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PART VI.

BILLS OF THE GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

The following further Report of a Select Committee, together with the Bill as settled by them, was presented to the Council of the Governor General of India for the purpose of making Laws and Regulations on the 19th of February, 1879 :—

We, the undersigned Members of the Select Committee to which the Bill to define and amend the law relating to the Transfer of Property was referred, have considered the Bill and the papers noted in the margin, and have the honour to present this further report.

From Secretary to Chief Commissioner, Assam, No. 532, dated 16th March, 1878.
,, Acting Under Secretary to Government, Bombay, No. 3583, dated 18th June 1878, and enclosures.
Extract from a Memorandum by Pandit Srikishen, Pleader, Judicial Commissioner's Court, Oudh.
Third Note by the Hon'ble Whitley Stokes, dated 20th July, 1878.
From Secretary to Chief Commissioner, Mysore, No. 2705-3 J, dated 9th July 1878, and enclosure.
,, Officiating Secretary to Chief Commissioner, Central Provinces, No. 3519-168, dated 24th August, 1878, and enclosure.
,, Officiating Under Secretary to Government, Bengal, No. 3678, dated 6th September, 1878, and enclosures.
,, Secretary to Government, North-Western Provinces and Oudh, No. 687A, dated 11th September 1878.
,, Junior Secretary to Chief Commissioner, British Burma, No. 1438-64, dated 28th September, 1878, and enclosures.
,, Secretary to Government, North-Western Provinces and Oudh, No. 721 A, dated 8th October, 1878, and enclosure.
,, Hon'ble H. S. Cunningham, dated 5th November, 1878, and enclosure.
,, Secretary to Government, Punjáb, No. 3925, dated 21st November, 1878, and enclosures.
Endorsement by Government of Bengal, No. 4556, dated 29th November, 1878, and enclosures.
Fourth Note by the Hon'ble Whitley Stokes, dated 9th January, 1879.
Forms of instruments taken from a Bengâli book of forms received from Mr. O'Kinealy.

2. The principal objections taken to this Bill in its second form are, first, that, as a whole, it is heterogeneous, and, secondly, that certain parts of it are neither necessary nor expedient. It is said, for instance, that though the bulk of the Bill deals with transfer of property *inter vivos* by act of parties, it also treats, in sections 82, 83, of conditions in Wills, and, in section 129, of Succession to a deceased person. It is said, again, that the chapters dealing respectively with the rights and liabilities of owners of limited interests and with property held by several persons, belong rather to the subject of the enjoyment, than to that of the transfer, of property. It is urged that settlements (in the conveyancer's sense of the word) are hardly ever made in India, that what are technically called Powers are almost unknown, and that the chapters respectively dealing with those subjects are certainly not necessary and can hardly be said to be expedient. We feel the force of these objections. In fact, we have always felt them. But we were not responsible for the first draft of the Bill, whatever were its excellences or defects. The matters thus objected to, together with others, such as Registration and Trusts, still more foreign to the proper subject of the Bill, are all dealt with by the draft prepared by the late Indian Law Commission, which was

sent out in 1870 by the then Secretary of State with instructions to introduce a Bill founded upon it, revised by Sir A. Hobhouse and sent home by the Government of India in January, 1877, *i. e.*, nearly six months before the Bill was introduced and referred to a Select Committee. The great deference due to the Law Commission and to Sir A. Hobhouse has hitherto prevented us from dealing freely with the Bill. Until the opinions of the Local Governments and the results of local experience had been obtained, for us to have altered it would have been to set our individual views against those of the able and learned men who were answerable for the Bill as introduced. But now that the opinions and results above referred to have been obtained, we see that, if the Bill is to go on at all, it must be strictly confined to the subject of transfer of property by act of parties, that is to say, by contract or gift.

3. We have therefore omitted chapters VII to XII, both inclusive.

4. We cannot maintain that they are in accordance with one of the canons laid down in our last report, namely, that no additions should be made to the existing law "which are not either necessary or clearly expedient." The chapters dealing respectively with settlements, the rights and liabilities of owners of limited interests, and property held by several persons, are, moreover, very incomplete; and, as Natives are excluded from chapter IX, it would apply to a very limited class of persons. Chapter XI (of Powers) would also be of little use. We believe that among Natives powers are almost unknown. So far as we are aware, the only reported cases in which anything like a power was given by a Native are in 2 Calc. 474, and N.-W. P. (1869) Part II, p. 6, in each of which cases a Hindú bequeathed land to his wife and expressly empowered her to alienate it, and in 5 Beng. 181, where a Hindú testator empowered his sister to appoint a trustee of a religious endowment. Moreover, powers may be created by will, and are, as often as not, exerciseable by will. The subject therefore does not properly fall within a measure treating of the *transfer* of property, that is, as lawyers generally understand the expression, the conveyance of property from one living person to another.

5. As the Bill is, so far as it deals with immoveable property and debts, only a partial measure, we have made the preamble run thus :—"Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties." Compare the preamble to the Indian Contract Act, IX of 1872.

Chapter I.—*Preliminary.*

6. In section 2 we have expressly saved all transfers by operation of law (*e. g.*, in case of insolvency, forfeiture, sale in execution of a decree), with which the Bill is not intended to deal.

7. In section 3 we have omitted, as unnecessary, the definitions of "grantor," "grantee," and "grant;" and, for the last paragraph, we have said : "Chapters III, IV, V and VI of this Act shall be taken as part of the Indian Contract Act, 1872."

Chapter II.—*Of Assurances of Immoveable Property.*

8. This chapter should, we think, be entitled "Of Transfers of Immoveable Property," as it relates to all transfers of such property, whether or not an assurance is employed. We have omitted section 5 and the schedule to which it relates : they do not fitly form part of a Bill dealing with substantive law. Moreover, English experience shews that statutory forms of conveyances are rarely used, and they are dangerous, as tempting unskilled persons to try and be their own conveyancers.

9. Section 6 applies to transfers of immoveable property made by assurance; but it obviously ought to apply also to oral transfers of such property. We have therefore re-drawn it.

10. In section 7 we have provided for the case of a Sebáit, which has twice come before the Judicial Committee. (See 14 Beng. 450, and I. L. R. 2. Calc. 341).

11. As rents and profits of land are 'immoveable property,' we have, after this section, inserted section 1 of Act XI of 1855 :—

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

This section now applies only to cases to which the English law is applicable; but there seems no reason why so equitable and useful a rule should not be extended to every one in India.

12. Section 8 of Bill No. III applies not only to cases where land has passed *inter vivos* by act of parties, but also to cases in which it has been transferred by operation of law. It therefore seems beyond the scope of the Bill.

13. The Bill is silent as to the doctrine of *lis pendens*, which has in about a dozen reported cases been applied to Native purchasers and mortgagees (see 11 Bom. 24, 29, 30, 139; 8 Beng. 474; 1 O'Kin. 303, 309; 10 W. R. 469; Sev. 808, 951). We have inserted the following :—

"10. During the active prosecution in any Court having authority in British India or established beyond the limits of British India by the Governor General in Council, of a suit in which the right to any immoveable property is directly and specifically in question, the property cannot be transferred by any party to the suit so as to affect the rights of any other party thereto under any decree or order made therein."

14. Section 9 of Bill No. III (as to the effect of payment by one person, of consideration for which a transfer is made to another) properly belongs to the Trusts Bill, and should, we think, be omitted from the present measure.

CHAPTER III.—*Sales of Immoveable Property.*

15. In accordance with a suggestion of Mr. Justice Cunningham we have prefixed to this chapter a section founded on section 78 of the Contract Act; but we do not think with him that the section should provide for part delivery, an expression which, in the sense in which it is used in the Contract Act, section 92, would be inappropriate as applied to land, nor do we consider that, in stating the time at which delivery takes place, the effect of executing and delivering the assurance should be ignored.

The section referred to is as follows :—

Sale how effected.

"Sale of immoveable property is effected by offer and acceptance of certain immoveable property for a price, or of a price for certain immoveable property.

"together with payment of the price and delivery of the property, or with tender, part-payment or earnest; or with an agreement, express or implied, that the payment, or delivery, or both, shall be postponed.

"Where there is a contract for the sale of immoveable property, the ownership of the property passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the property is delivered.

"If the parties agree, expressly or by implication, that the payment, or delivery, or both, shall be postponed, the ownership passes as soon as the proposal for sale is accepted.

"Delivery of immoveable property takes places—

"(*a*) if the transfer is made by assurance—when the assurance is executed and delivered by the seller, and (if its registration is required by law) registered :

"(*b*) if the transfer is not made by assurance, in the case of a reversion or other intangible thing—when the parties consent to its delivery, and in the case of other immoveable property—when the buyer becomes capable of exercising physical control over it and determines to exercise such control on his own behalf or on behalf of the person whom he represents."

This will have the effect of settling a moot point of Hindú law, namely, whether change of possession is necessary to complete a sale of land; whether, in other words, the vendor must, at the time of sale, be in possession of the property sold (I. L. R. 1 Calc. 302 : I. L. R. 1 Bomb. 502 : N.-W. P. 1871, p. 2 : *contra* 7 Bomb. A. C. J. 4 : 10 Bomb. 491). This question is answered in the negative by the Calcutta High Court and Mr. J. D. Mayne, a considerable authority on Hindú law.

16. We have omitted clauses (*d*) and (*i*) of section 11 (now 12). The former is, as Mr. Jacob points out, provided for by the Contract Act, section 39; the latter by section 10 of the same Act. On the other hand, we have restored clauses (*e*) and (*f*) of Bill No. I modified as follows :—

"Till the ownership of the property passes to the buyer, the seller is entitled to the rents and profits thereof.

"When the ownership of the property has passed to the buyer, he must bear any loss arising from the destruction, injury or deterioration of the property not caused by the seller, and he is entitled to the benefit of any improvement in, or increase in value of, the property and to the rents and profits thereof."

The latter clause corresponds with the provision of the Contract Act, section 86, as to goods.

17. We have recast and abridged section 10 (now 13) as follows :—

Disclosures required from seller and buyer.

"The following omissions are fraudulent :—

"(*a*) an omission of the seller of immoveable property to disclose to the buyer any defect therein of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover :

"(*b*) an omission of the buyer of immoveable property to disclose to the seller any fact as to the nature or extent of the seller's interest therein, of which the buyer is, and the seller is not, aware, and which increases the value of such interest."

This will attract section 17, clause (5), of the Contract Act, which declares that "fraud" includes "any such omission as the law specially declares to be fraudulent."

18. As the Bill is now strictly limited to transfers by act of parties, we have omitted section 13, as to the procedure where the buyer becomes insolvent before completion. For the same reason we have also omitted section 73, as to the procedure where, during the continuance of a lease, the lessee becomes insolvent.

19. Section 17 (now 18), as to joint purchases. We have added, as Mr. Field suggests : "In the absence of evidence as to the shares so advanced, such persons shall be presumed to be equally interested in the property."

CHAPTER IV.—*Of Exchanges.*

20. As this chapter deals with moveable as well as immoveable property, we have placed it after the chapter on leases, and we have omitted the first paragraph of section 22, as the matter seems sufficiently provided for by Act IX of 1872, sections 64, 65, and Act I of 1867, sections 25, 37.

CHAPTER V.—*Of Mortgages of Immoveable Property.*

21. Section 27.—We fear that the abolition of equitable mortgages here proposed by the Law Commissioners would inconvenience the mercantile community. We have thought it better to say that a mortgage by deposit of title-deeds shall be deemed to create a charge on the property comprised therein and to insert the necessary clause in section 68 (now 63).

22. We have provided, in accordance with a suggestion of Mr. Field, that in the case of an usufructuary mortgage, the mortgagor may recover possession of the property, (1) where the mortgagee is authorized to pay himself from the rents and profits of the property the principal and interest of the mortgage-money—when such principal and interest are so paid; (2) where the mortgagee is authorized to pay himself from such rents and profits the interest of the mortgage-money—when the term (if any) of the mortgage expires and the mortgagor pays or tenders to the mortgagee, or deposits in such Court as last aforesaid, the principal of the mortgage-money."

23. Section 29 (now 24).—We have here declared the duty of a mortgagor to take all legal means to protect his rights in the mortgaged property (Macph. 112).

24. Section 31 (now 27).—This provided only for voluntary waste. We have now provided that the mortgagor is not liable for permissive waste.

25. Section 42 (now 39), clause (*c*).—We have added, in order to meet the case of patní tenures and saleable under-tenures, "and any arrears of rent in default of payment of which the property may be summarily sold."

We have provided that a mortgagee in possession ought to do such repairs as he can pay for out of the rents received after his interest is paid (see 9 W. R. 488).

We have omitted clause (*e*). The right which it gives is, as Mr. Field says, part of the mortgagee's right to take possession, which, as a general rule, finds no place in the Bill.

Where sufficient tender is made, the mortgagee in possession is thenceforth accountable for all his receipts from the mortgaged property (N.-W. P. 1: Macph. 159—160). We have provided for this.

26. Section 60 (now 57).—When a mortgagor obtains a decree in a redemption-suit and fails to pay the amount due, we think the mortgagee should be entitled either to a foreclosure or a sale. We have altered this section accordingly.

27. Section 61 (now 58).—We have omitted the second paragraph and the schedule to which it refers. It is hardly the function of a Bill codifying substantive law to give forms of decrees. They should, if necessary, be added to schedule IV of the Code of Civil Procedure.

CHAPTER VI.—*Of Leases.*

28. Section 70 (now 66).—We have substituted a section analogous to that above proposed as a substitute for section 10.

29. Section 71 (now 65).—We have struck out clauses (*c*) and (*g*). The former is superfluous; the latter is provided for by the Contract Act, sections 64 and 73.

Clause (*l*) now (*j*).—With reference to Couch, C. J.'s, decision in *Koegler* v. *Yule*, 5 Beng. 401, 416, we think this clause should run thus: "The lessee may use the property leased and its products (if any) as a reasonable owner would use them, but he must not use the property for a purpose other than that for which it was leased, or fell timber, open mines or quarries, or commit any other act which is destructive or permanently injurious thereto." We have added "The prohibition in this clause does not apply to mines which were open when the lease was granted."—See 8 Chan. Div. 526.

Clause (*q*) now (*o*).—We have inserted words in the proviso to show that the lessor's transferee is not entitled to arrears of rent due before the transfer.

Clause (*r*) now (*p*).—We have made (in accordance with a suggestion of the Government of the North-Western Provinces) the second paragraph to run thus: "Nothing in this clause shall be deemed to authorize a tenant having a right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, and the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee."

30. Section 76 (now 70).—We have completed the list of events on which a lease determines.

31. We have redrawn the clause as to waiver of forfeiture and notice. It is now numbered 71, 72.

32. We have inserted a section (74) as to the effect of surrender and forfeiture of a lease, on sub-lessees.

33. We have made some other comparatively unimportant omissions, additions and alterations in wording and arrangement. We have added on the margins references to the reported decisions of the Indian Courts and the Judicial Committee, which justify the rules contained in the Bill. It will be seen that but few of these rules are devoid of this valuable support. The assertion that the Bill would introduce a mass of new law into India must therefore be due to ignorance of the extent to which English law (under the name of justice, equity and good conscience) is actually administered to the Natives by the Anglo-Indian Courts. The object of the Bill, like that of all our Codes, is to strip our own law of all that is local and historical, and to mould the residue into a shape in which it would be suitable for an Indian population and could be easily administered by non-professional Judges. But the Bill will introduce hardly any new substantive law, and it will not (except in the case of the procedure relating to mortgages) displace any existing enactment. The rules, for instance, as to the relation of landlord and tenant contained in the local Acts, X of 1859, XVIII of 1873, XIX of 1868, XXVIII of 1868, Bengal Act VIII of 1869, and Madras Act VIII of 1865, will all remain untouched.

34. To the body of local usages and contractual incidents which in India, as in other countries, exists as to the transfer of land the tenderest care is shown by the Bill. Not only is local usage expressly saved in sections 62,65 and 68, but the effect of section 1, clause (*a*), will be to maintain intact the statutory force which the legislature has given to local usage in those two *pays de coutumes* the Panjáb and Oudh; and throughout India all the many incidents of a mortgage or a lease, which are not inconsistent with the provisions of the Bill, will remain wholly unaffected.

35. The Bill and preliminary report of the Select Committee have been published in English in the Presidency-towns, the Panjáb, the Central Provinces and British Burma. From the North-Western Provinces no report of publication has been received. Publication of the Bill and Report in the vernacular has been reported only by the Government of Bengal. We recommend that the Bill as now altered be published in the *Gazette of India* and sent to the various Local Governments for opinion. And we think that no further steps should be taken upon the Bill until it has been reported on by the new Indian Law Commission.

WHITLEY STOKES.
F. R. COCKERELL.

CALCUTTA;
The 19th February 1879.

I concur in all the omissions and amendments made by the Committee and in their final recommendation; but I believe the Bill to be capable of further simplification, and regret to notice the almost entire absence of illustrations.

T. H. THORNTON.

I have not had time to consider either the provisions of the Bill or the changes now made thoroughly; but I agree that the chapters on Powers, Settlements, &c., should be omitted, and think these omissions necessitate republication with a view to elicit fresh criticism to be laid before the new Commission.

I would modify the new section 10 by requiring a written instrument in all cases where the value of the property sold is Rs. 100 or upwards. This will involve registration and get rid of the inconvenience and anomaly which would arise from oral sales of valuable land with deferred possession and no registration. Subject to the above remarks, I approve of the additions now made to the Bill.

G. H. P. EVANS.

I concur in all the omissions, and agree that there should be a further publication.

G. C. PAUL.

I am opposed to the republication of this Bill at the present time. I believe that there is a great deal still left in the Bill which it will be desirable to omit, as relating to matters on which legislation is not called for; and I think that there should be no further publication until the Law Commission have reported on the measure.

A. J. ARBUTHNOT.

I am inclined to think that there can be no harm in republishing the Bill in its present form (though I must say that I believe it admits of further improvement), inasmuch as the republication will elicit public criticisms which may be of some use to the Law Commission.

JOTINDRA MOHAN TAGORE.

No. III.

THE TRANSFER OF PROPERTY BILL, 1879.

CONTENTS.

No. III.

A Bill to amend the law relating to the Transfer of Property by act of Parties.

Preamble.

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

CHAPTER I.

PRELIMINARY.

ll s. 1 : ll II, s. 1.

Short title.

1. This Act may be called "The Transfer of Property Act, 1879:"

Extent.

It extends to the whole of British India;

Commencement.

And it shall come into force on the first day of *January* 1880.

ll. s. 2 : l II, s. 1.

Repeal of Acts.

2. On and from that day the enactments specified in the schedule hereto annexed shall be repealed to the extent mentioned in the third column thereof. But nothing herein contained shall be deemed to affect—

t IX of 1872, s. 1.

Saving of certain Acts, incidents, rights, liabilities, &c.

(*a*) the provisions of any enactment not hereby expressly repealed:

(*b*) any incidents of any contract which are not inconsistent with the provisions of this Act:

(*c*) any right or liability acquired or incurred before this Act comes into force, or any remedy in respect of any such right or liability:

(*d*) the right to anything affixed to the soil by the lessee under any lease granted before this Act comes into force:

eng. A.C. 219.

(*e*) any right of pre-emption acquired after this Act comes into force:

. R., 2 Bom. 541.

(*f*) any transfer by operation of law.

Interpretation-clause.

Bill s. 3 : Bill II, s. 1 : Report, s. 2 :

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

"assurance."

Act III of 1877, s. 17, cl. (*b*).

"assurance" means any non-testamentary instrument which purports or operates to create, transfer, or otherwise dispose of, whether in present or in future, any right, title or interest, whether vested or contingent, to or in immoveable property:

"registered."

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

"attached to the earth."

"attached to the earth" means—

(*a*) imbedded in the earth, as in the case of walls:

See ss. 18, 44, clause (*s*), 61.

(*b*) permanently resting upon it, as in the case of buildings; or

(*c*) attached to what is so imbedded or so rests, as by means of nails, bolts, screws, cement, solder or other permanent fastening.

Chapters III, IV, V and VI to be part of Act IX of 1872.

4. Chapters III, IV, V and VI of this Act shall be construed as one with the Indian Contract Act, 1872.

CHAPTER II.

OF TRANSFERS OF IMMOVEABLE PROPERTY.

Persons competent to make transfers of immoveable property.

Bill, s. 4 : Report, s. 4.

5. Every person competent to contract may make a transfer of immoveable property: but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such property.

Operation of transfer.

Bill, s. 10 : Report. s. 10. v. last clause, Report s. 6 : 2 W. R. 125 (buildings) : 14 W. R. 379.

6. Unless a different intention is expressed or necessarily implied, a transfer of immoveable property vests in the transferee all the interest which the transferor is then capable of passing therein and in the legal incidents thereof.

N.-W.P. 1870, p. 251: 24 W. R. 330 (trees 'everything grown on it,' Morley, N. S. 259.

Such incidents include (where the property is land) the easements annexed thereto, the mines and minerals thereunder and the standing trees, and all other products of the soil,

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

and (where the property is a house) the easements annexed thereto and its locks, keys, bars, doors, windows, pankhas, half-doors, mats and blinds.

9 Moo. I. A. 303.

Title which transferor of immoveable property can give.

7. The transferor of immoveable property cannot give to another a title thereto better than his own, and where he has only a restricted power of alienating the property, he cannot give to another a title thereto valid as against third parties, except upon an alienation within the restriction:

6 Moo. I. A. 393: 2 W. R. 123: 3 W. R. 11: 8 W. R. 77: 1 Bom. 27: 8 Bom. 77: 9 Bom. 116: 12 Bom. 69: 14 Beng. 450: I. L. R. 2 Calc. 341, 438. 2 Mad. 407: 3 Mad. 294: 6 Mad. 371.

Protection to innocent transferees for value.

Provided that where the transferor is (*a*) the manager of the property of a minor, an undivided family, or an endowed temple, (*b*) a sonless Hindu widow in possession of her deceased husband's property, or (*c*) a trustee, benámídár or other ostensible owner, the transferee's title shall not be impeached if the transfer has been made for a consideration and the transferee has acted in good faith and used due care and diligence to ascertain that the transferor had power to make the transfer.

Act XI of 1855, s. 1.

Rent bonâ fide paid to holder under defective title.

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

11 Bom. 72, 76: 12 Bom. 138: 8 Mad. 12: 21 W. R. P. C. 237.

Transfer of share of undivided property.

9. Where undivided immoveable property is held in possession by co-owners and one of them transfers his share or any interest therein, the transferee takes the share or interest subject to the right of the other co-owners to enforce a partition of the property; and when such partition is effected, the right of the transferee as such, in the absence of a contract to the contrary by the co-owners, extends only to the share allotted to himself or to his transferor.

8 Beng. 478: 7 Mad. 111: 11 Bom. 24, 64, 139: N.-W.P. 1867, p. 301: 10 W. R. 469: 7 W. R. 225: 15 W. R. 372: 23 W. R. 382: 2 Tayl. & Bell, 113: 1 O'Kin. 303, 309: 5 W. R. P. C. 63: 8 Bom. A. C. J. 61. Consider *Berry* v. *Gibbons*, L. R. 8 Ch. 747.

Transfer of property pending suit relating thereto.

10. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor General in Council, of a suit in which the right to any immoveable property is directly and specifically in question, the property cannot be transferred by any party to the suit so as to affect the rights of any other party thereto under any decree or order therein.

CHAPTER III.

Of Sales of Immoveable Property.

Sale how effected.

11. Sale of immoveable property is effected by offer and acceptance of certain immoveable property for a price, or of a price for certain immoveable property,

Delivery not necessary in case of Hinúds, 14 Beng. 307: 1 Bom. 5, 19. Effect of part-payment, N.-W.P. 1866, p. 161: 15 W. R. 44: in Muhammadan law: Effect of earnest, W. R. 1864. 281: 1 Bom. 403. Cf. Act IX of 1872, s. 78, as to goods: postponement of payment, W. R. 317. Effect of delivery before payment, 10 W. R. 194.

together with payment of the price and delivery of the property, or with tender, part-payment or earnest; or with an agreement, express or implied, that the payment, or delivery, or both, shall be postponed.

Where there is a contract for the sale of immoveable property, the ownership of the property passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the property is delivered.

If the parties agree, expressly or by implication, that the payment, or delivery, or both, shall be postponed, the ownership passes as soon as the proposal for sale is accepted.

Delivery of immoveable property takes place—

(*a*) if the transfer is made by assurance—when the assurance is executed and delivered by the seller, and (if its registration is required by law) registered;

14 Beng. 307, 312: N.-W.P. 1866, p. 87 Consider 12 W. R. P. C. 6: as to delivery of assurance, W. R. 1864, p. 222: 5 W. R. 248: Morley N. S. 358.

(*b*) if the transfer is not made by assurance, in the case of a reversion or other intangible thing—when the parties consent to the delivery, and in the case of other immoveable property—when the buyer becomes capable of exercising physical control over it and determines to exercise such control on his own behalf or on behalf of the person whom he represents.

Right to redeem, N.-W.P. 1868, p. 376.

Rights and liabilities of buyer and seller.

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

Bill, s. 11: Bill II, s. 11: Report, s. 14.

(*a*). The seller must produce to the buyer, for examination, all documents of title relating to the property which are in his possession or power, and must inform the buyer of all facts not apparent thereon of which the seller is aware and which affect the seller's power to fulfil his contract, and must answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto.

Devsí Gheld v. *Jivaraj Mukundás*, 2 Bom. 432 (no right to have good title shewn). Abstract of title, 1 Bom. 78.

(*b*). Till the ownership of the property passes to the buyer, the seller is entitled to the rents and profits thereof.

Bill, 11 (*c*).

(*c*). When the ownership of the property has passed to the buyer, he must bear any loss arising from the destruction, injury or decrease in value of the property not caused

Cf. Act IX of 1872, s. 86. Bill, 11 (*f*).

by the seller, and he is entitled to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof.

3 Bom. A. C. J. 102: 2 Hay 577.

(*d*). When the buyer has been let into possession of the property before payment of the whole of the purchase-money, the seller has a charge upon the property for the amount of the purchase-money, or any part thereof, remaining unpaid, and for interest on such amount or part; but as soon as the assurance, if any, is registered, such charge shall cease except as against the buyer.

(*e*). Unless the buyer has improperly declined to accept delivery of the property, he has, against the seller, a charge on the property, to the extent of the seller's interest therein, for the amount of any purchase-money property paid by the buyer in anticipation of the delivery, and for interest on the amount of such payment; and, when the buyer properly declines to accept the delivery, also for the earnest (if any) and for his costs (if any) of a suit by himself or the seller to compel specific performance of the contract or to obtain a decree for its rescission.

3 Beng. O. C. J. 79.

(*f*). When the buyer has been let into beneficial possession of the property before payment of the price, and the price is not paid owing to defects in the seller's title, the buyer is not liable to pay for such possession.

(*g*). The seller must discharge all incumbrances on the property existing at the date of the contract. The buyer may retain, out of the unpaid purchase-money, the amount of such incumbrances, and shall pay the amount so retained to the parties entitled thereto.

(*h*). On payment or tender of the amount due in respect of the price, the seller is bound to execute a proper assurance of the property when the buyer tenders it to him for execution at a proper time and place.

(*i*). On delivery of the property, the buyer is entitled to all documents of title relating thereto which are in the seller's possession or power:

Provided that (1) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (2) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (1) the seller, and in case (2) the buyer, of the lot of greatest value is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, or by any person claiming under him, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof as he may require; and, in the meantime, the seller or the buyer, as the case may be, of the lot of greatest value, must keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(*j*). Unless the sale is made by a person in a fiduciary character, the seller shall be deemed to contract with the buyer,

Bill, s. 41 (1) altered. N.-W. P. 1867, p. 199: See 7 W. R. 196: 6 W. R. 152: 25 W. R. 46.

first, that notwithstanding anything done by the seller or any person through whom he claims, the seller has power to transfer the property to the buyer, free from incumbrances;

secondly, that the seller and all persons claiming any interest in the same through or for him, or any person through whom he claims, will on demand execute and deliver to the buyer at his expense any further assurance of the same that may reasonably be required;

and, where the property is leasehold, *thirdly*, that the lease is valid and subsisting and that the rent reserved thereby, the conditions contained therein and the contracts binding on the lessee have been paid, performed and observed down to the delivery.

further assurance, 5 W. R. P. C. 111.

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

Disclosures required from seller and buyer.

13. The following omissions are fraudulent:— Bill II, s. 10

(*a*) an omission of the seller of immoveable property to disclose to the buyer any defect therein of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover:

7 W. R., 258. Cf. Act IX of 1872, ss. 17, clause (5), 19.

(*b*) an omission of the buyer of immoveable property to disclose to the seller any fact as to the nature or extent of the seller's interest therein, of which the buyer is, and the seller is not, aware, and which increases the value of such interest.

Contract for sale not of itself to create interest in property.

14. A contract for, or relating to, the sale of immoveable property, shall not of itself have the effect of creating any interest in, or charge on, such property; but the only right of any person under the contract shall be to apply for specific performance, or for compensation, or for both, according to the rules laid down in the Indian Contract Act, 1872, and the Specific Relief Act, 1877.

Bill, s. 12 Bill II, s. 12: Report, s. 15: 7 W. R. 38.

Liability of buyer of leasehold.

15. As between the seller and buyer of leasehold property, the buyer is, in the absence of a contract to the contrary, bound to pay the rent reserved by the lease and accruing due after delivery of the property, to perform the contracts entered into by the lessee, and to indemnify the seller against all claims arising after the delivery in respect of non-payment of such rent or breach or non-observance of such contracts.

Bill II, s. 14

Liability of buyer of right to redeem.

16. As between the seller and buyer of a right to redeem mortgaged property, the buyer is, in the absence

Bill II, s. 15

of a contract to the contrary, bound (*a*) to pay to the mortgagee the principal sum which, on delivery of the right, is due on the mortgage, and all interest from time to time due for the same, when payment thereof, respectively, is lawfully demanded, and (*b*) to indemnify the seller against the payment thereof, and against all claims for non-payment thereof, respectively.

Bill II, s. 16

Money received by seller under fire-policy.

17. If at the date of the contract the property is insured against loss or damage by fire, the buyer, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the seller actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Bill II, s. 17.

Joint purchases.

18. When two or more persons purchase any immoveable property, with separate funds belonging to them respectively, they shall, in the absence of a contract to the contrary, be interested in such property in proportion to the shares of the purchase-money which they respectively advanced.

In the absence of evidence as to the shares so advanced, such persons shall be presumed to be equally interested in the property.

Bill II, s. 18: 7 W. R. 483.

Right of buyer of one of two properties subject to common charge.

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

Bill II, s. 19: 2 Hay 549: 1 W. R. 14: XXXI of 1854, s. 17: XXVIII of 1860, s. 31.

Boná fide buyer not bound to see to application of purchase-money.

20. When any property is sold, the proceeds of which are subject to any trust, the buyer in good faith of the property is not bound to see to the application of the purchase-money to the purposes of the trust, nor is he answerable for the misapplication of such money.

CHAPTER IV.

OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

Bill II, s. 25: Bill, s. 14: Act XXVIII of 1866, s. 19: Mortgagor need not have present ownership. N.-W. P. 1872, p. 11. Macph. 4. Fulton 36. Purchaser of right of redemption, 11 Bom. 41.

Mortgage, mortgagor and mortgagee defined.

21. When, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, or the performance of an engagement, one person transfers to another a right over specific immoveable property, the transfer is called a mortgage of immoveable property, the transferor is called a mortgagor, the transferee a mortgagee, the money of which payment is secured is called the mortgage-money, and the assurance by which the transfer is effected is called a mortgage-deed.

For the purposes of this chapter, any person entitled as heir, legatee, assignee, lessee or otherwise than as a mortgagee to the interest of the transferor in the property subject to the mortgage, or any part of such interest, is a mortgagor; and any person entitled as heir, legatee, assignee or otherwise to the interest of the transferee under the mortgage, or any part thereof, is a mortgagee.

English mortgage.

Where the mortgagor transfers the property to the mortgagee with a proviso that, upon payment of the mortgage-money at a certain date, the property shall be retransferred, the transaction is called a mortgage in the English form. 5 Beng. 393. 5 W. R. 230.

Usufructuary mortgage.

Where the mortgagor delivers possession of the property to the mortgagee, and authorizes him to retain such possession and to pay himself from the rents and profits of the property the interest, or the mortgage-money and interest, or to take such rents and profits in lieu of interest, or of the mortgage-money and interest, the transaction is called an usufructuary mortgage. Macph. 12, 59: R. B. Ghose, 218, 219: 2 Moo. I. A. 487.

Simple mortgage.

Where the mortgagor binds himself personally to repay the mortgage-money, and pledges the property as collateral security for the repayment, but does not contract that, on default of payment of the mortgage-money and interest at a certain date, the property shall pass to the mortgagee, the transaction is called a simple mortgage. Macph. 10, 12.

Mortgage by conditional sale.

Where the mortgagor not so binding himself, contracts that, on default of payment of the mortgage-money and interest at a certain date, the property shall pass to the mortgagee, the transaction is called a mortgage by conditional sale. Macph. 11, 12.

Mortgage to be by assurance.

22. A mortgage can be effected only by assurance signed by the mortgagor and attested by at least two witnesses. Bill II, s. 26: See Macph. 53: R. B. Ghose 64.

Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem, tender or deposit.

23. A mortgagor has the following rights as against the mortgagee:— Bill II, s. 28: Bill, s. 15: 5 Beng, 450: 6 Beng. 562: 2 Mad. 420: 7 Mad. 395: In Cen. Provs. 13 Beng. 205.

(*a*) at any time after the mortgage-money has become payable, or has been paid, the mortgagor has a right on payment or tender, at a proper time and place, of the mortgage-money and interest remaining due on the mortgage, to require the mortgagee to re-transfer the mortgaged property to him, or to execute an acknowledgment in writing that any right in derogation of his ownership or other interest transferred to the mortgagee has been extinguished: N.-W. P. 1868, p. 204: Bomb. 237, no redemption before expiration of period named. Redemption after fixed time has expired, 9 Bomb. 69. see 7 Ben. 136 (P.C.). English practice followed, with necessary modifications, in case of defendant Pársi, 5 Bom. A. C. J. 109.

Provided that the mortgagee has not obtained an order absolute foreclosing such right, or that such right has not been after the date of the mortgage released or other- 6 Bom. A. C. J. 265: N.W. P. 1869, p. 128.

wise extinguished, or that the property has not been duly sold in pursuance of a decree or under a power given by the mortgage-deed.

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

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

(*b*) at any time after the mortgage-money has become payable and before such suit is barred, the mortgagor may deposit in any Court in which he might have instituted a suit for redemption of the mortgaged property, to the account of the mortgagee, the mortgage-money and interest remaining due on the mortgage :

(*c*) in the case of an usufructuary mortgage, he may recover possession of the property (1) where the mortgagee is authorized to pay himself from the rents and profits of the property the mortgage-money and interest thereof,—when such money and interest are so paid, (2) where the mortgagee is authorized to pay himself from such rents and profits the interest of the mortgage-money,—when the term (if any) of the mortgage expires and the mortgagor pays or tenders to the mortgagee the mortgage-money, or deposits it in such Court as last aforesaid.

N.-W. P. 1867, p. 88 : 20 W. R. 387 : 22 W. R. 262 : 24 W. R. 24 : N.-W. P. 1870, p. 4 : N.-W. P. 1872, p. 92: N.-W. P. 1873, p. 148 : R. B. Ghose 198 : 15 Beng. 303.

Redemption of portion of mortgaged property.

Nothing in this section shall be deemed to authorize a person interested in part only of the mortgaged property to institute a suit for the redemption of his own part only, on payment of a proportionate part of the amount remaining due on the mortgage, except where there is but one mortgagee and the mortgagor's interest in part of the property becomes vested in such mortgagee, in which case the person so interested may institute such suit.

Bill II, s. 29.
N.-W. P. 1867, p. 199.

Implied contracts by mortgagor.

24. In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,

first, that the mortgagor has power to grant the mortgaged property to the mortgagee, free from incumbrances ;

S. D. A. 1857, p. 1195 : 1853, p. 575.

secondly, that the mortgagor will take all legal means to protect his rights in the property :

thirdly, that the mortgagor and every person claiming any interest in the property will on demand (at the cost, until foreclosure or sale, of the mortgagor and afterwards of the person requiring the same) execute every such assurance of the same that may reasonably be required ;

Effect of forfeiture of lease, N.-W. P. 1869, p. 128.

and, where the property is leasehold, *fourthly*, that the lease is valid and subsisting, that the rent reserved thereby, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the execution of the mortgage-deed ; and that the mortgagor will, so long as the security exists, pay the rent reserved by the lease, perform the conditions contained therein and observe the contracts binding on the lessee and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts.

Accession to mortgaged property.

25. If after the date of the mortgage any accession is made to the mortgaged property, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, and subject to the law relating to alluvion for the time being in force, be entitled to such accession.

10 Bomb. 369 : 11 Bomb. 32.

Illustration.

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

10 Bomb. 369, 371, and see N.-W. P. 1866, p. 281.

Renewal of mortgaged lease.

26. Where the mortgaged property is a lease for a term of years, and the mortgagee, while in possession of the property, obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, have the benefit of the new lease.

Bill II, s. 30.

Waste by mortgagor in possession.

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

Bill II, s. 31.
Macph. 109.
R. B. Ghose 147.

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

Notice to mesne incumbrancers.

28. A mortgagor proposing to make a second or other subsequent mortgage of the mortgaged property shall, before effecting the mortgage, give the second or other subsequent mortgagee notice in writing under his hand of the prior mortgage or mortgages, and a mortgagor effecting a second or other subsequent mortgage of the mortgaged property shall, as soon as may be, give the prior mortgagee or mortgagees like notice of such mortgage.

Bill II, s. 32.
Contra, 12 W. R. 105.

A mortgagor failing to give any notice required by this section shall, when the accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure, in addition to any other liability resulting therefrom.

Right to redeem one of two properties separately mortgaged.

29. If the owner of two or more properties creates separate mortgages on them by separate assurances, each mortgage may be dealt with irrespectively of the other, though the mortgages are created in favour of the same mortgagee.

Bill II, s. 33 : Bill, s. 39 : *Contra*, 6 Bomb. A. C. J. 90. But see R. B. G. 330, 331.

Illustration.

A, the owner of farms Z and Y, mortgages Z to B for Rs. 1,000. A afterwards mortgages Y to B for Rs. 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

Rights and Liabilities of Mortgagee.

Bill II, s. 34 : 2 Mad. 289 : N.-W. P. 1870, p. 311 : No foreclosure before expiration of period named, 2 Bomb. 242 : Mortgagee's right to sale, 7 Bomb. A. C. J. 146 : 9 Bomb. 12.

Right to sue for foreclosure or sale.

30. In the absence of a contract to the contrary, the mortgagee may, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid, institute against the mortgagor (1) a suit for a declaration that he has lost his right to redeem the property, or (2) a suit for a sale of the property.

A suit for a declaration that a mortgagor has lost his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

Simple mortgagee, N.-W.P. 1869, P. 184 : Usufructuary, N-W. P. 1875, p 55.

(*a*) to anthorize a simple mortgagee to institute a suit for foreclosure, or an usufructuary mortgagee to institute a suit for foreclosure or sale, or a conditional mortgagee to institute a suit for sale;

(*b*) to authorize a mortgagor who has become a trustee of the mortgaged property or legal representative of the mortgagee, to institute a suit for foreclosure;

(*c*) to authorize the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

Cases *contra*, Macph. 195–6.

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property: but he may institute any suit which, under this Act, he is anthorized to institute, relating to the whole of the mortgaged property, making the other mortgagees, if they cannot or will not join as plaintiffs, defendants.

Bill II, s. 35 : Bill, s. 15, clause(*e*) Ben. Reg. 1 of 1798, s. 2. Macph. 171.

Right to money deposited by mortgagor.

31. When the mortgagor deposits money in Court under section twenty-three, and pays the fee leviable for the service next hereinafter mentioned, the Court shall forthwith cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on depositing the mortgage-deed in the same Court and on filing a written statement (verified in manner prescribed by law for the verification of plaints) of the amount then due on the mortgage, apply for and receive in payment of such amount the money so deposited.

Bill II, s. 36 : Bill s. 28, usufructuary mortgage, 16 W. R. 251.

Right to interest.

32. Where the mortgagor and mortgagee have contracted as to the payment of interest on the mortgage-money, interest shall be payable in accordance with such contract.

Where no such contract has been entered into, the mortgagee is entitled to interest on such money at the rate of six per cent. per annum :

9 N. W. P. 1. Macph. 159, 160.

Proviso.

Provided that, when the mortgagor has tendered or deposited in Court, under section twenty-three, the amount for the time being due on the mortgage, interest on the mortgage-money shall cease from the date of the tender or from the earliest time when the mortgagee could take such amount out of Court, as the case may be.

Bill II, s. 37 : 6 Bomb. 121 : Right to eject third persons wrongfully in possession, 9 Bomb. 275.

Bar of entry by mortgagee.

33. In the absence of a contract to the contrary, no mortgagee shall be entitled as such to take possession of the mortgaged property; but at any time after the expiration of one year from the time when the mortgage-money has become payable according to the terms of the mortgage-deed, or after any interest thereon has been in arrear for six months, he may institute a suit for the appointment of a receiver of the rents and profits of the whole or any part of the mortgaged property.

Right to receiver.

In any suit for foreclosure or sale, the Court may, if it think fit, appoint such a receiver pending the proceedings in the suit, unless the mortgagee is already in possession of the mortgaged property.

Right to sue for mortgage-money.

34. The mortgagee may sue the mortgagor for the mortgage-money in the following cases only :— Bill II, s. 38.

(*a*) where the mortgagor expressly binds himself to repay the same; 6 W.R. 283.

(*b*) where the mortgagor remains in possession of the mortgaged property and fails to pay arrears of revenue or rent due in respect thereof, and the property is consequently sold or attached; Macph. 233. Act XXXIII of 1871 s. 46.

(*c*) where the property is destroyed by diluvion, fire or other superior force; 7 Bomb. 116 : 21 W. R. 226.

(*d*) where the mortgagee is deprived of his security by the wrongful act or default of the mortgagor : 25 W. R. 7 (partial deprivation).

(*e*) in the case of an usufructuary mortgage, where the rents and profits of the property are to be taken in lieu of interest only, or where the mortgagor fails to deliver to the mortgagee possession of the property or to secure the possession thereof to him without disturbance by the mortgagor or any other person. 4 Moo. I. A. 464 : Marsh. 209. 7 S. D. A. 47 : N.-W. P. 1860, p. 280. So in the case of a Kánam mortgage, 2 Mad. 315.

Power of sale invalid.

35. A power conferred by the mortgage-deed on the mortgagee or on any person on his behalf, to sell or concur in selling the mortgaged property, or any part thereof, is invalid, except where the mortgagee is the Secretary of State for India in Council, or the mortgaged property is situate within the towns of Calcutta, Madras, Bombay, Karáchi or Rangoon.

Bill II, s. 391 Bill II, s. 24 : 8 Bomb. A. C. J. 142. 6 W. R. 283 (power to usufructuary mortgagee). Muhammadan law, Macph. 2.

Act No. XXVIII of 1866, section 6, is repealed so far as it is inconsistent with this section.

Bill II, s 40.

Right as to insurance-money.

36. If, at the date of the mortgage, the mortgaged property is insured against loss or damage by fire, the mortgagee, in case of such loss or damage, may, in the absence of an express contract to the contrary, require any money which the mortgagor actually receives under the policy, or so much thereof as may be necessary, to be laid out in reinstating the property.

Bill II, s. 41 : 11 B. ... 32.

Accession to mortgaged property.

37. If, after the date of the mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, and subject to the law relating to alluvion for the time being in force, shall, for the purposes of the security, be entitled to such accession.

Illustrations.

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

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

Renewal of mortgaged lease.

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

Bill II, s. 42 : Bill, s. 16.

Mortgagee in possession.

39. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he has the following rights and liabilities :—

2 Bomb. 222 : Act IX of 1872, s. 151.

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

N.-W. P. 1875, p. 100.

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

2 Bomb. 231.

Macph. 113, 119.

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

9 W. R. 488.

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

Macph. 109, 113, 252 : 1 Bomb. 199, 203 : 5 Bomb. A. C. J. 109, 116 : N.-W. P. 1867, p. 187 : 1 W. R. 133 : 11 Moo. I. A. 241.

(*e*) he may spend such money as is necessary (1) for the due management of the property and the collection of the rents and profits thereof, (2) for its preservation from destruction, forfeiture or sale, (3) for supporting the mortgagor's title to the property, (4) for making his own title thereto good against the mortgagor, and (5) when the mortgaged property is a renewable leasehold, for the renewal of the lease ; and may, in the absence of a contract to the contrary, add such money to the mortgage-money, at the same rate of interest ;

23 & 24 Vic., c. 145 s. 11.

(*f*) where the property is by its nature insurable at ordinary rates, he may, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and add the premiums paid for any such insurance to the mortgage-money at the same rate of interest; and, in case of such loss or damage, shall apply any money which he may actually receive under the policy, or so much thereof as may be necessary, in reinstating the property;

2 Beng. P. C. 55 : 5 W. R. 53, 271, &c.: Macph. 119.

(*g*) he shall keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

5 Bomb A.C.J. 196. 12 Bomb. 88 : 10 Beng. 386 : N.-W.P. 1856, p. 132: *ibid.* 1868, p. 153. when he cultivates, 7 W.R. 244; R. B. G. 262.

(*h*) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation rent in respect thereof, shall, after deducting the expenses mentioned in clauses (*c*), (*d*), (*e*) and (*f*), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money. The surplus, if any, shall be paid to the mortgagor ; 2 Moo. I. A. Ca. 1.

Macph. 159, 160.

(*i*) when the mortgagor tenders, or deposits in Court, under section twenty-three, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

Bill II, s. 62.

Loss occasioned by his default.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss, if any, occasioned by such failure.

Bill II, s. 43 : Bill, s. 17 : Sev. 333. See 10 Moo. I. A. 340.

Receipts in lieu of interest.

40. Nothing in section thirty-nine, clauses (*g*) and (*h*), applies to cases where there is a contract in writing between the mortgagee and the mortgagor that the receipts from the mortgaged property,

after deducting the said expenses, shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the mortgage-money.

Bill II, s. 44 : Bill, s. 18, altered : Macph. 118, 119. citing 7 N.-W. P, 436 : 9 N.-W. P. 1 : Act I of 1877, s. 54.

Waste by mortgagee.

41. A mortgagee in possession of the mortgaged property must not commit any act which is destructive or permanently injurious thereto.

Bill II, s. 45 : Macph. 113, 234 : I W. R. 270 : 16 W. R. 222.

Charge on proceeds of revenue-sale.

42. When a mortgagor in possession of the mortgaged property fails to pay arrears of revenue or rent due in respect thereof, and the property is consequently sold, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage.

Bill II, s. 49 : Bill, ss. 35, 36, 37 : Report, ss. 31, 33.

Right to pay off mortgagee in order to prevent sale.

43. Any second or other subsequent mortgagee may, at any time before a sale of the mortgaged property has taken place under this chapter, tender to the next prior mortgagee the amount due to him on account of his mortgage. Such mortgagee is bound to accept such tender and to give a receipt for the sum due, and on such receipt being registered, the person making the tender shall acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Priority.

Bill II, s. 46 : Evidence Act, s. 115 : N.-W.P, 1868, p. 402 : 4 Mad. 373 : 2 Moo. I. A. 487 : 11 W. R. 286 : Hindú mortgagee in possession preferred, 8 Bom. A.C.J. 50, 55. *Secus* in Guzerat, 11 Bom. 41.

Postponement of prior mortgagee.

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

Bill II, s. 47 : Bill, s. 34 : Report, s. 29.

Mortgage to secure balance of account

45. If a mortgage made to secure the balance of a running account expresses the maximum to be secured thereby, a subsequent mortgage on the same property, shall, if made with notice of the prior mortgage, or if the instrument effecting the prior mortgage is registered, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subseqeent mortgage.

Illustration.

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C to secure Rs. 10,000; and C gives notice thereof to B and Co. At the date of the second mortgage, the balance due to B & Co. does not exceed Rs. 5,000. B & Cc. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled, to the extent of Rs. 10,000, to priority over C.

Bill II, s. 48 : Bill, s. 38 : Report, s. 34 : 2 Beng. App. 45 : 5 Beng. 463 : 11 W. R. 310.

Tacking abolished.

46. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And except in the case provided for by section forty-five, no mortgagee making a subseqeunt advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Marshalling and Contribution.

Bill II, s. 50 : W. R. 1864 ... 374 : 1 W. R. 35 : 7 W. R. 483 : 12 W. R. 114 : Macph. 205.

Marshalling securities.

47. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgage is entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having an incumbrance on either property.

Macph. 136.

Bill II, s. 51 : 12 W. R. 291 : sec 22 W. R. 430.

Contribution to mortgage-debt.

48. Where several properties, whether of one or several owners, are mortgaged to secure one debt, the several properties shall contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject.

Where of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property shall contribute rateably to the latter debt, after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under section forty-seven to the claim of the second mortgagee.

Suits for Redemption, Foreclosure or Sale.

Bill II, sec. 52 : 14: Moo. I. A. 101 : 1 W. R. 176 : 21 W. R. 428 : explained by Macph. 146. Seton i. 442, see Act X of 1877, sec. 32. 5 Bomb. O. C. J. 76, (legal representative of deceased mortgagor) : 8 Beng. 104 (purchaser from mortgagor) : Marshall 292, claimants of right of redemption, N.-W. P. 1868, p. 144.

Parties to suits for redemption, foreclosure and sale.

49. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest either in the right of redemption or in the security ought to be joined as parties to any suit under this chapter, and the first or any subsequent mortgagee who institutes a suit for foreclosure or sale ought to make every mortgagee and other incumbrancer whose security is subsequent to his own, a party to the suit.

Foreclosure and Sale.

Bill II, sec. 53 : Bill, s. 19.

Decree in foreclosure-suit.

50. In a suit for foreclosure, if the plaintiff succeed, the Court shall pass a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the

mortgage and for his costs of the suit, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the mortgaged property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the mortgaged property; but

that, if such payment is not made on or before such day, the defendant shall be absolutely foreclosed of all right to redeem such property.

Bill II, sec. 54.

Procedure in case payment of amount due and subsequent costs.

51. If payment is so made of such amount and of such subsequent costs as are mentioned in section fifty-nine, the defendant shall (if necessary) be put into possession of the mortgaged property,

Order absolute for foreclosure.

If such payment is not so made, the plaintiff may apply to the Court for an order absolute for the foreclosure of the said mortgage, and the Court shall then pass an order absolute that the defendant be foreclosed of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the plaintiff; and thereupon the defendant's right to redeem and the security shall both be extinguished:

W. R. 91.

Power to enlarge time.

Provided that the Court may, upon good cause shown, from time to time postpone the day appointed for such payment.

In the Code of Civil Procedure, schedule IV, No. 129, for the words "Final Decree," the words "Order absolute" shall be substituted.

Bill II, s. 55.

Decree for sale.

52. In a suit for a sale under this chapter, if the plaintiff succeed, the Court shall, and in any other suit by the mortgagee under this chapter, if the plaintiff succeed, the Court may, at his instance, pass a decree, ordering as provided in the first and second paragraphs of section fifty and also ordering that, in default of the defendant making payment as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Power to decree sale at instance of mortgagee

Bill, s. 21: 15 & 16 Vic., c. 86, s. 48.

Power to decree sale in foreclosure-suit at instance of mortgagor.

When the mortgagee sues only for a foreclosure, if the Court considers that he will not be damnified by such sale and if the defendant furnishes such security, if any, as the Court thinks sufficient for the payment of the balance due for the time being by him on the mortgage, the Court may, at the instance of the defendant, pass a like decree.

Any decree under this section may also direct the defendant to pay any balance remaining due to the plaintiff upon the mortgage after the proceeds of sale have been dealt with as above provided.

Bill II, s. 56.

Procedure when defendant pays amount due and subsequent costs.

53. If in any case, under section fifty-two, the defendant makes payment as mentioned in section fifty-one, he shall (if necessary) be put in possession of the mortgaged property; but, if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section fifty-two; and thereupon the defendant's right to redeem and the security shall both be extinguished.

Order absolute for sale.

Bill II, sec, 57: Bill, s. 23.

Recovery of balance due on mortgage.

54. When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, the balance, if payable according to the contract between the parties by the defendant otherwise than out of the property sold, may be recovered either (if the Court thinks fit) in the same suit in the same manner as under a decree for money, or by any other legal process open to the mortgagee.

Redemption.

Bill II, s. 58.

Who may sue for redemption.

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

(a) any person (other than the mortgagee) having any interest in or charge upon the property;

3 W. R. 230: 6 W. R. 230, &c. But see 17 W. R. 272.

(b) any person having any interest in or charge upon the right to redeem the property;

(c) any surety for the payment of the mortgage-debt or any part thereof;

(d) the guardian of the property of a minor mortgagor;

(e) the committee or other legal curator of a lunatic or idiot mortgagor;

(*f*) the judgment-creditor of the mortgagor, when he has obtained execution;

(*g*) a creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

Bill II, s. 59: Bill, s. 25: See Code, C. P., section 461: N.-W.P. 1870, p. 207

Decree in redemption-suit.

56. In a suit for redemption, if the plaintiff succeed, the Court shall pass a decree

ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree; and

ordering that upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall (if such property has been transferred to the defendant) retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property; but

that if such payment is not made on or before such day, the plaintiff shall be absolutely foreclosed of all right to redeem such property.

Bill II, s. 60.

In case of redemption, possession:

57. If payment is made of such amount and of such subsequent costs as are mentioned in section fifty-nine, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

In default, foreclosure or sale.

If such payment is not so made, the defendant may apply to the Court for an order absolute either for the foreclosure of the said right to redeem, or for a sale of the mortgaged property.

If he apply for an order for foreclosure, the Court shall pass an order absolute ordering the plaintiff to be foreclosed of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he apply for an order for sale, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section the plaintiff's right to redeem and the security shall both be extinguished:

Power to enlarge time.

Provided that the Court may upon good cause shown, from time to time, postpone the day fixed under section fifty-six for payment of the amount due.

Redemption and Foreclosure.

Right of mesne mortgagee to redeem and foreclose.

58. When property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Bill II, s. 61: *Mulook Chund* v. *Aghooree*, 2 Sev. 573: *Sheopal* v. *Deen Dyal*, N.-W. P. 1873, p. 148: Macph. 139, 140.

Costs.

Costs of mortgagee subsequent to decree.

59. In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Bill II, s. 64: Bill, s. 30.

Sale of Property subject to prior mortgage.

Sale of property subject to prior mortgage.

60 If any property the sale of which is directed under this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Bill II, s. 65: Bill s. 32: Report, s. 25, altered: Act X of 1877, s. 295.

Application of proceeds.

61. Such proceeds shall be brought into Court and applied as follows:—

Bill II, s. 66: Bill, s. 33: See Act X of 1877, s. 295.

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

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

fifthly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Anomalous Martgages.

Mortgages not described in section 21.

62. In the case of a mortgage not coming within any of the definitions contained in section twenty-one, the rights and liabilities of the parties shall

Bombay Reg. 1827, s. 15.

be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage: Provided that, in the absence of an express contract to the contrary, the mortgaged property shall be deemed to be the only security for payment of the mortgage money.

Charges.

Bill II, s. 68: Bill, s. 41.

63. If by any assurance other than a mortgage-deed, or by any will, or under the provisions of this or any other Act, or by operation of law, certain immoveable property of one person is made security for the payment of certain money to another, the latter person is said to have a charge on the property; and all the provisions hereinbefore applied to a mortgagor shall, so far as may be, apply to the owner of such property, and all the provisions hereinbefore applied to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Charges.

3 Beng. Appendix 140: N.-W. P. 1869, p. 184: N.-W. P. 1871, p. 207.

The delivery by a debtor to the creditor or his agent, of documents of title relating to property, with intent to create a security thereon, shall be deemed to create a charge on such property in favour of the creditor for the amount of the debt.

Effect of deposit of title-deeds.

Bill, s. 31: Bill II, s. 27: 7 Beng. 653: 11 Beng. 405: N.-W. P. 1869, p. 74: 7 Bom. O. C. J. 45: I. L. R. I Bom. 237? 9 Moo. I. A. 303? Macph. 53, 54.

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

Bill II, s. 69: 7 Mad. 231: 14 W. R. 491: 3 O'Kin. 184: 5Beng. 463: 11 Bom. 41.

64. Where a person is or becomes absolutely entitled to immoveable property, of a charge or other incumbrance on which he is also the owner, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or unless such continuance would be for his benefit.

Extinguishment of charges.

CHAPTER V.

Of Leases of Immoveable Property.

Bill II, s. 71.

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

Rights and liabilities of lessor and lessee.

39 (2) altered: of IX of 1872, s. 93; 11 W. R. 278: 12 W. R. 149:

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

6 Beng. Appendix44, 39 (3): 15 W. R. 230: 23 W. R. 121.

(*b*.) The lessor shall be deemed to contract with the lessee that the latter paying the rent reserved by the lease and performing the contracts binding on the lessee may hold the property leased during the time limited by the lease without interruption by the lessor or his transferees, or any person lawfully claiming through him or them:

5 W. R. 314.

(*c*.) The lessee is entitled to the enjoyment of all easements annexed to the property leased at the time when the lease was made until the lease determines or such easements are extinguished, whichever event first happens:

(*d*.) The lessee is bound to keep, and on the termination of the lease to restore, the property leased in as good condition as it was in at the time when he was put in possession, subject only to reasonable wear and tear, and to allow the lessor and his agents, at all reasonable times during the term, to enter into the property leased and inspect the condition thereof, and to give or leave notice of any defect in such condition and to make good all such defects within three months after such notice has been given or left:

See 23 W. R. 34.

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

8 Beng. 73.

(*f*.) If by fire, tempest or flood, or violence of an army or of a mob, or other superior force, any part of the property leased be wholly destroyed or rendered substantially unfit for the purposes for which it was let, the lease shall be void as to that part, and any rent or fine payable under the lease shall proportionately abate, and a proportionate part of any fine paid by the lessee shall be returned by the lessor:

If the injury be occasioned by the wrongful act or default of either party, such party shall not be entitled to avail himself of the benefit of this provision:

(*g*.) If the lessor neglects to make, within a reasonable time after notice, repairs which he is bound to make to the property leased, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor:

(*h*.) If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property leased, the lessee may make such payment himself, and deduct it from his rent, or otherwise recover it from the lessor:

(*i*.) Every lessee who becomes aware of any proceeding to recover the property leased or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, is bound to give notice thereof to the lessor with reasonable diligence; and, in default of so doing, he is liable to make compensation to the lessor for any loss or expenses occasioned by such omission:

(*j*.) The lessee may use the property leased and its products (if any) as a reasonable owner would use them; but he must not use the property for a purpose other than that for which it was leased, or fell timber, pull down or damage houses, open mines or quarries, or commit any other act which is destructive or permanently injurious thereto.

5 Beng. 401, 416: 8 Beng. Appendix 70: 10 Beng. Appx. 41. sed. v. 5 S. D. A. 205. 15 W. R. 360: 17 W. R. 416: 23 W. R. 298: W. R. Sp. (1864) 36.

The prohibition in this clause does not apply to mines which were open when the lease was granted:

8 Beng. 242 : 14 & 15 Vic., c. 25, s. 3.

(*k.*) No lessee shall, without the lessor's consent, erect on the property leased any permanent structure, except for agricultural purposes; and no such lessee who erects thereon any building, engine or machinery for agricultural purposes shall remove the same without first giving to the lessor or his agent one month's previous notice in writing of his intention so to do, and thereupon the lessor or his agent may elect to purchase the thing so proposed to be removed, and the lessee's right to remove the same shall thereby cease, and the same shall belong to the lessor, and the value thereof shall in case of dispute be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the lessor:

Re Thakoor Chunder Paramanick, Beng. F.B. Rulings 595 : 8 Beng. 237 : 14 Beng. 201, 205.

(*l.*) Subject to the provisions of clause (*k*), the lessee has a right to remove, at any time during his possession of the property leased, all things which he has affixed to the soil: but he is liable to make compensation to the lessor for all damage caused to the property by such removal:

(*m.*) On the determination of the lease, the lessee is bound to put the lessor into possession of the property leased:

cf. Act XIX of 1868, s. 46. Act XVIII of 1873, s. 42.

(*n.*) When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property leased for the season current when the lease determines, and to free ingress and egress to reap and carry them:

14 W. R. 83 : 24 W. R. 68.

(*o.*) If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee shall possess all the rights and, if the lessee so elects, be subject to all the liabilities, of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him: Provided that the transferee is not entitled to arrears of rent due before the transfer, and that if the lessee pay rent to the lessor without having reason to believe that such transfer has been made, the lessee shall not be liable to pay such rent over again to the transferee:

Act XI of 1855, s. 1 : 4 Anne, c. 16, s. 10.

Where only a part of the property leased is transferred by the lessor, he may determine what proportion of the rent reserved by the lease is payable in respect of the part so transferred:

5 S. D. A. 205 : 5 Mad. 120, 227 : 7 Beng. 152 : N.-W. P. 1875, p. 181. 12 W. R. 451 : 16 W. R. 112 : 6 S. D. A. 67.

(*p.*) The lessee may transfer, absolutely or by way of mortgage, the whole or any part of his interest in the property leased, and any transferee of such interest or part may again transfer it. The lessee shall not by reason of such transfer, cease to be subject to any of the liabilities attaching to the lease, unless the lessor elects to treat the transferee as the person subject to such liabilities. Subject as aforesaid, each successive transferee, so long as he is entitled to the property leased, possesses all the rights, and is subject to all the liabilities, of the lessee as such.

15 W. R. 449.

Nothing in this section shall be deemed to authorize a tenant having a right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

8 Beng. 239 : 12 Beng. 82.

Disclosures required from lessor and lessee.

66. The following omissions are fraudulent:— Bill II, s. 70, altered.

(*a*) an omission of the lessor of immoveable property to disclose to the lessee any defect therein of which the former is, and the latter is not, aware, and which the latter could not with ordinary care discover; 3 Beng. A. C. J. 277.

(*b*) an omission of the lessee of immoveable property to disclose to the lessor any fact as to the nature or extent of the lessor's interest therein, of which the lessee is, and the lessor is not, aware, and which increases the value of such interest.

Lessee before entry.

67. A tenancy begins when the lessee enters, under the lease, into possession of the property leased, and until he so enters, he cannot sue for compensation for an unlawful entry thereon. Bill II, s. 72.

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

68. In the absence of a contract in writing or local usage to the contrary, a lease of immoveable property for purposes of cultivation shall be a lease from year to year terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be a lease from month to month, terminable on the part of either lessor or lessee, by fifteen days' notice expiring with the end, of a month of the tenanco.

Bill II, s. 74 : Bill, s. 46 : Report, s. 40. 5 Bom. A. C. J. 179. 6. *ibid.* 31 : 7 *ibid.* 111, and see 1 Beng. F. B. 25 : 13 W. R. 190. I. L. R. 2 Calc. 146 4 Beng. Appendix 86. 12 Beng. 263, N.-W. P. 1873, P. 9: Perry 480.

Every notice under this section must be in writing signed by or on behalf of the party giving it and tendered or delivered to the party who is intended to be bound by it, or affixed on a conspicuous part of the property.

Exclusion of day on which term commences.

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

Bill II, s. 75. Bill, s. 43.

Duration of lease for a year.

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

Option to determine lease.

Where the time so limited is expressed to be determinable before its expiration at the option of the parties or one of them, the lessee, in the absence of an express agreement to the contrary, shall have such option.

Bill II, s. 76.
7 W. R. 283.

Determination of lease.

70. A lease of immoveable property determines—

3 Moo. I. A. 261.
16 W. R. 147.

(a) by efflux of the time limited thereby:

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

Lease by Hindú widow, Marshall 166.

(c) where the lessor can only alienate for his own life the property leased—by the death of the lessor:

(d) where the lessor holds the property leased for the term of the life of another person—by the death of such person:

(e) on the expiration of a notice to determine the lease duly given in pursuance of a power therein contained.

3 O'Kin. 159,
But see per Peacock C. J. 10 W. R. 15.

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

Surrender of right to redeem mortgaged lease, N.-W. P., 1869, p. 45. Surrender by one of several joint lessees 9 W.R. 147.

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

(h) by implied surrender, that is to say, in case the lessee accepts from the lessor a new lease of the property leased, to take effect during the continuance of the existing lease:

Marshall 250.
16 W. R. 103.
25 W.R. 227.

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

18 W. R. 465.
But see 22 W. R. 448.
25 W. R. 147.

23 W. R. 238, 271

(j) on the expiration of a notice to quit or of intention to quit the property leased duly given by one party to the other.

Bill. II, s. 77' cl. 1:
W. R. F. 10.
Marshall 25:

Waiver of forfeiture.

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

2 Bom. 73.

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

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

Waiver of notice to quit.

72. A notice given by the lessor under section seventy, clause (j), is waived, with the express or implied consent of the lessee by acceptance of rent which has become due since the expiration of the notice, or by distress for such rent, or by duly giving to the lessee a second notice to quit, or by any other act on the part of the lessor shewing an intention to treat the lease as subsisting.

Bill, II, s. 77, cl. 2.
N.-W. P. 1867 Ex. o. c. j. 1.
Timmarsá Puranik v. Babiya Kuppayo nvd, 2 Bom. 70.

Relief against forfeiture for non-payment of rent.

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

8 W. R. 225, per Peacock, C.J.

Nothing in this section applies to suits under Act No. X of 1859, or Bengal Act No. VIII of 1869.

Effect of surrender and forfeiture on under-leases.

74. The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee: but unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to, and enforceable by, the lessor.

10 W. R. 384:
13 W. R. 281:
N.-W. P. 1871, p. 63.

The forfeiture of such a lease annuls all such under-leases.

Effect of holding over.

75. If a lessee or under-lessee of property remains in possession thereof after the determination of the lease, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year or from month to month, according to the purpose for which the property is leased, as specified in section sixty-eight.

Bill II, s. 78:
Bill, s. 47:
Report, s. 41:
3 Bom. A. C. J. 27:
12 Beng. 263:
N.-W. P. 1870, p. 204.
7 W. R. 152:
16 W. R. 185.
22 W. R. 394, 548.
23 W. R. 271.
25 W. R. 234.

Illustrations.

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

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

CHAPTER VI.

OF EXCHANGES.

"Exchange" defined.

76. When two persons contract to mutually give one thing for another, neither thing or both things being money only, the contract is called a contract of exchange.

Bill II, s. 21:
Bill, s. 48:
N. Y. Code, ss. 903, 906:
1 Mad. 100.

Right of party evicted from thing received in exchange.

77. The party deprived of the thing he has received in exchange by reason of anything done by the other party or any person through whom the latter claims, may, at his option, sue for compensation or sue for the thing given by him.

Bill II, s. 22, cl. 2

Rights and liabilities of parties.

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

Bill II, s. 23:
Bill, s. 48, para. 2:

Bill II, s. 24: Bill, s. 48, para. 3: Delivery must be immediate. 1 Morl. 105.

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

Exchange of money.

CHAPTER VII.

Of Transfers of Debts.

Bill II, s. 136: Bill, s. 99: Report, s. 99: 36 & 37 Vic., c. 66, s. 25 (b): 1 Mad. 150. See 5 W. R. 230. But see 10 N.-W. P. 474, cited Macph. 122.

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

Transfer of debts.

Illustrations.

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

(b) A has jewels deposited with B, a jeweller. A mortgages them to C. A then executes an instrument transferring them to D, who takes it to B and gets the jewels from him before he, B, has received any notice of C's mortgage. B is justified in handing the jewels to D, and C has no remedy against D.

Bill II, s. 137: Report, s. 100.

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

Notice to be in writing signed.

Bill II, s. 138.

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

Debtor to give effect to transfer.

Bill II, s. 139.

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

Liability of transferee of debt.

Illustration.

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

Bill II, s. 67 para. 2.

84. Where a debt is transferred for the purpose of securing money advanced or to be advanced by way of loan, or an existing or future debt, the original debt, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor.

Mortgaged debt.

Bill II, s. 140.

85. Nothing in this chapter applies to debts secured by negotiable instruments.

Saving of negotiable instruments.

CHAPTER VIII.

Of Apportionment.

Bill II, s. 140.

86. All rents, annuities, pensions, dividends and other periodical payments shall upon the determination, by death or otherwise, of the interest of the person entitled to receive such payment be apportioned as if they had been made to accrue due from day to day, but to be payable on the days appointed for the payment thereof.

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

Bill II, s. 60.

Nothing in this section shall affect any express provision in any instrument binding on such person.

THE SCHEDULE.

(a). Statute.

Year and chapter.	Subject.	Extent of repeal.
4 Wm. & Mary, c. 16.	Clandestine Mortgages.	The whole.

(b). Acts of the Governor General in Council.

Number and year.	Subject.	Extent of repeal.
XXIX of 1842.	Lease and release ...	The whole.
XXXI of 1854.	Modes of conveying land.	Section 17.
XI of 1855 ...	Mesne profits and improvements.	Section 1, and in the title and preamble, the words "to mesne profits and" and "to limit the liability for mesne profits and."
XXVII of 1866	Indian Trustee Act.	Section 31.
IV of 1872 ...	Punjáb Laws Act ...	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX of 1875 ...	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII of 1876.	Oudh Laws Act ...	So far as it relates to Bengal Regulation XVII of 1806.
I of 1877.	Specific Relief ...	In sections 35 and 36, the words "in writing."

(c). Regulations.

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

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