminology *fidei commissum* was used in Roman law to express the obligation of the heir to execute the last wishes of the deceased. In other words, the appointed heir who got property in trust for another was termed *fidei commissum*. The expression thus belonged to the land of testament, whereas the English word 'use' had its origin in an agreement, *inter vivos*, between the parties as a result of which one person held the property of another for the benefit of a third person. Thus " . . . . use, trust or confidence originates in an agreement. As to the want of valuable consideration for the trustee's promise, it might, I think, fairly be said that even if there is no benefit to the promisor, the trustee, there is at all the events detriment to the promisee, the trustor, since he parts with legal rights with property and with possession. Men ought to fulfil their promises, their agreements; and they ought to be compelled to do so, that is the principle . . . "[3]

(*iii*) From the very beginning the chancellors seem to have treated the rights of a *cestui que use* as analogous to an estate in land. They brought to bear upon it the rules of the English land law as regards such matters as descent and the like.[4] The Roman "*fidei commissarius*"[5] (the beneficiary) had no such right of ownership.

**(b) In Roman law.**—Under Roman law, a citizen while appointing a testamentary heir had but a limited choice in so far as he could not appoint an alien, not a posthumous child outside his family, nor a woman, to inherit his property. This was quite unfair. A method, therefore, was found out to bypass the State rules, statutes and prohibitory orders. They appointed a qualified person as heir according to law, and as prearranged with him under a request or direction, this qualified person would transfer the property to the person who was to be the real object of the bounty. This subsequent transfer was in the form of a gift which the person receiving was not prohibited to receive. The qualified person was thus to hold the property in trust for another until he transferred it to the real object. The inheritance so given was termed *fidei commissum*, the heir or trustee was termed as *fiduciarius* and the beneficiary the *fidei commissarius*.

### 4. USE AND FIDEI COMMISSUM

These two concepts under two different legal systems had between them their own similarities, of course, not praiseworthy. (*i*) Both were designed as an instrument or a device to get rid of the clutches of the prevailing law, and (*ii*) in both, it was left to the heir's or the trustee's sense of honour and confidence to hold and use or transfer the land for the benefit of another.

But the distinctions between these are also noteworthy. The Privy Council accepted the same in *Abdul Hamid case*[6].

3. Maitland: *Lectures on Equity*, p. 29.
4. *Ibid.*, p. 32.
5. Pomeroy: *Equity Jurisprudence*, p. 891.
6. *Abdul Hamid* v. *De Saram*, 1946 App Cas 208.

(*i*) The essence of a trust lies in the distinction between legal and equitable ownership whereas in a *fidei commissum* no such double estate idea or division of ownership existed.

(*ii*) The legal and equitable ownership which rests in two different persons in a trust, is simultaneous and concurrent while in a *fidei commissum* the legal ownership begins where the fiduciary ownership ends.

(*iii*) In a trust the interest of a beneficiary is quite ineffective and impotent against a *bona fide* purchaser of an estate for value without notice. In *fidei commissum* this is not so. There, once an interest is vested in the *fidei commissarios*, it holds good against the whole world and a *fiduciarius* (trustee/heir) cannot destroy it or cannot burden it by a transfer as a charge.

## 5. USE DEVELOPS INTO A TRUST

The history of the growth of trust falls into two natural divisions: the period before the Statute of Uses and the period after the Statute of Uses, 1536.

**(a) Before 1535.**—After the Norman conquest by William the Bastard, the Duke of Normandy, better known as William the Conqueror,[7] a controversy of Norman versus Anglo-Saxon law came to surface. William had brought with him the feudal law. He made certain that every acre of English land was held, directly or indirectly, from the king. He had the political foresight to avoid decentralization which feudalism had introduced in the rest of Europe. He got compiled the famous "Doonesday Book" by referring to which his agents could find out at once who the owner of the land was. He did not destroy the Germanic legal system of Anglo-Saxon England but gradually got both of them merged just as the two languages merged to form the English tongue.[8] The merger of the two systems gave England its Common law.[9] Under this system, the king was the supreme lord and the feudal lords held the lands distributed by the king on his behalf and at his pleasure. In turn, these lords also distributed the land received by them to their friends and followers, which consequently resulted in a feudalistic arrangement wherein the immediate superior at the top was the feudal lord, subject to the king, and the lowest link in the chain was the poor helpless life tenant, whose position was no better than a serf in so far as the lord had complete control over his person and property.[10] In the beginning the land held by the life tenants was inalienable, non-transferable and non-hereditary, but after a prolonged battle and owing to the force of circumstances, concessions were wrenched out which made the land hereditary and transferable but in no case was it absolutely transferable without the king's prior approval, as in principle, all lands belonged to him. This position held good roughly up to the end of the twelfth century.

The thirteenth century witnessed for the first time an incident wherein land was conveyed by one person to the other, the first holding the same for the use

7. R.A. Wormser: *The Story of the Law*, 1961 Edn., pp. 238-239
8. *Ibid.*, Part VII, 'William Begins a New System', pp. 240-242.
9. William ruled from 1066 to 1087.
10. Story: *Equity Jurisprudence*, 3rd Edn., p. 396.

of another. The monasteries had their rule that no monk or man was to have any wealth or property at all. But it was impossible to run them unless they had some means to live upon. And this was supplied by a device, by which land was conveyed to the borough community to the use of the Franciscan friars. English Common law had a similar provision so that no land could be conveyed to religious houses and monasteries by reason of the Statute of Mortmain.[11] But in spite of this so many Englishmen had sought to save their souls by making donations to the church that it seemed as though all the land of England, sooner or later, might pass into the hands of the church corporations. This in turn increased the power of the church.

As the above contrivance worked well people were tempted to use it more and more. The growing power of the church was a serious challenge to the king's powers and the powers of the feudal lords.

This popular device, which was originally used for conveying lands to religious houses, was in the 14th century employed profitably[12] to get rid of (*i*) the feudal burdens of wardship and marriage, (*ii*) the law of forfeiture for treason and escheat for felony, (*iii*) the Statute of Mortmain, and (*iv*) one's own creditors, (*v*) Lastly, by means of this device, one could give oneself the power of making something very like a will of lands. The use was thus a cloak for the real owner.

In the 15th century the use became popular for transfer of land for all purposes. The ordinary Common law lawyers found this system very distasteful. Common law itself did not and could not recognise and enforce it as it was too vague as an agreement and did not fulfil the requirements of a contract. It therefore fell within the province of the Chancellor who enforced it efficiently. The Chancellor enforced it not as a contract but as a confidence binding the conscience of the feoffee who was to hold the land for the *cestui que use* (the person called beneficiary) and a remedy was given to the beneficiary to enforce it. The right of the beneficiary was recognised as an equitable ownership in land-an equitable estate in the land, which in course of time was available against all except a *bona fide* purchaser for value without notice of the equitable interest. Common law lawyers rejected the 'deed to a use' entirely and prevailed upon the Parliament to enact the Statute of Uses, which converted a deed to the use of another into actual title in that other. Thus the feoffee could not serve the purpose of a cloak to the real owner and the use, in the words of Snell, became the land.

**(b) After 1535.**—With the passing of the Statute of Uses the second period in the development of use into a trust began. The statute was designed to put an end to the use. For example, when land was conveyed to *X* to the use of *Y*, the statute deprived *X* of any interest in the land and the equitable interest of *Y* was recognised by it as a legal estate. The statute however did not apply to personal chattels, leaseholds and copyholds, but it applied only to freeholds. It also did

11. 'Mortmain' means 'dead hand'. Land was no longer to be transferred in such a way that it would be forever owned by a dead hand.

12. Maitland: *Lectures on Equity*, 1969 Edn., p. 27.

not apply where there were duties to be performed by the trustee, the person to whom the land was conveyed, and it did not recognise a use upon use,[13] i.e., where land was conveyed by *X* to *Y* to the use of *Z* to the use of *P*; *Z* was considered to be the legal owner and *P* got nothing. This gave a fresh and further chance to equity courts to decide in favour of the second[14] use, under the argument that the statute when applied to the first use, recognised the holder of the first use as a legal owner and thus the statute was exhausted in its application. The result would be that in the above example *Z* would be the legal owner and *P* the holder of an equitable estate. The second use came to be known as trust due to the invention of the chancery lawyers. In the words of Lord Hardwicke[15], the net result of passing the "statute, made upon great consideration, and introduced into a solemn and a pompous manner by this strict construction, had no other effect than add at most three words to a conveyance", i.e., 'to the use'.

In 1660, military tenures were abolished and the 17th and the 18th centuries saw its smooth working with the extension of the doctrine to chattels, funds of every kind, actionable claims and money, till we come to the Law of Property Act, 1925 which repealed all the previous enactments relating to trusts.[16] From January 1, 1926, a trust of any property can be created by an instrument without the aid of a use. Thus *A* can convey property to *B* in trust for *C*. At present trusts in England are created by way of settlements, and the beneficial interest of such a trust may be enjoyed by a number of persons in succession.

## 6. IN INDIA

In India the law regarding trusts has been incorporated in the Indian Trusts Act, 1882. Recapitulating succinctly what has been said before regarding the essential characteristics of a trust in England, we can say that there are two kinds of estates, legal and equitable, of which two different persons can be the owners and these owners can well transfer their respective interests to any person or persons. This peculiar position of double ownership is the distinctive and original feature of an English trust. Justice Peacock[17] and Justice Markby[18] were of the opinion that no such precise idea as expressed by the English "use" and the Roman "*fidei commissum*" existed or was ever known to Hindu or Muslim law. But Macpherson, J.[19] opined to the contrary and said that a number of trusts for religious and charitable purposes were enforced by the courts in India and gift made to an idol tantamounted to a trust, which was beyond doubt. But In *Ganendra Mohan Tagore* v. *Upendra Mohan Tagore*[20], it has been clearly

13. *Tyrrel case*, (1557) Dyer's Rep 155(*a*).
14. *Sambach* v. *Dalston*, (1634) Tothil 188.
15. *Hopkins* v. *Hopkins*, (1938) 1 Atk 581.
16. The Statute of Uses, 1535, the Trustees Act, 1850, the Trustees Act, 1888, the Trust Investment Act, 1889, and the Trustees Act, 1893.
17. *Kumar Asimkrishna Dev* v. *Kumar Kumarkrishna*, BLR (Original Cases) 36.
18. *Smt Krishna Ramini Dasi* v. *Anand Krishna Bose*, BLR (Original Cases) 231.
19. In appeal in these cases.
20. BLR (OC) 134.

expressed by Frier, J. that the double-ownership idea was unknown to Hindu and Mahomedan law but that is not a ground for drawing a baseless conclusion that trusts were unknown to Hindu and Mahomedan law. On the contrary, the variety of fiduciary relationship and the meticulous way in which they have been expressed in Indian law are quite unparalleled.[21] This proposition also finds support in his speech by Stokes on the Trusts Bill in the Legislative Council in the year 1881. Before 1882, trusts under Hindu law and Mahomedan law were enforced, but in doing so principles of English equity, justice and good conscience were applied where necessary.[22]

It is true that before 1882, no systematic effort was made to present the law relating to trusts which was scattered in different provisions in various other enactments. A commission[23] for this purpose was appointed, which gave its report on November 15, 1879 and in 1882 it was passed as an Act called the Indian Trusts Act, 1882. Now, This Indian Trust Act are enforceable in Bangladesh.

## 7. INSTITUTION OF TRUST—ITS BENEFITS AND HAZARDS[24]

*Trusts grew out of Fraud and Fear and their nurse was the court of Conscience. They are the product of evasion of law by society.* However it is not an overstatement when one says that trust implies power and big trusts imply and generate 'big power, a group power'.

No doubt trusts have contributed to the progress and development of society in every sphere. In several striking passages Maitland has vigorously emphasized that the English trust has "supplied a personalized substitute for the far more comprehensive use of corporate devices in German law".

Maitland was true when he said that the personalized English concept of a trust was more useful to society than the impersonal collectivized German concept of an association (*verein*). Charitable trust therefore should be confined not to corporations but to natural persons, because men are more conscientious when they are acting in their own names than when they are using the name of a corporation (or associations of foundations etc.).

Besides, the giant trusts (corporations) wield a great hidden group power, so far not satisfactorily controlled by the State. One may, therefore, join W. Friedmann when he says that: "Ironically enough, the immense sociological and juristic aspects of the problem of group power within the State have largely remained hidden behind accidents of legal form, especially in the Anglo-American system". The greatest problem is "the social and political danger of the assumption that an association, corporate or unincorporated, merely by being in form private rather than public, should still enjoy the far-reaching immunity from judicial or other official control which the courts have accorded it". *Giant trusts are thus a constant source of hidden power, which if not properly controlled by the State, would result into a continuous menace and*

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21. *Ibid.*
22. *Kahandas and Narandas, Re*, (1880) 6 Bom 154.
23. Whitley Stokes, C.A. Turner and Raymond West were its members.
24. Based on W. Friedmann: *Law in a Changing Society*, Chaps. 9 and 10, pp. 231-254, 268.

*challenge to the social, political and economic life of the country, as is the experience of the Western world. Ransacked as a subject of research "Use of Trust Power" would expose equally shocking results in India too.*[25]

As a solution to the riddle of abuses of group power eight types of controls or remedies have been suggested:

(*i*) Total socialization,

(*ii*) Mixed public and private enterprise,

(*iii*) Cooperatives,

(*iv*) Mixed companies,

(*v*) Partnership of capital and labour,

(*vi*) Regulatory public authorities,

(*vii*) Anti-trust law, and

(*viii*) Social restraints.

To examine these is not within the scope here, but it would be profitable to look to Friedmann when he explains how this can be achieved: (*i*) By safeguarding of "due process" in the personal, political and social life of the individual, and (*ii*) by response of law largely in terms of judicial interpretation and extension of reviewability of unfair practices and lack of procedural safeguards in the affairs of association, this is possible. Of course, continuous administrative supervision over private institutions (unions, associations, foundations and the like representing group power-congeries) would jeopardize that minimum freedom without which democracies can slide to the brink of totalitarianism. No country can be an exception to this, much less India.

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25. Cf. The Scandal about Indira Pratibha Pratishthan and other trusts by the then Chief Minister of Maharashtra State. U.S. Stall Corporation, Standard Oil Company, American Tobacco Company are the American examples of notorious Trusts. The Sherman Anti-Trust Act, 1890, outlawed many of their practices and The American Supreme Court decreed dissolution of such Trusts. (Walker D.M.: The Oxford Companion to law, 1980 edn., pp. 1241, 1267.