

CHAPTER I.—*Preliminary.*

3. We have here followed the Contract Act, section 1, by inserting a clause to save all enactments not expressly repealed, such, for instance, as the Acts limiting powers of guardians and managers to make sales and leases, and the provisions of the Panjáb Tenancy Act, section 32, which have been held to restrict to occupancy-tenants the right to sublet. We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option, which the Bill as introduced expressly preserved, there must be many other incidents of Native contracts with which it is desirable not to interfere. We have also saved the right to anything affixed to the soil by tenants under leases granted before the proposed Act comes into force.

CHAPTER II.—*Assurances of Immoveable Property.*

4. We have struck out the section relating to easements, as it will more fitly come into the Bill relating to those rights, which is now in preparation.

5. Section 6 of the Bill as introduced would have often rendered persons liable to an obligation, or at least to be sued on an obligation, the existence of which was unknown to them. We think that this is obviously inexpedient, and have therefore made the section an embodiment of the well-known rule, that a contract between the respective owners of two neighbouring parcels of land, that one of them shall do or refrain from doing something on his parcel for the benefit of the other parcel, may be enforced in equity against all persons claiming the former parcel under him with notice of the contract.

6. We think that section 7 of the Bill, as introduced, should be omitted, as it would allow incidents of a novel kind to be devised and attached to property at the fancy or caprice of any owner. It would, moreover, allow the grantee's enjoyment of the property to be destroyed or materially lessened by the exercise of the right reserved.

7. We have also struck out section 9 of the Bill as introduced. The rules of construction therein referred to, besides being inapplicable in some respects to instruments executed *inter vivos*, are contained in the testamentary portion of the Succession Act, which does not apply to Muhammadans anywhere, and applies to Hindús only in the Presidency-towns and the Lower Provinces.

8. We have provided (section 7) rules as to the right of innocent grantees for valuable consideration without notice, of persons like the managers of the property of a minor or an undivided family, childless Hindú widows in possession of their deceased husband's property, and benámídar's and other ostensible owners, who have only a restricted power of alienation. Our rules on this head are in accordance with decisions of the Privy Council and the Calcutta High Court.

9. We have redrawn section 13 of the Bill as introduced, so as to save the rights of the creditors of the person paying the consideration for a benámí transaction, and as the section will apply to benámí leases as well as to benámí sales, we have transferred it to chapter II.

CHAPTER III.—*Sales.*

10. We have declared (section 10) the respective liabilities of an intending seller and an intending buyer to make disclosures of defects and advantages.

11. We have introduced into section 11 clauses as to the seller's duty to produce title-deeds for examination, to answer questions respecting the property and to discharge incumbrances; as to the buyer's right to abandon the contract when the seller materially alters the property; and as to the custody and production of title-deeds after completion. We have also declared when the property vests in the purchaser, and explained when the purchase is completed.

12. Clause (a) of section 11 of the Bill as introduced, would have rendered a vendor liable for damage sustained by the purchaser owing to the loss of his bargain, and it would have made a vendor, like a mortgagor, warrant his title as against all the world. We think that in this respect his liability should be restricted, as it is in England, to acts done by himself or those through whom he claims. Section 11, clause (j), has been framed accordingly.

13. Clauses (c) and (f) of the same section, as introduced, are corollaries from the doctrine of equitable ownership and appear to us to be inconsistent with section 12, which declares that a mere contract for sale shall not transfer the property. Why, for instance, should the buyer be made liable to bear loss arising from destruction of property which is not his own? We have therefore omitted these clauses. Under any circumstances they would have been of little use in a country where, as a rule, the making of the contract is immediately followed by the completion of the purchase.

14. We have provided (section 12) for cases where, before completion, the buyer becomes insolvent. This provision is modelled on the present English Law, 32 and 33 Vic., c. 71, ss. 23, 24. We have also provided for the following matters:—

(a) the liability to the seller of the buyer of a leasehold (section 13):

(b) the liability to the seller of the buyer of an equity of redemption (section 14):

(c) money received under a fire-policy by the seller for damage done after the date of the contract (section 15):

(d) joint-purchases (section 17):

(e) the rights arising where two estates are subjects to a common charge and one of the estates is sold (section 18):

- (f) the exemption of *bond fide* buyers of trust-property from seeing to the application of the purchase-money (section 19) :
- (g) the rights of the seller where there is default on the part of the buyer and the rights of the buyer where there is default on the part of the seller (section 20).

CHAPTER IV.—*Exchanges.*

15. In this chapter, which corresponds with chapter V. of the Bill as introduced, we have made no substantial change except the insertion of a section (22), providing (in accordance with the Code Civil, Art. 1704) that if one of the parties prove that the other was not owner of the thing given or agreed to be given to the former in exchange, the former cannot be compelled to deliver that which he has promised in counter-exchange; but when he has received the thing given to him in exchange, he may be compelled to return it.

16. We have also provided, in accordance with the same Code, Art. 1705, that the party deprived of the thing he has received in exchange by reason of invalidity of title caused by 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.

CHAPTER V.—*Mortgages and Charges.*

17. We have made it clear that the mortgages here dealt with are only mortgages of immoveable property and sub-mortgages. Mortgages of policies, ships, machinery, furniture, cattle and other moveable property require to be separately treated.

18. We have inserted a section (26) requiring that every mortgage shall be created by an assurance signed by the mortgagor and attested by at least two witnesses. As mortgages by verbal agreement are now rarely if ever made, this will not substantially alter the present practice, and will obviously tend to prevent fraud and litigation.

19. The Bill as introduced permits the mortgagor to deposit the amount due only in the District Court. This might lead to much inconvenience, and we have modified section 28, clause (b), so as to allow the mortgagor to deposit in any Court in which he could have instituted a suit for redemption.

20. We have, in accordance with the present law, precluded (section 28) a person interested in part only of the mortgaged property from redeeming his own part only, and a person interested in part only of the mortgage-money from foreclosing his own part only.

21. We have given (section 29) the mortgagee the rights which he has under the covenants for title contained in an English mortgage-deed. When the mortgagee has a right to sue for the mortgage-money, these covenants are of no practical use during the continuance of the mortgage; but they become valuable after a foreclosure or sale.

22. We have declared (section 30) that, where the property is a lease for years and the mortgagee, while in possession, obtains a renewal, the mortgagor upon redemption shall have the benefit of the new lease.

23. We have imposed (section 32) on a mortgagor making a subsequent mortgage the duty of disclosing to the subsequent mortgagee the previous mortgages, and of giving notice to the prior mortgagees of the subsequent mortgage.

24. Although from the theoretical point of view there is much to be said in favour of discarding the distinctions between the various kinds of mortgages used in India, we think that the amount of simplicity gained would not justify the amount of disturbance created, and that, in practice, confusion and hardship would be caused if simple mortgages and mortgages by conditional sale were allowed (as they would be by the Bill as introduced) to take possession, or if simple and usufructuary mortgagees were allowed to foreclose. Moreover, any such extension of the power to foreclose would enable large classes of speculators and money-lenders to defeat the intentions with which the Legislature framed the new Code of Civil Procedure, sections 320—322, by obtaining simple mortgages and then instituting foreclosure-suits. We have therefore introduced (section 34) a clause the effect of which will be to maintain the law as it stands in this respect.

25. We have also (section 34) prohibited mortgagees from interfering with the right of the public to the continued use of undertakings, such as canals and railways, in the maintenance of which the public are interested. The remedy of such mortgagees will be to obtain a receiver of the profits of the undertaking.

26. We have provided (section 36) for the case where the parties to a mortgage have omitted to stipulate expressly for interest.

27. We are of opinion that, in the absence of an express contract to the contrary, no mortgagee should be entitled as such to take possession, and we have inserted (section 37) a clause to this effect. We have, however, allowed the mortgagee to sue for a receiver after the expiration of one year from the time when the principal has become payable, or after interest has been in arrear for six months; and we have empowered the Court, in any suit for foreclosure or sale, to appoint a receiver pending the proceedings in the suit.

28. We think that the mortgagee should be allowed to sue for the mortgage-money in four cases only, namely, (1) where the mortgagor binds himself expressly to pay the loan, (2) where the mortgagor remains in possession and allows the property to be sold for arrears of revenue, (3) where the property is destroyed by diluvion, fire or other superior force, and (4) in the case of an usufructuary mortgage, where the mortgagor is unable to give or secure possession. We have inserted a section (38) to this effect.

29. We have considered the question as to whether we should validate powers of sale in mortgages of property situate in the Mufassal, and we have come to the same conclusion as the late Sadr Diwānī Adālat came to in 1842, namely, that it would not be safe to entrust Indian money-lenders with powers so liable to abuse. We have therefore framed the section (39) corresponding with section 24 of the Bill as introduced, so as to invalidate such powers except where the lender is the Government, or the property is situate in the Presidency Towns or Rangoon.

30. We have limited (section 40) the right of a mortgagee in possession to insure to cases in which the property is insurable at ordinary rates. In the case of an inflammable property, the mortgagee might, under the Bill as introduced, impose an unfair burden on the mortgagor.

31. We have provided (section 41) for accessions to the mortgaged property.

32. We have framed the section (43) corresponding with section 17 of the Bill as introduced, so as to exempt mortgagees who, under a contract in writing, take the profits of the mortgaged property in lieu of interest, from keeping accounts of their receipts.

33. Where a mortgagor in possession fails to pay arrears of revenue and the estate is consequently sold, our Courts have ruled that the mortgagee has a charge on the surplus of the sale proceeds after payment thereof of such arrears. We have in section 45 adopted this ruling.

34. The Bill as introduced had nothing to shew that Lord Denman's doctrine in *Pickard v. Sears* applies to mortgages. We have therefore inserted the following :—

“ 46. 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.”

35. The Bill should, we think, embody the equitable principles that a creditor who can satisfy his debt out of several funds shall so exercise his right as not to take from another creditor the fund which forms his only security, and that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone. We have therefore inserted sections (50, 51) as to what English lawyers call marshalling securities and contribution.

36. Though the matter is one rather of procedure than of substantive law, we have inserted a rule (section 52) as to the proper parties to suits for redemption, foreclosure or sale, which will save the right of subsequent incumbrancers to redeem, and, if a decree for sale is made, conclude them.

37. We have provided (Sections 54 and 60) that in suits for foreclosure and redemption, upon good cause shewn, the time fixed by the Court for payment may be enlarged. We believe that this power (which is constantly exercised by Courts of equity) will be in accordance with the feelings of the people of many parts of India where, until recently, the power to redeem was held to last for ever, and even the long term of sixty years fixed by the Limitation Act is sometimes regarded as an unfair innovation.

38. We have designedly withheld power to open foreclosures.

39. We have enumerated the persons entitled to redeem as follows :—

“ 58. 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 :

(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 the sale of the mortgaged property.

Explanation.—An easement is not an interest within the meaning of clause (a).”

40. When property is mortgaged for successive debts to successive mortgagees, we have expressly authorised (section 62) any mesne mortgagee to institute a suit to redeem the prior mortgagees and to foreclose those that are posterior to himself. We have given in the third schedule a form of the decree passed in such a suit.

41. We think that as a person having a charge has a mere right of realization, he should not be allowed to foreclose, and should be only entitled, under the proposed Act, to institute a suit for the sale of the property charged. We have framed section 68 accordingly. We have introduced a section (69) providing for the merger of charges. But the section in its present form is not to be understood as representing our final opinion on the subject.

CHAPTER VI.—Leases.

42. We have prefixed to this chapter a section (70) declaring the respective duties of proposing lessors and lessees to make disclosures of defects and advantages.

43. As the law stands, both in England and, as a general rule, in India, there is no implied warranty on the letting of land or an unfurnished house that it is fit for cultivation or occupation ; there is no implied obligation on the landlord to repair the premises, and, in the absence of a contract to the

contrary, the tenant is bound to keep and leave them in good repair; and the landlord does not warrant his title, but merely covenants that the tenant paying his rent and performing his covenants may peaceably enjoy the property during the term without interruption by the landlord or any one claiming through him. We think that the Bill should, in these respects, accord with the law as above stated, and we have therefore struck out, in section 44, of the Bill as introduced the latter half of clause (b) and the whole of clause (f), and substituted for clauses (c) and (d) a clause providing for quiet enjoyment by the lessee. But there is no doubt that, in certain parts of India and with regard to certain classes of houses, usages have become established with regard to repairs, with which it is undesirable to interfere. We have, therefore, made our provisions as to liability to repair subject to local usage.

44. Where part of the property leased is destroyed by superior force, we think that the lease should become void as to that part, that any rent or fine payable under the lease should proportionately abate, and that a proportionate part of any fine paid by the lessee should be returned. If the lessor reinstate the part destroyed, he and the lessee can come to a new agreement. We have altered clause (i) in accordance with these views.

45. We think that no lessee should, without the lessor's consent, erect any permanent structure on the property, except for agricultural purposes, and we have made provision to that effect in section 71, clause (m). Under the Bill as introduced the tenant might have erected unsightly buildings on his holding and thereby seriously injured the landlord's contiguous property.

46. We have struck out the words authorising a lessee to remove fixtures after the termination of his lease. They might have prevented the lessor from letting the property to another at the end of the term.

47. We have declared (section 71, clause r) that the power of transfer conferred on a lessee shall not be deemed to authorise an occupancy-ryot to assign his interest. This is the law in Bengal, in the absence of a special custom: the saving clause in section 2 will leave unaffected the right of occupancy-tenants in the Panjáb.

48. We have provided (section 73) for the insolvency of the lessee, and enabled the receiver of his property, with the leave of the Court, to disclaim the property leased. This provision, like the similar clause in chapter III, is founded on 32 & 33 Vic., c. 71, sections 23, 24.

49. We have declared (section 74), in accordance with the present law, that a tenancy begins on entry, and that a lessee before entry cannot sue for trespass.

50. We have stated (section 76) the various ways in which a lease may be determined: we have explained (section 77) the law as to the waiver of forfeiture or a notice to quit; and we have provided by the same section for relief against forfeiture for non-payment of rent. Power to grant such relief has long been exercised by Courts of equity on payment of arrears and the landlord's costs, and a like power was, by 23 & 24 Vic., c. 126, conferred on the Common-law Courts. Act X. of 1859, section 78, and Bengal Act VIII. of 1869, section 52, provide for stay of execution of a decree for ejection on payment into Court within fifteen days from its date, and we propose to leave this procedure untouched.

CHAPTER VII.—*Settlements.*

51. Strong representations have been made to us that, in the case of European and East Indian married women, restraints on anticipation should continue to be allowed. We have therefore added a proviso to section 82 (corresponding with section 52 of the Bill as introduced) which will have the desired effect.

52. We think that section 83 in its present state requires further consideration. But in deference to the Indian Law Commissioners we have let the section stand as they framed it.

53. We think sections 85 and 86 (corresponding with sections 55 and 56 of the Bill as introduced) should not apply to Natives; and we have made a provision to this effect.

CHAPTER VIII.—*Discretion of the Courts to deal with settled Land.*

54. We think that the delicate jurisdiction which this chapter proposes to confer should be exercisable only by the High Courts. We have altered the wording of section 88 accordingly.

55. We have recast section 90 (=section 68 of the Bill as introduced) so as to restrict the privilege of appearing, &c., to persons interested in the land and to persons permitted by the Court to appear.

CHAPTER IX.—*Gifts for Religious and Charitable Purposes.*

56. We have exempted Natives from the operation of this chapter, which would have interfered with their religious usages: we have confined it expressly to immoveable property; and we have provided that notice of the assurances contemplated shall be given to the Local Government.

CHAPTER X.—*Owners of Limited Interests.*

57. It is said that Hindú law allows the person increasing by his own exertions the value of an estate a larger share in the increase than he possesses in the corpus. We have therefore saved (section 99) in such cases any benefit to which the persons making the increase is entitled under his personal law.

58. We have in the section (100) relating to the discovery of the deaths of tenants for life, taken care that the Court shall not be authorised to compel the appearance in public of pardah-women.

CHAPTER XI.—*Powers.*

59. We have here added rules declaratory of the present law, as to the following matters:—

- (a) the revocation of appointments (section 107) :
- (b) the delegation of powers (section 108) :
- (c) the application of the doctrine of election to appointments (section 120) :
- (d) gifts by implication to the objects of powers (section 125) :
- (e) the priority of interests created under powers (section 127) :
- (f) the extinguishment of powers (section 128) :

CHAPTER XII.—*Property held by several Persons.*

60. We have, at the request of our honourable colleague Mahārājā Jotīndra Mohan Tagore, declared (section 130) that nothing in the clause authorising the Court in a suit for partition, to direct a sale and distribute the proceeds, shall apply to the property of an undivided family. But we have reason to believe that, in the Hindū community of Calcutta much difference of opinion exists as to the expediency of making such declaration, and we invite the special attention of the Local Governments to this matter.

61. We have provided (section 134) that the buyer or mortgagee of a share of undivided immoveable property takes subject to the right of the co-owners to enforce a partition, and that, when such partition is effected, his right extends only to the share allotted to his transferor.

CHAPTER XIII.—*Assignments of Things in Action.*

62. When the debtor receives notice of the assignment, we have provided (section 137) that he shall give effect thereto unless he resides, or the property is situate, in a foreign country, and the title of the person in whose favour the assignment is made is not complete according to the law of such country.

The First Schedule.

63. We have added to the enactments proposed for repeal, 4 Wm. & Mary, c. 16, as to clandestine mortgages, a matter provided for by section 32 of the amended Bill, Act XXXI. of 1854, section 17, which is embodied in section 19 of the amended Bill, and Act I. of 1877, section 13, which is inconsistent with section 12 of the same Bill. We have also, by repealing the words 'in writing' in the Specific Relief Act, sections 35 and 36, rendered those sections applicable to oral contracts.

The Second Schedule.

64. We have added forms of an exchange and an English mortgage, and for the form of lease contained in the Bill as introduced, we have substituted forms of a lease of a dwelling-house and a farm.

65. We have now enumerated the changes which we have made in the substance of the Bill. We have also made some in its wording and arrangement.

66. We recommend that the Bill as now amended be republished with this report in the *Gazette of India* and sent to the several Local Governments for consideration and for republication in the local Gazettes. In order to give ample time for the further discussion of so important a measure, we think that no steps should be taken to pass it into law until the Council re-assembles next November.

67. We desire, in conclusion, to express our obligations to the gentlemen who have favoured us with criticisms on the Bill. We are especially indebted to the Honourable Raymond West, a Judge of the High Court of Bombay; Mr. Grant, Officiating Judicial Commissioner of the Central Provinces; Pandit Lakshmi Nārāyana of Lucknow; Mr. J. W. Smyth, a Judge of the Panjāb Chief Court, Muttusāmi Ayyar, C. I. E., Acting Judge of the Court of Small Causes at Madras, and Srīnivāsa Rao, a Judge of the Court of Small Causes at Madras; and Mr. Stokes desires to acknowledge some valuable remarks privately communicated to him by Sir R. Garth.

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No. II.
THE TRANSFER OF PROPERTY
BILL, 1878.

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- 138. Debtor to give effect to assignment.
- 139. Liability of assignee of thing in action.
- 140. Saving of negotiable instruments.

CHAPTER XIV.

OF APPORTIONMENT.

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

FIRST SCHEDULE—Repeal of Enactments.

SECOND SCHEDULE—Forms of Assurances.

THIRD SCHEDULE—Decree for successive Redemptions.

No. II.

A Bill to define and amend the law relating to the Transfer of Property, and for other purposes.

WHEREAS it is expedient to define and amend the law relating to the transfer of property, to owners of limited interests, and to powers, property held by several persons and apportionment; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

- 1. This Act may be called "The Transfer of Property Act, 1878 :"
Short title. Property Act, 1878 :"
Extent. It extends to the whole of British India ;
Commencement. And it shall come into force on the first day of January 1879.

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

(a) the provisions of any enactment not hereby expressly repealed :
Saving of certain Acts, incidents, rights, liabilities, &c. (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 tenant under any lease granted before this Act comes into force :

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

(f) any sale in execution of a decree or order or for arrears of rent or revenue :

And nothing contained in sections 85 and 86 and Chapter IX. shall apply to Hindus Muhammadans, or Buddhists.

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

"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 :

the person so creating, transferring or otherwise disposing, is called a
"Grantor." grantor: the person in whose favour such creation, transfer or disposition is made, is called a
"Grantee." grantee; and the operation effected by an assurance is called a grant ;
"Grant." grantee ; and the operation effected by an assurance is called a grant ;

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

"affixed to the soil" means—

- (a) imbedded in the soil, as in the case of walls ;
- (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.

All words occurring in this Act and defined in the Indian Contract Act, 1872, shall have the meaning attributed to them respectively by that Act.

CHAPTER II.

OF ASSURANCES OF IMMOVEABLE PROPERTY.

- 4. Every person competent to contract may make an assurance 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.

5. An assurance may be made in the form in the second schedule hereto annexed, or in any other form which expresses an intention thereby, and without any further act on the part of the grantor, to create, transfer or otherwise dispose of any right, title, or interest to or in immoveable property.

6. Unless a contrary intention appears by the assurance it shall be deemed to pass to the grantee all the interest

Operation of assurance.

contrary, bound (a) to pay to the mortgagee or his legal representative the principal sum which, on completion of the purchase, is owing on the security of the mortgage, and all interest for the time being due for the same, when payment thereof, respectively, is lawfully demanded, and (b) to indemnify the seller and his legal representative against the payment thereof, and against all claims for non-payment thereof, respectively.

16. 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 may actually receive under the policy, or so much thereof as may be necessary, to be applied in reinstating to property.

Money received under fire policy.

17. When two or more persons purchase any, immovable 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.

Joint purchases.

18. When two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller and his legal representative, 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.

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

19. When any property is sold, the proceeds of which are subject to a trust, the *bonâ fide* buyer bound to see to application of purchase-money. of the property is not bound to see to the application of the purchase-money to the purposes of the trust.

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

20. When the buyer fails to perform any duty imposed upon him, as such, by this Act or any other law for the time being in force, the seller may, notwithstanding anything contained in the Indian Contract Act, 1872, section 56, sue the buyer for compensation for such non-performance.

Remedies of buyer and seller.

When the seller fails to perform any duty imposed upon him, as such, by this Act or any other law for the time being in force, the buyer may either sue under the Specific Relief Act, 1877, to have the contract rescinded, or may affirm it and sue for compensation for its non-performance. In the latter case, the buyer may recover his expenses reasonably incurred, after the contract was entered into, in relation to the attempted purchase; and in each case he may recover his deposit (if any) with interest thereon.

CHAPTER IV.

OF EXCHANGES.

21. 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.

"Exchange" defined.

22. If one of the parties prove that the other was not owner of the thing given or agreed to be given to the former in exchange, the former cannot be compelled to deliver that which he has promised in counter-exchange; but when he has received the thing given to him in exchange, he may be compelled to return it.

When thing exchanged does not belong to party giving it.

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.

Right of party evicted from thing received in exchange.

23. 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.

Rights and liabilities of parties.

24. On an exchange of money, each party there-by warrants the genuineness of the money given by him.

Exchange of money.

CHAPTER V.

OF MORTGAGES AND CHARGES.

25. When, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, one person transfers to another a right over specific immovable property, the transfer is called a mortgage, 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.

Mortgage, mortgagor and mortgagee defined.

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.

Where the mortgagor transfers the property to the mortgagee conditionally upon the non-payment of the mortgage-money at a certain date, the transaction is called an English mortgage.

English mortgage.

Where the mortgagor delivers possession of the property to the mortgagee, and authorises him to retain such possession and to pay himself from the rents and profits of the property the interest, or the principal and interest, of the mortgage-money, the transaction is called an usufructuary mortgage.

Usufructuary mortgage.

Where the mortgagor binds himself personally to repay the mortgage-money, and pledges the property as collateral security for the repayment,

Simple mortgage.

but does not deliver possession of the property, or contract that in default of payment of the principal and interest at a certain date the property shall pass to the mortgagee, the transaction is called a simple mortgage.

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

26. A mortgage can be effected only by assurance signed by the mortgagor and attested by at least two witnesses.

27. The deposit of title-deeds with intent to create a mortgage on the property comprised therein, but without actual transfer of such property, shall be deemed to be only evidence of a contract to execute a mortgage of the property.

Rights and Liabilities of Mortgagor.

28. A mortgagor has the following rights as against the mortgagee :—

(a) at any time after the mortgage-money has become payable, or has been paid, and before an order absolute has been made foreclosing his right to redeem the mortgaged property or the property is duly sold in pursuance of a decree or under a power conferred by the mortgage-deed, he may, on payment or tender of the mortgage-money remaining due, require the mortgagee to re-grant the property to him, or to execute an acknowledgment in writing that any right in derogation of his ownership or other interest granted to the mortgagee has been extinguished.

(b) at any time after the mortgage-money has become payable and before such suit is barred, he may tender to the mortgagee at a proper time and place, or 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 whole amount for the time being due on the mortgage.

Nothing in this section shall be deemed to authorise a person interested in part only of the mortgaged property to institute a suit for the redemption of his own part only, except where there is but one mortgagee and the mortgagor's interest in part of the property becomes vested in such mortgagee.

29. 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 property to the mortgagee, free from incumbrances; *secondly*, that the mortgagor and every person claiming any interest in the same 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; and, where the

property is leasehold; *thirdly*, 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.

30. 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.

31. A mortgagor in possession of the mortgaged property must not commit waste thereon, if the security is insufficient or will be rendered insufficient by such waste.

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 mortgage-money.

32. 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 making 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.

A mortgagor failing to give any notice required by this section, in addition to any other liability resulting from such failure, 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.

33. 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.

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 the Mortgagee.

34. In the absence of a contract to the contrary, the mortgagee may at any time after the mortgage-money has be-

come 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 foreclosure of his right to redeem the property with or without possession thereof, or (2) a suit for a sale of the property, or (3) a suit for such foreclosure or sale.

Nothing in this section shall be deemed—

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

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

(c) 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 of the suits mentioned in that clause, which, under this Act, he is authorized to institute, relating to the whole of the mortgaged property, making the other mortgagees, if they cannot or will not join as plaintiffs, defendants.

35. Where the mortgagor deposits money in court under section twenty-eight, 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 due to him under the mortgage, apply for and receive in payment of such amount the money so deposited.

36. When the mortgagor and mortgagee have contracted as to the payment of interest on the principal money for the time being due to the mortgagee under the mortgage, interest shall be payable in accordance with such contract: Provided that, where the mortgagor has tendered or deposited in court under section twenty-eight the whole amount due to the mortgagee, such interest 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.

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

37. In the absence of an express 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 principal 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 same.

In any suit for a foreclosure or sale, the Court may, if it think fit, appoint such a receiver pending the proceedings in the suit.

38. No mortgage shall be deemed to imply a debt for the recovery of which a suit will lie against the debtor; but the mortgagee may sue the mortgagor for the mortgage-money—

(a) where the mortgagor expressly binds himself to repay the same;

(b) where the mortgagor remains in possession of the property and fails to pay arrears of revenue due in respect thereof, and the property is consequently sold;

(c) where the property is destroyed by dilution, fire or other superior force;

(d) in the case of an usufructuary mortgage, 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.

39. A power conferred by the mortgage-deed on the mortgagee 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 town of Calcutta, Madras, Bombay or Rangoon.

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

40. 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 a contract to the contrary, require any money which the mortgagor may actually receive under the policy, or so much thereof as may be necessary, to be laid out in reinstating the property.

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

Illustrations.

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

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

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

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

(b) he shall use his best endeavours to collect all rents and other profits arising out of the property;

(c) he shall, in the absence of an express contract to the contrary, out of the income of the property pay the Government revenue and all other charges of a public nature accruing due in respect thereof during such possession.

(d) he may spend such money as is necessary (1) for the due management of the property and the collection of the rents and other profits arising out of the same, (2) for its preservation from destruction, deterioration, 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 principal money secured, at the same rate of interest;

(e) he may eject the tenants (if any) in occupation of the property under leases made without the mortgagee's consent after the completion of the mortgage;

(f) where the property is by its nature insurable at ordinary rates, he may 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 principal money secured, 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;

(g) he shall, in the absence of an express contract to the contrary, keep 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;

(h) his receipts from the mortgaged property, after deducting the expenses mentioned in clauses (c), (d) and (f), shall be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the principal sum secured by the mortgage, and, so far as such receipts exceed any interest due, in reduction of such principal sum.

43. Nothing in section forty-two, clauses (g) and (h), applies to cases where there is an express contract in writing between the mortgagee and the mortgagor that such receipts, after deducting the said expenses, shall, so long as the mortgagee is in possession of the mortgaged property, be taken in lieu of interest on the principal sum secured by the mortgage.

44. A mortgagee in possession of the mortgaged property must not commit waste thereon.

45. When a mortgagor in possession of the mortgaged property fails to pay arrears of revenue due in respect thereof, and the property is consequently sold, the mort-

gagee has a charge on the surplus, if any, of the proceeds, after payment thereof of the said arrears.

Priority.

46. 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.

47. If a mortgage made to secure the balance of a running account exceeds the maximum to be secured thereby, a subsequent mortgage on the same property shall, if made with actual knowledge 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 subsequent mortgagee.

Illustration.

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

48. 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-seven, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

49. 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 to whom he has made such tender.

50. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person without actual knowledge of the former mortgage, the second mortgagee 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 pre-

Receipts in lieu of interest.

Charge on proceeds of revenue-sale.

Right to pay off mortgagee in order to prevent sale.

Marshalling securities.

Waste by mortgagee.

judge the rights of the first mortgagee or of any other person having an incumbrance on either property.

51. 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 fifty to the claim of the second mortgagee.

Suits for Redemption, Foreclosure or Sale.

52. 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 section twenty-eight or thirty-four, 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.

53. In a suit for foreclosure, or foreclosure or sale, if the plaintiff succeeds, 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.

54. If payment is so made of such amount and of such subsequent costs as are mentioned in section sixty-four, the de-

fendant shall (if necessary) be put into possession of the mortgaged property.

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 to 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.

Provided that the Court may, upon good cause shewn, 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.

55. 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-four, 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.

When the mortgagee sues only for a foreclosure, if the Court considers that he will not be damaged 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.

56. If in any case under section fifty-five the defendant makes payment as mentioned in section fifty-four, 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-five, and thereupon the defendant's right to redeem and the security shall both be extinguished.

57. When the net 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.

58. 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:

(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.

Explanation.—An easement is not an interest within the meaning of clause (a).

59. 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) re-transfer 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.

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

If such payment is not so made, the defendant 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 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; and thereupon the plaintiff's right to redeem and the security shall both be extinguished:

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

Redemption and Foreclosure.

61. 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.

The decree in such suit may be in the form set forth in the third schedule hereto annexed, with such variation as the circumstances of each case require.

62. If the mortgagee fail to perform any of the duties imposed upon him by section forty-two, 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.

Costs.

63. The mortgagee is ordinarily entitled to receive or add to his debt his costs properly incurred of any suit under this chapter. But such costs, or any part thereof, may be disallowed if the mortgagor has paid or tendered to the mortgagee, or has deposited in court, the whole amount due to him under the mortgage, and if the mortgagee has unreasonably refused to accept such tender or to take such money out of court in discharge of his claim, or if he has prevented a mortgagor willing and able to make such payment, tender or deposit from making it by refusing or neglecting to give him proper information as to the state of the accounts required to be kept under section forty-two.

64. 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 principal debt 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.

Sale of Property subject to prior mortgage.

65. If any property the sale of which is directed under this chapter is

Sale of property subject to prior mortgage. 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.

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

Application of proceeds.

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 all principal moneys 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.

67. If property subject to a mortgage, or the

Rights and powers of transferee of mortgage-debt or mortgaged property.

right to receive mortgage-money, be transferred to a third person, the transferee has all the

rights and powers of his transferor, under the mortgage, and is subject to the liabilities existing between his transferor and the mortgagor or mortgagee, as the case may be.

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

Charges.

68. If by any assurance other than a mortgage-deed, or by any

Charges.

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 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 apply to the person having such charge.

69. 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 by an instrument in writing registered he expressly declares that it shall be kept on foot.

CHAPTER VI.

OF LEASES OF IMMOVEABLE PROPERTY.

70. A person proposing to let immoveable property need not disclose from proposing lessor defects therein which the and lessee. lessee might with ordinary

care discover; but the proposing lessor must not conceal, or attempt to conceal, such defects, and he must disclose to the lessee all other defects therein of which the former is, and the latter is not, aware.

When the proposing lessee stands, or has stood, as regards the property, in a fiduciary relation to the lessor, he must disclose to the lessor any fact which increases the value of the property itself, and of which the former has, during the existence of such relation, become aware. Save as aforesaid, a person proposing to take a lease of immoveable property need not disclose any fact unknown to the lessor which increases such value.

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

(a.) The lessor is bound to put the lessee in possession of the property leased:

(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 by the lessee may hold the property leased during the time limited by the lease without interruption by the lessor or his assigns, or any person lawfully claiming through him or them:

(c.) In the absence of fraud, concealment or misrepresentation, the lessor is not answerable for any defect in the property leased which the lessee could not with ordinary care have discovered:

(d.) During the continuance of the lease, the lessee is entitled to the enjoyment of all easements appendant to the property leased at the time when the lease was made until such easements are extinguished:

(e.) 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:

(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.) In case the lease is rescinded for the default of the lessee, he is bound to pay the rent up to the time of such rescission, and also to make compensation for any other loss resulting from his default; but in estimating such compensation, the Court shall take into account the fine (if any) paid under the lease :

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

(i.) 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 :

(j.) Every lessee who becomes aware of any proceeding to recover the property leased to him or any part thereof 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 :

(k.) The lessee is bound to give notice to the lessor, within a reasonable time, of any encroachment made upon, or any interference with the lessor's rights concerning, the property leased, which may come to his knowledge; and, in default of so doing, he is liable to make compensation to the lessor for any loss or expenses occasioned by such omission :

(l.) The lessee may use the soil and its products for all purposes of enjoyment as a reasonable owner would use them; but he may not fell timber, pull down or damage houses, open mines, or commit any other waste :

(m.) No lessee of immoveable property shall, without the lessor's consent, erect any permanent structure thereon, 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 :

(n.) Subject to the provisions of clause (m), 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 :

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

(p.) 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 land for the season current when the lease determines, and to free ingress and egress to reap and carry them :

(q.) 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, if the lessee pay rent to the lessor without having reason to believe that such transfer has been made, he shall not be liable to pay such rent over again to the transferee :

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 :

(r.) The lessee may transfer, absolutely or by way of mortgage, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason 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.

Nothing in this section shall be deemed to authorise a tenant having a right of occupancy to assign his interest as such.

72. 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 a trespass thereon.

73. When the lessee is declared an insolvent, the receiver of his property appointed under the Code of Civil Procedure, section 351, may, with the leave of the Court, by writing under his hand, disclaim the property leased, and thereupon the lease shall be deemed to be surrendered from the date of the declaration, and the Court may order the property to be delivered up to the lessor or make such other order as to the possession thereof as may be just :

Provided that the receiver shall not disclaim such property in cases where an application in writing has been made to him by any person interested therein, requiring him to decide whether he will disclaim or not, and the receiver has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not.

On the application of any person interested in the property, the Court may direct possession thereof to be delivered to him, or make such other order as to possession thereof as may be just.

Any person injured by the operation of this section shall be deemed to be a creditor of the insolvent to the extent of such injury, and may accordingly prove the same as a debt under the insolvency.

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

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.

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

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

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.

76. A lease determines—

- (a) by efflux of the time limited thereby;
- (b) by rescission;
- (c) by surrender in express terms;
- (d) by surrender by operation of law, 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;
- (e) 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 either by setting up a title in a third person or by claiming title in himself;
- (f) on the expiration of a notice to quit duly given to the lessee.

77. A forfeiture or notice under section seventy-six clause (e) or (f), is waived by receipt of rent which has become due since the breach or the expiration of the

notice, 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—

Where a lease 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.

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

78. If a lessee or sub-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 sub-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 seventy-four.

Illustrations.

(a.) A lets a house to B for five years. B sub-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 VII.

OF SETTLEMENTS.

79. "Settlement" means, in this chapter, any disposition in writing of moveable or immoveable property—

- (a) which is not testamentary, and is not founded on any consideration, or
- (b) which is made in consideration of marriage, or

(c) which is made for the purpose of dividing property of the settlor among his family or those for whom he desires to provide,

but does not include a gift made by a Hindú, Muhammadan or Buddhist.

80. A settlement, whether made for a consideration or not, is binding on the settlor and those claiming under him.

81. A settlement made for the purpose of depriving present or future creditors or other persons of their demands against the settlor, is void against all present and future creditors of the settlor and

their successors in interest, and against any person upon whom his property devolves in trust for the benefit of his creditors.

Nothing in this section affects the rights of persons who have acquired, in good faith and for consideration any interest under the settlement.

82. A condition or limitation in a settlement or will, restraining any person from parting with or disposing of his interest is void: provided that property may be settled or bequeathed for the benefit of a married woman who is not a Hindú, Muhammadan or Buddhist, so that she shall not have power to deprive herself of the income thereof in anticipation.

83. A condition or limitation contained in a settlement or will making an interest thereby reserved or given to or in trust for any person to cease on his becoming insolvent, or endeavouring to transfer or dispose of the same, is void.

84. If, by a settlement, property be given to a person then living in general terms, without indicating the time when it is to be paid or delivered, such person has a vested interest therein from the day of the execution of the settlement, and if he dies without having received it, it shall (subject to any legal disposition thereof which he may have made) pass to his legal representative.

85. Where, by the terms of a settlement, property is given to a person not in existence, but he is not entitled to possession of it immediately upon his birth, a right to receive it at the proper time shall, unless a contrary intention appears by the settlement, become vested in such person upon his birth, and shall (subject to any legal disposition thereof which he may have made) pass to his legal representative if he dies before that time, and without having received it. And in such cases it is from his birth said to be vested in interest.

86. The provisions of the Indian Succession Act, 1865, sections 100 to 104, both inclusive, 107 and 108, 111 to 127, both inclusive, and 167, shall apply, *mutatis mutandis*, to gifts contained in settlements.

87. Whenever a person becomes entitled in possession, by virtue of a settlement, to money or any other property yielding income, he shall be entitled to receive the interest or income thereof from that time.

CHAPTER VIII.

OF THE DISCRETION OF THE COURTS TO DEAL WITH SETTLED LAND.

88. If any person having, under a settlement or will, a limited interest in possession in any land, apply under this section to the High Court within the limits of whose

appellate civil jurisdiction such land or any part thereof is situate, the Court may, if it deem it just and expedient to do so,—

(a) make such leases of the whole or any part of the land for such terms of years, for such rents, with such powers, and with such conditions, reservations and exceptions as the Court thinks fit;

(b) make such sales of the whole or any part of the land, for such sums, payable either at once or periodically, with such powers, and with such conditions, reservations and exceptions as the Court thinks fit;

(c) appropriate any part of the land for the formation of streets, roads, gardens or other open spaces, tanks, sewers, drains or water-courses, and authorize the erection of buildings and works thereon;

and generally deal with the land in any way the Court may think just and beneficial to the persons interested therein.

89. Every such application shall be in writing, and notice thereof shall be served through the Court on all trustees under the settlement or will, and on any other persons who in the opinion of the Court ought to be so served, and shall be published in such newspapers as the Court may direct.

90. The Court shall permit any person interested in the land, and may in its discretion permit any other person, to appear and be heard in opposition to, or in support of, any such application, on such terms as to costs or otherwise as it thinks fit.

91. The Court may order the costs of all or any parties to any such application to be paid out of any principal money receivable on account of any dealing with the land which is the subject of the application, or to be a charge on such land or on any other land belonging to the same owners.

92. Every lease made under section eighty-eight shall take effect in possession; and on every such lease shall be reserved the best rent that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine.

93. All or any part of the proceeds of any lease, sale or disposition under section eighty-eight may, if the Court think fit, be paid into court.

94. The Court shall declare what parts of such proceeds so received shall be considered as income, and may direct the same to be paid to the person for the time being entitled in possession to the land dealt with; and the residue of such money shall be applied as the Court shall

direct in one or more of the manners following :—

(a) the payment of the amount due in respect of any charge on the land dealt with ;

(b) the purchase of other property or the investment in securities for the benefit of the persons interested in the land dealt with ;

(c) the payment to any person becoming absolutely entitled to the land dealt with.

EXPLANATION.—In this section the term “securities” means—

(d) promissory notes, debentures, stock and other securities of the Government of India ;

(e) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;

(f) stock or debentures of, or shares in, Railway or other companies, the interest whereon has been guaranteed by the Government of India ; and

(g) debentures or other securities for money issued by or on behalf of any municipal body under the authority of any Act of an Indian legislature.

CHAPTER IX.

OF GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES.

95. No person having a nephew or niece, or any nearer relative, shall have power to give any immovable property to religious or charitable uses, unless by an assurance executed not less than twelve months before his death, and registered.

96. Subject to the provisions of the last preceding section, immovable property may be assured in perpetuity for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. Provided that notice of such assurance shall be given, as soon as may be after its execution, to the Local Government and that no such assurance shall take effect until it has been sanctioned by some public authority to be designated by the Local Government by notification in the official Gazette.

The grant or refusal of such sanction may be notified by an entry in the book in which the assurance is registered, and the registering officer shall make such entry on receiving from the public authority aforesaid a written order in this behalf.

If no such order is made within two years next after the time when the property becomes applicable for the benefit of the public, it shall be deemed that sanction has been granted.

If such sanction is refused, the property shall devolve as if no such assurance had been made.

CHAPTER X.

OF CERTAIN RIGHTS AND LIABILITIES OF OWNERS OF LIMITED INTERESTS.

97. A person having a limited interest in any immovable property is not, as such, entitled to do or omit any act the doing or omitting of

which is destructive or permanently injurious to such property.

EXPLANATION.—No act done in the reasonable use and enjoyment of property is destructive or injurious within the meaning of this section, though it may exhaust the substance of the property.

Illustrations.

(a). A is a tenant for life of land on which dwelling-house stands. He is not entitled, as such, to pull down the house. Nor must he suffer it to fall for want of necessary repairs.

(b). A is tenant for life of land in which coal lies. He is entitled, as such, to work and use the coal.

(c). A is tenant for life of land planted with trees. He is entitled as such to cut the trees at maturity, but is not entitled, as such, to cut them when immature, except for the purpose of thinning out or otherwise benefiting the plantation.

Save as aforesaid, such person or his legal representative has the same right as a lessee to remove, during the continuance of such interest or within a reasonable time afterwards, all things which he has affixed to the soil in which he had such limited interest, and all crops growing upon the land for the season current when such limited interest determines.

98. A person having a limited interest in possession in any immovable property, is bound to discharge all taxes and other public periodical charges to which such property is liable and, to the extent of the rents and profits of the property which without his wilful default he might have received, all periodical payments accruing due on account of any mortgage or charge thereon taking effect during the continuance of his interest in priority to such interest.

99. Every advantage or increase of value accruing (accidentally or through the exertions of any one having a limited interest) to any immovable property in which successive interests exist, belongs, in the absence of any personal law to the contrary, to all the persons having any interest in the property, in the same shares and manner as they are entitled to the property.

100. Any person claiming any immovable property after the death of any minor, married woman or other person and having reason to believe that such minor, married woman or other person is dead, and that his or her death is concealed by his or her guardian, husband or any other person, may once a year move the High Court to order the person concealing or suspected to conceal such person to produce him or her at such time and place, and before such persons (if any), as the Court may direct. And the High Court, if it think fit, shall make such order, and in case of disobedience thereto by the person in possession of the property, the person so claiming the same may, by order of the Court, enter thereon and receive the profits thereof as if the person so concealed or suspected to be concealed were dead.

Nothing in this section shall be deemed to authorize the High Court to compel the produc-

tion in court of women who, according to the customs and manners of the country, ought not to be compelled to appear in public.

Saving of mortgagees and lessees.

101. Nothing in this chapter applies to mortgagees or lessees.

CHAPTER XI.

OF POWERS.

102. A person may be authorized to determine, with or without the consent of others, the disposition of property otherwise than by virtue of his ownership. A person so authorized is said to have power to appoint such property.

The person who gives the power is called the donor, the person to whom the power is given is called the donee, and the persons for whose benefit the power is to be exercised are called the objects of the power. A person to whom any property is appointed is called an appointee.

Illustrations.

(a). A grants land to B for B's life, with remainder to such of B's children as B shall appoint. B appoints to C and D, two of his children, in equal shares. A is the donor of the power, B the donee, B's children the objects, and C and D the appointees.

(b). A, the absolute owner of certain land, grants it to B to such uses as C, with the consent of D, shall by assurance appoint. C with D's consent appoints part of the land to E absolutely, and the rest to F for seven years. Here C is the donee and also the object of the power, and E and F are the appointees.

A power authorizing the donee to appoint to whomsoever and for whatsoever interest he pleases, is called a general power.

A power restricted in respect either of its objects or the interests that may be conferred under it, is called a special power.

Where the donee has neither a present, nor a future interest in the property, the power is called a collateral power.

Rules as to all Powers.

103. Where a power is vested in several donees, all who are living must unite in its execution; but in case any one or more of them die during the continuance of the power, it may be exercised by the survivors or the survivor, unless a contrary intention appears by the instrument creating the power.

104. The donor may direct that the power shall be exercised by will only, or by non-testamentary instrument only.

If he directs that the power shall be exercised by will only, it must be exercised by will duly executed according to the provisions of the Indian

Succession Act, 1865, or according to such other law as at the time of the execution of the power may be applicable to a will executed by the donee.

If he directs that the power shall be exercised by non-testamentary instrument only, it must be exercised by such an instrument and registered.

If he imposes no such restriction on the exercise of the power, it may be exercised either by such will or by such assurance as lastly hereinbefore mentioned.

105. When the power is not properly exercised, no Court shall in any case compel the person in possession of the property to which the power relates to deliver the property as if the power had been properly exercised, or shall otherwise aid the defective execution, except as provided in the Specific Relief Act, 1877, chapter three.

106. All appointments made in the manner directed by section one hundred and four shall be deemed to be executed and attested in proper form, notwithstanding that some other mode of execution or attestation has been prescribed by the donor.

107. An appointment made by will may be revoked by a subsequent will; but it is not revoked by mere general words of revocation of all former wills, without a new appointment.

An appointment made by a non-testamentary instrument is irrevocable except where power to revoke the appointment is expressly reserved by such instrument.

108. A power exercisable by will only cannot be delegated.

A special power involving the exercise of personal discretion by the donee cannot be delegated.

A power to do an act merely ministerial and involving no personal discretion may be delegated.

Illustrations.

(a). A has power under a settlement to dispose of an estate in such proportions as he thinks fit among the issue of his marriage with B. A by his will purports to delegate this power to B, to exercise as she thinks fit. The attempted delegation is void, and the dispositions, if any, in default of appointment take effect.

(b). A, the donee of a power to appoint to his children, determines to exercise it in favour of the objects equally. With this view he causes an instrument of appointment to be prepared. A may appoint an attorney to execute this instrument.

109. Where a power is to be exercised with the consent of several persons, all who are living must concur in the consent, but in case any one or more of them die during the continuance of the power, the consent of the survivors or the survivor is sufficient, unless a contrary intention appears by the instrument creating the power.

Consent to the exercise of a power must be given during the donee's lifetime by a non-testamentary instrument registered.

Consent to the exercise of a power need not be given by the instrument by which the power is exercised, but if it is given by a different instrument, such instrument must be executed at a time not later than the time at which the donee of the power executes the instrument by which he exercises the power.

110. If a person disposes of property in such

Recital of power not necessary. manner as is authorized by a power vested in him, such disposition shall take effect under the power, notwithstanding that the power is not mentioned or referred to in the instrument of disposition.

Illustration.

Land is settled upon A for life with a special power to charge, by a non-testamentary instrument, portions in favour of his children. Subsequently, a general power to dispose of the land by any instrument is vested in A. He executes an assurance, by which he directs that a sum of money shall be raised out of the land and settled on his son B for life, with remainder to B's wife and children. Such an appointment cannot take effect under the special power, but may be treated as a valid exercise of the general power.

111. The donee of a power need not exercise

Power exercisable by several instruments executed at different times. it entirely and at once by a single instrument, but he may from time to time exercise any unexhausted part thereof at his discretion.

If the donee has purported to exercise his power in such a manner that his appointment is void, the power is, to that extent, unexhausted.

Illustrations.

(a). A has a general power. He may appoint the property at one time to B for his life and at another to C absolutely.

(b). Trustees under a settlement, having power to lend Rs. 10,000 to A, the tenant for life, lend the money accordingly. A repays it. The trustees may again lend Rs. 10,000 to A.

(c). A has power to raise Rs. 10,000 by sale or mortgage of Sultánpur. A exercises the power by mortgaging Sultánpur. He may afterwards exercise the power by selling Sultánpur in order to pay off the mortgage.

112. Where a power given by any instrument

Disposition intended to take effect after interests appointed under power. is void in its creation, no disposition or gift made by the same instrument shall be deemed void merely because it is intended to take effect after the interests to be appointed under the power or in default of any such appointment.

Illustration.

A marriage-settlement provides that the settled property shall belong to the husband and wife successively for their lives; that after the death of the survivor of them, it shall go to such of the children of the marriage, and in such shares, as the husband and wife shall jointly appoint, the interest of each such child to become vested in him on his attaining the age of twenty-five years; and that in the event of

there being no child of the marriage who shall attain that age, or in default of appointment, the property shall belong to the husband or his legal representative.

Here the power to appoint the property is, under section eighty-six, void in its creation; but the ultimate interest given to the husband takes effect.

General Powers.

113. If the donor confers on the donee a

Effect of general power. * general power, the donee shall, so far as regards his power of disposition, his creditors and all persons who contract with him for lawful consideration to obtain any interest in the property comprised in the power, be deemed to be the absolute owner of such property for such interest therein as the donor could dispose of.

This rule is to take effect notwithstanding that the donor has prescribed some particular method for executing the power.

Illustrations.

(a). A, the absolute owner of land, settles it on B for life with remainder to such purposes as B— shall appoint, or shall by deed appoint, or shall by will appoint, or shall by deed or will appoint, and in case B dies without making any such appointment, on C absolutely.

If B—

grants the land by assurance, or bequeathes it, or contracts to sell it, or incurs debt,

the property is liable, in the hands of either B or C, as the case may be, to the claims of B's grantee, legatee, purchaser or creditors, as the case may be.

If B dies having made no disposition of the property, C is entitled to it, subject to any claims which B's creditors may establish against it.

(b). A confers on B a general power, exercisable by a non-testamentary instrument, to appoint certain land. B appoints the land to certain persons in such shares as C shall fix. This appointment is valid.

114. If the donor confers on the donee a

Effect of general power without disposition of property in case of non-appointment. general power, and makes no disposition of the property in the event of non-appointment, the

donee shall be considered as the absolute owner of the property or such interest therein as the donor could dispose of.

Illustration.

A, the absolute owner of property, settles it on B for life with remainder to such purposes as B shall appoint, and makes no gift over in default of appointment. B dies without making any disposition of the property. The property vests in the representatives of B, and does not revert to A or his representatives.

Special Powers.

115. If the donee has only a special power, he

Interest conferable by donee of special power. cannot confer any interest in the property comprised therein which could not have been conferred by the donor at the time of the creation of the power.

Illustrations.

(a). A settles a fund upon B for life with remainder to such purposes as B shall appoint. After the

settlement is made C is born. B then appoints the fund to C for life with remainder to C's children absolutely. The appointment is valid, though C has no children at the time.

(b). A settles a fund upon B for life with remainder to his children as he shall appoint. At the date of the settlement B has no child, but afterwards has a son C. B then appoints to C for his life, with remainder to his children. Such interest could not have been conferred by A, and B's appointment is void.

116. Where the donee of a special power purports, in exercise of the power, to appoint to objects authorized by the power and also to objects not so authorized, the appointment in favour of the authorized objects shall take effect if their interests are independent of those of the unauthorized objects.

Illustration.

Property is settled on A for life, and after his death on such of his children as he shall appoint, and in default of appointment to all A's children equally. A appoints that the property shall go after his death to his widow for her life, and after her death to two of his sons, C and D, in equal shares. There are five children of A. The appointment in favour of A's widow is invalid, and the rents and profits of the property during her life will go to all the five children in equal shares, but after her death to C and D absolutely.

117. Where the donee of a special power purports, in exercise of the power to confer a larger interest than is authorized thereby, such appointment shall, if the appointee so elect, be void only for the excess, and good for the residue, if they can be separated.

Illustrations.

(a). A has a life-interest in Rámnagar, with power to grant leases thereof for 30 years. A makes a lease of Rámnagar for 50 years. Such lease is good for 30 years only.

(b). A having a life-interest in Rámnagar and Sultánpur, with power to grant leases of Rámnagar for 21 years, grants a lease comprising both Rámnagar and Sultánpur for 21 years. After A's death the lessee may, if he thinks fit, elect to retain the lease as a lease of Rámnagar only, till the end of the 21 years.

(c). A having power to charge Rámnagar with Rs. 7,000 charges it with Rs. 8,000. The appointment is good for the Rs. 7,000, but not for the residue.

118. Where, by an appointment under a special power, interests authorized and also interests unauthorized are created, and the interests authorized cannot be distinguished from those unauthorized, the whole is void.

Illustrations.

(a). A fund is settled on A during his life, and after his death on his children as he shall appoint. A appoints the annual income for the benefit of his son B and B's wife and children, in such manner as trustees shall think fit. The appointment is wholly void.

(b). Under a similar settlement, A having legitimate children by B, his wife, and others by C and D, his concubines, appoints the property to be divided among his children by B, C and D, the shares of the sons to be double those of the daughters. Here the interests authorized and unauthorized cannot be distinguished, and the appointment is wholly void.

119. When a person exercising a special power appoints to the gift a condition or qualification which is not authorized by the power, the gift is good and the condition or qualification only is void.

Illustrations.

(a). A, having a power to appoint a fund among his children, gives a part of it to his son B on condition that B shall settle it on B's children. The condition is void, and the gift is absolute.

(b). A, having a power to appoint a fund to a limited class of objects of whom B is one, appoints it to B, adding a condition that B shall release a debt owing to him by A, and also pay Rs. 1,000 to C. The appointment is good; but the condition is void.

120. Where the donee of a special power purports, in exercise of the power, to appoint to persons not objects of the power, and by the same instrument gives to the persons entitled, in default of appointment, to the property comprised in the power benefits out of other property, the persons so entitled shall elect either to confirm such appointment or to dissent from it, and in the latter case they shall relinquish the benefits so given to them.

The rules contained in the Indian Succession Act, 1865, sections 173 to 177, both inclusive, shall, *mutatis mutandis*, apply to elections under this section.

121. If a beneficial interest in immoveable property, and also a power to let it, are given to the same person, and he grants his interest in the property, he may enter into a contract not to exercise his power.

122. Save as provided by section one hundred and twenty-one, an agreement or undertaking not to exercise a power which is given for the benefit of persons other than the donee is void.

123. Where a power given for the benefit of persons other than the donee is exercised with a view to the benefit, direct or indirect, of the donee, in any mode not intended by the donor, the appointment is void.

Illustrations.

(a). A, having power to appoint a fund in favour of any of her children, appoints the whole fund absolutely to one child, who has previously entered into an agreement with her to give one-half of the fund to A's husband absolutely. The appointment is void.

(b). A, having power to appoint a fund in favour of any of his children, appoints a portion of the fund to his son C, a minor, whom he knows to be suffering from a mortal disease; A being the person entitled to C's property in the event of his death. The appointment is void.

CHAPTER XII.

OF PROPERTY HELD BY SEVERAL PERSONS.

(c). A, having power to grant leases of certain settled land, exercises the power in favour of B in consideration of Rs. 1,000 paid to A by B as a fine or premium. The lease is void, and A holds the Rs. 1,000 in trust for the persons interested under the settlement.

124. If the instrument by which a power of appointment in favour of specified objects is created does not provide for the event of no appointment being made, the property belongs (subject to any appointment that may have been made) in equal shares to the said objects.

Illustration.

A settles property on B for life with remainder to B's children as he shall appoint, and makes no disposition in default of appointment. B has two children, C and D, and appoints Rs. 1,000, part of the property, to C. Then C dies. Then B dies without making any further appointment. After paying Rs. 1,000 to C or his representative, the residue of the property is divisible in equal moieties between D and the representative of C.

125. Where there is a power of appointment in favour of a certain class of objects, and there is also a disposition of the property comprised in the power in the event of there being no objects, if the power is not exercised and there are objects, the property belongs to them in equal shares.

126. Under a power of appointment in favour of several objects, an appointment of the whole property to one or more of such objects exclusively of the others is valid :

Appointment of whole property to some only of several objects in favour of which power is given.

Provided that, where the assurance creating the power declares the minimum amount or value of the share from which no object of the power is to be excluded, the appointment shall be invalid so far as it excludes any such object from any such share, and no farther.

127. Interests authorized to be created under a power take effect when created as if they had been created by the original instrument conferring the power, unless where a contrary intention is expressed therein.

Priority of interests created under powers.

128. A power given to the owner of a limited interest in the property comprised in the power is extinguished when he becomes the absolute owner of such property.

Extinguishment of powers.

When the exercise of a power given to the owner of a limited interest in property would derogate from a previous grant of such interest by the donee, the power shall be deemed to have been extinguished by such grant.

Illustrations.

(a) Z, tenant for life of certain land with power to charge it with a jointure for his wife, becomes absolute owner of the land. The power is extinguished.

(b). A, tenant for life of certain land with power to grant leases thereof in possession, grants his life-interest in the land to B. The power is extinguished.

129. On the death of one of two or more persons entitled to property in their own right, his share shall become vested in his legal representative, unless the property is held under an instrument which expressly provides that on the death of one, his share shall accrue to the survivor or survivors.

Devolution of share of one of several persons entitled to property in their own right.

Nothing in this section applies to property belonging to an undivided family.

Illustrations.

A and B jointly advance money on mortgage, A contributing one-third. A died intestate. A's third belongs to his legal representative.

130. When immoveable property is held in possession by co-owners, any one of them may institute a suit in the proper Court, and such Court may direct a partition of the property to be made among the co-owners, and for the purposes of partition may, in order to equalise the value of the shares, direct any money to be paid by one to another or to be charged on one share in favour of another.

Partition of immoveable property.

If it appear to the Court that a sale of the property and a distribution of the proceeds would be more beneficial for the persons interested than a division of the property between them, the Court may, on the application of any such person, direct a sale of the property.

Power to direct sale and to distribute proceeds.

Nothing in the second clause of this section shall be deemed to authorise the Court to direct a sale of the property of an undivided family.

131. On any sale under the last preceding section, the Court may, if it think fit, allow any of the persons interested in the property to bid at the sale, on such terms as to setting-off or accounting for the purchase-money or any part thereof, or as to any other matters, as to the Court seems reasonable.

Power to allow person interested to bid for property sold for purposes of partition.

132. All sums of money paid under the two last preceding sections may, if the Court think fit, be paid into Court.

Payment into Court.

133. Nothing in this chapter shall affect any local law for the time being in force relating to the partition of estates paying revenue to Government.

Saving of laws relating to partition of revenue-paying estates.

134. When undivided immoveable property is held in possession by co-owners and one of them transfers his share or any interest therein, by sale, mortgage or otherwise, the transferee takes the share or interest subject to the right of the other co-owners to enforce a partition of the

Right of transferee of share of undivided property.

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.

135. When one co-owner of immoveable property commits, or threatens to commit, waste on the same without the consent of the other joint-owner, that other may institute a suit to recover compensation for the injury caused to him by the waste, or to obtain an injunction to stay the waste, as the case may require.

CHAPTER XIII.

OF ASSIGNMENTS OF THINGS IN ACTION.

136. No assignment 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 assignment or charge is given to him, unless he is a party to such assignment or charge; and every dealing by such debtor or person, not being a party to, and not having received express notice of, an assignment or charge, with the debt or property shall be valid as against such assignment or charge.

Illustrations.

(a) A owes money to B, who assigns the debt to C. B. then demands the debt from A, who, having no notice of the assignment, 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 assigning 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.

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

138. On receiving such notice the debtor or person in whom the property is vested shall give effect to the assignment 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 assignment or charge is made is not complete according to the law of such country.

139. The person to whom a debt or charge is assigned shall take it subject to all the liabilities to which the assignor thereof at the date of the assignment.

Illustration.

(a). 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.

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

CHAPTER XIV.

OF APPORTIONMENT.

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.

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

THE FIRST SCHEDULE.

(a). STATUTES.

Year and chapter.	Subject.	Extent of repeal.
13 Ed. I, c. 22	Waste	The whole.
31 Hen. VIII, c. 1 ...	Partition	The whole.
32 Hen. VIII, c. 62 ...	Do.	The whole.
13 Eliz., c. 5.	Fraudulent Conveyances...	The whole.
27 Eliz., c. 4.	Do.	The whole.
4 Wm. & Mary, c. 16 ...	Clandestine Mortgages ...	The whole.
6 Anne, c. 72	Discovery of deaths of tenants for life.	The whole.

(b). ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
XXIV. of 1841.	Illusory appointments, &c.	So far as regards illusory appointments.
XXXI. of 1854.	Modes of conveying land	Section 17.
X. of 1865 ...	Succession	Illustration (g) to sec. 107.
IV. of 1872...	Punjab 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 Regulations XVII. of 1806.
I. of 1877 ...	Specific Relief	Section 13, and in sections 35 and 36 the words "in writing."

(c). REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I. of 1793.	Conditional sales ...	The whole Regulation.
Bengal Regulation XVII. of 1806.	Redemption ...	The whole Regulation.
Bombay Regulation V. of 1827.	Mortgagees in possession.	Section 15.

THE SECOND SCHEDULE.

FORMS OF ASSURANCES.

(See Section 5.)

A.—TRANSFER OF IMMOVEABLE PROPERTY ON SALE.

This grant made the _____ day of _____ 18____, between *A B* of _____, and *C D* of _____. In consideration of _____ rupees paid to the said *A B* by the said *C D*, the receipt whereof the said *A B* hereby acknowledges, he, the said *A B*, hereby grants unto *C D* [*here describe the property as provided in the Indian Registration Act, section 21*]. In witness whereof, the said *A B* has signed these presents.

*A B.*Signed in the presence of *E F* of _____

B.—EXCHANGE.

This Exchange made the _____ day of _____ between *A B* of _____ and *C D* of _____. Whereas the said *A B* is the owner of the lands comprised in the first schedule hereunder written, free from incumbrances, and the said *C D* is the owner of the lands comprised in the second schedule hereunder written, free from incumbrances. And whereas the said *A B* and *C D* have agreed to make an exchange in manner hereinafter appearing of the said lands comprised in the said schedules respectively. In pursuance of the said agreement and in consideration of the lands intended to be hereinafter granted in exchange by the said *C D*, he the said *A B* hereby grants unto the said *C D* the lands situate in _____ specified in the first schedule hereunder written and delineated in the map in the margin of these presents and therein coloured red [*or as the case may be*] in exchange for the lands intended to be hereinafter granted by the said *C D*. And the said *C D* in further pursuance of the said agreement and in consideration of the lands hereinbefore conveyed in exchange by the said *A B* hereby grants to the said *A B* the lands situate in _____ specified in the said second schedule hereunder written and delineated in the map in the margin of these presents and therein coloured blue [*or as the case may be*] in exchange for the lands hereinbefore granted in exchange by the said *A B*. In witness whereof, we have signed these presents.

A B.
*C D.*Signed in the presence of *E F* of _____

(The first schedule above referred to).

(The second schedule above referred to),

C.—ENGLISH MORTGAGE OF IMMOVEABLE PROPERTY.

This mortgage-deed made the _____ day of _____ 18____ between *A B* of _____ and *C D* of _____. In consideration of Rs. _____ paid to the said *A B* by the said *C D*, the receipt whereof is hereby acknowledged, the said *A B* contracts with the said *C D* that the said *A B* will pay to the said *C D* the sum of Rs. _____ with interest for the same in the meantime at the rate of _____ per cent. per annum on the _____ day of _____ next; and for the consideration aforesaid, he, the said *A B*, hereby grants to the said *C D* [*here describe the property as provided in the Indian Registration Act, section 21*]: Provided that if the said *A B* pays to the said *C D* the said sum of Rs. _____ with interest thereon in the meantime at the said rate on the _____ day of _____ next, then the said *C D* will, upon the request and at the cost of the said *A B*, reconvey the said premises to the said *A B*, or as he shall direct, free from encumbrances by the said *C D*. In witness whereof the said *A B* has signed these presents.

Signed in the presence of *E F* of _____ and *G H* of _____

D.—CHARGE.

(a). This assurance made the _____ day of _____ 18____, between *A B* of _____, and *C D* of _____. The said *A B* hereby renders the lands specified in the schedule hereunder written security for the payment to the said *C D* of five thousand rupees and interest for the same at the rate of _____ per cent. per _____, payable on the _____ day of _____. In witness, &c.

Signed in the presence of *E F* of _____ and *G H* of _____

(The schedule above referred to).

(b). This assurance made the _____ day of _____ 18____ between *A B* of _____, and *C D* of _____.

The said *A B* hereby renders the lands and houses specified in the schedule hereunder written security for the payment to the said *C D* of the sum which shall be due to him on the balance of the account, of the said *A B*, not exceeding _____ rupees, together with interest thereupon at the rate of _____ per cent. per _____. In witness, &c.

Signed in the presence of *E F* of _____ and *G H* of _____

(The schedule above referred to).

E.—LEASE OF A DWELLING-HOUSE.

This lease made the _____ day of _____, between *A B* of _____, and *C D* of _____. The said *A B* hereby leases to the said *C D* [*description of property as required by the Indian Registration Act, section 21*], to hold the same from the _____ day of _____ for the term of _____ at the rent of _____ rupees, payable by the said *C D* to the said *A B* in equal _____ payments on the _____ day of _____ and the _____ day of _____ in each year [*or in equal monthly payments or in equal quarterly payments, or as the case may be*].

And the said *C D* hereby contracts with the said *A B*,

First, that he the said *C D*, during the said term will pay the said rent on the days and in manner aforesaid: and pay all rates and taxes payable in respect of the said premises: and keep in repair all the glass windows belonging to the said house, and not make any alteration in the said premises without the previous consent in writing of the said *A B*, and at the determination of the said term so yield up the same to the said *A B*,

Secondly, that the said *A B* and his agents and workmen may at all reasonable times during the said term enter upon the said premises to inspect the same:

Thirdly, that during the said term no offensive business or occupation or nuisance shall be carried on or committed on the said premises, and the same shall be used as a private dwelling-house only:

Fourthly, that the said *C D* will not assign or under-let the said premises without the consent in writing of the said *A B*:

Provided that on any breach or non-observance of any of the contracts hereinbefore contained, the said *A B* may re-enter upon the said premises and hold the same as if this lease had not been made.

And the said *A B* hereby contracts with the said *C D* that he the said *A B* will keep the said house in good and tenantable repair during the said term.

In witness whereof the said *A B* and *C D* have signed these presents.

A B.

C D.

Signed in the presence of *E F* of

F.—LEASE OF A FARM.

This lease made the day of 18
between *A B* of and *C D* of . The said
A B hereby leases to the said *C D* the lands
in called with the buildings
thereon, the particulars whereof are specified in
the schedule hereunder written, except all timber
and other trees, and the right to enter and cut
and remove the same. To hold the same, except
as aforesaid, from the day of for the term
of years from the day of the date of these
presents at the rent of rupees payable by
the said *C D* to the said *A B* in equal payments
on the day of and the day of
in each year [or as the case may be]. And the said
C D hereby contracts with the said *A B*—

First, that the said *C D*, during the said term will pay the said rent on the days and in manner aforesaid; and pay all rates and taxes payable in respect of the said premises; and keep the buildings, fences, ditches, gates and fixtures upon or about the said lands in good condition and complete repair and without any alteration except such as the said *A B* shall approve; and will cultivate

and manage the said lands in a proper manner, and will not convert into arable land any land now in pasture without the consent of the said *A B*, and will, at the determination of the said term, yield up the said premises in such condition and repair and in proper order as aforesaid unto the said *A B*.

Secondly, that the said *A B*, and his agents and workmen may at all reasonable times during the said term enter upon the said premises to inspect the same and to cut and remove the timber and other trees.

Thirdly, that the said *C D* will not assign or under-let the said premises or any part thereof without the consent in writing of the said *A B*.

Provided that on any breach or non-observance of any of the contracts hereinbefore contained, the said *A B* may re-enter upon the said premises and hold the same as if this lease had not been made.

In witness whereof the said *A B* and *C D* have signed these presents.

Signed in the presence of *E F* of

(The schedule above referred to.)

THE THIRD SCHEDULE.

DECREE FOR SUCCESSIVE REDEMPTIONS.

(See section 61.)

[<i>A</i> , third mortgagee	...	<i>Plaintiff.</i>
<i>B</i> first mortgagee in possession	}	<i>Defendants.]</i>
<i>C</i> second mortgagee		
<i>D</i> owner of right of redemption		

Account of what is due to the defendant *B* for principal and interest in respect of the said mortgage of 1837, and for costs properly incurred in respect thereof, and tax him his costs of the suit.

Account of the rents and profits of the mortgaged property received by the said defendant *B*, or by any other person by his order or for his use, or which without his wilful neglect or default might have been received. Let what shall be owing on such last mentioned account be deducted from what shall be found due to the defendant *B* for principal, interest and costs as aforesaid.

And upon the defendant *C* paying to the said *B* the balance which shall be remaining due to him for such principal, interest and costs after such deduction within six months after such balance has been declared in court.

Let the said *B* assign the mortgaged property free from incumbrances created by him, or any one claiming under him, or those under whom he claims, and deliver upon oath all documents of title in his possession or power relating thereto to the said *C*, or as he shall appoint.

But in default of the said *C* paying to the said *B* such balance by the time aforesaid, let him stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute for the said *B* his subsequent interest on his said mortgage and tax him his subsequent costs of the said suit. And upon the plaintiff *A* paying to the said *B* what shall be found due to him for principal, interest and costs as aforesaid after such deduction as aforesaid within three months after such amount has been declared in court,

Let the defendant *B* assign the mortgaged property free from incumbrances, &c. [as above] and deliver upon oath, &c. [as above] to the said *A*, or as he shall appoint.

But in default of the said *A* paying to the said *B* what shall be found due to him as aforesaid by the time aforesaid, let the said *A* stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute the said *B* subsequent interest on his said mortgage and tax him his subsequent costs of the said suit, and upon the said *D* paying to the said *B* the amount found due to him for principal, interest and costs as aforesaid, within three months after such amount has been declared in court, let the said *B* assign the said mortgaged property free from incumbrances, &c. [as above] and deliver upon oath, &c. [as above] to the said *D*, or as he shall appoint.

But in default of the said *D* paying to the said *B* what shall be found due to him as aforesaid by the time aforesaid, let the said *D* stand absolutely foreclosed of all right to redeem such property.

But in case the said *O* should redeem the said *B* as aforesaid by the time aforesaid—

Let an account be taken of what is due to the said *O* for principal and interest in the mortgage of 1841, and for what the said *O* shall so pay to the said *D* for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said *O* his costs of the said suit.

And upon the said *A* paying to the said *O* what shall be found due to him for such principal, interest and costs within three months after such amount has been declared in court, let the said *O*

assign the said property free, &c. [as above], and deliver upon oath, &c. [as above] to the said *A*, or as he shall appoint.

But in default of the said *A* paying to the said *O* what shall be found due to him as aforesaid by the time aforesaid, let the said *A* stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute the said *O* his subsequent interest on his said mortgage and on what he shall have paid to the said *B* and tax him his subsequent costs of this suit. And upon the said *D* paying to the said *O* what shall be found due to him for principal, interest and costs as aforesaid within three months after such amount has been declared in court, let the said *O* assign, &c. [as above].

But in default of the said *D* paying to the said *O* what shall be found due to him as aforesaid by the time aforesaid, let the said *D* stand absolutely foreclosed, &c. [as above].

But in case the said *A* shall redeem the said *O* as aforesaid, let an account be taken of what was due to the said *A* for principal and interest on the mortgage of 1861 in the plaint mentioned, and for what the said *A* shall so pay the said *O* for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said *A* his costs of the said suit.

And upon the said *D* paying to the said *A* what shall be found due to him for such principal, interest and costs as aforesaid, within three months after such amount has been declared in court—

Let the said *A* assign the said property free, &c. [as above], deliver upon oath, &c. [as above], to the said *D*, or as he shall appoint.

But in default of the said *D* paying to the said *A* what shall be due to him for such principal, interest and costs by the time aforesaid, the said *D* is from thenceforth to be absolutely foreclosed, &c. [as above].

D. FITZPATRICK,
Secy. to the Govt. of India.

Published with the "Bombay Government Gazette" on the 28th February 1878.

PART VI.

LEGISLATIVE DEPARTMENT.

CORRIGENDA.

In the Transfer of Property Bill, No. II,* published in the *Gazette of India* of the 16th instant—
in section 14, last line, for "covenants," read "contracts":
in section 55, line 8, for "fifty-four," read "fifty-three".

D. FITZPATRICK,

Secretary to the Government of India.

BILLS OF THE GOVERNMENT OF INDIA.

LEGISLATIVE DEPARTMENT.

The following Preliminary 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 9th February 1878:—

WE, the undersigned Members of the Select Committee to which the Bill to define and amend the

Despatch from Secretary of State, No. 26, dated 7th July, 1870, and enclosure.

Extract from a letter from the Registrar, High Court, Bombay, dated 14th July, 1877, and enclosure.

Note by the Hon'ble Whitley Stokes, dated 31st July, 1877.

" by H. G. Keene, Esq., District Judge, Agra, dated 31st July, 1877.

" by John Alone, Esq., Judge, Small Cause Court, Agra.

From C. Sanderson, Esq., Solicitor to the Port Commissioners, dated 1st August, 1877.

Note by A. Phillips, Esq., dated 19th September, 1877.

From Under Secretary to Government, Bombay, No. 5958, dated 25th September, 1877, and enclosures.

" Officiating Secretary to Chief Commissioner, Assam, No. 2267, dated 1st October, 1877, and enclosure.

" Secretary to Chief Commissioner, Mysore, No. 6778-5, dated 18th October, 1877, and enclosures.

" Chief Secretary to Government, Fort St. George, No. 2742, dated 20th November, 1877, and enclosures.

" Lakshmi Náráyana Pandit, Pleader, High Court, North-Western Provinces, dated 2nd December, 1877, and enclosure.

" Officiating Secretary, Chief Commissioner, Central Provinces, No. 4644—219, dated 3rd December, 1877, and enclosures.

" Chief Secretary to Government, Fort St. George, No. 2820, dated 28th November, 1877, and enclosure.

" Secretary to Government, North-Western Provinces and Oudh, No. 759A, dated 8th December, 1877, and enclosures.

" Ditto ditto, No. 761A, dated 11th December, 1877, and enclosure.
Memorandum by Pandit Srikishen, Pleader, Judicial Commissioner's Court, Oudh.

From Officiating Secretary to Government of Bengal, No. 4768, dated 12th December, 1877, and enclosures.

Second Note by the Hon'ble Whitley Stokes, dated 27th December, 1877.

From Secretary to Chief Commissioner, British Burma, No. 49-64, dated 12th January, 1878, and enclosures.

" Chief Secretary to Government, Fort St. George, No. 41, dated 8th January, 1878, and enclosure.

" Secretary to Government, Panjáb, No. 232, dated 21st January, 1878, and enclosures.

" Secretary to Government, Bombay, No. 557, dated 25th January, 1878, and enclosures.

CHAPTER I.—Preliminary.

3. We have here followed the Contract Act, section 1, by inserting a clause to save all enactments not expressly repealed, such, for instance, as the Acts limiting powers of guardians and managers to make sales and leases, and the provisions of the Panjáb Tenancy Act, section 32, which have been held to restrict to occupancy-tenants the right to sublet. We have also saved all incidents of contracts not inconsistent with the provisions of the Bill. Besides the Malabar mortgagee's option, which the Bill as introduced expressly preserved, there must be many other incidents of Native contracts with which it is desirable not to interfere. We have also saved the right to anything affixed to the soil by tenants under leases granted before the proposed Act comes into force.

CHAPTER II.—Assurances of Immoveable Property.

4. We have struck out the section relating to easements, as it will more fitly come into the Bill relating to those rights, which is now in preparation.

5. Section 6 of the Bill as introduced would have often rendered persons liable to an obligation, or at least to be sued on an obligation, the existence of which was unknown to them. We think that this is obviously inexpedient, and have therefore made the section an embodiment of the well-known rule, that a contract between the respective owners of two neighbouring parcels of land, that one of them shall do or refrain from doing something on his parcel for the benefit of the other parcel, may be enforced in equity against all persons claiming the former parcel under him with notice of the contract.

6. We think that section 7 of the Bill, as introduced, should be omitted, as it would allow incidents of a novel kind to be devised and attached to property at the fancy or caprice of any owner. It would, moreover, allow the grantee's enjoyment of the property to be destroyed or materially lessened by the exercise of the right reserved.

7. We have also struck out section 9 of the Bill as introduced. The rules of construction therein referred to, besides being inapplicable in some respects to instruments executed *inter vivos*, are contained in the testamentary portion of the Succession Act, which does not apply to Muhammadans anywhere, and applies to Hindús only in the Presidency-towns and the Lower Provinces.

8. We have provided (section 7) rules as to the right of innocent grantees for valuable consideration without notice, of persons like the managers of the property of a minor or an undivided family, childless Hindú widows in possession of their deceased husband's property, and benámídar's and other ostensible owners, who have only a restricted power of alienation. Our rules on this head are in accordance with decisions of the Privy Council and the Calcutta High Court.

9. We have redrawn section 13 of the Bill as introduced, so as to save the rights of the creditors of the person paying the consideration for a benámí transaction, and as the section will apply to benámí leases as well as to benámí sales, we have transferred it to chapter II.

CHAPTER III.—Sales.

10. We have declared (section 10) the respective liabilities of an intending seller and an intending buyer to make disclosures of defects and advantages.

11. We have introduced into section 11 clauses as to the seller's duty to produce title-deeds for examination, to answer questions respecting the property and to discharge incumbrances; as to the buyer's right to abandon the contract when the seller materially alters the property; and as to the custody and production of title-deeds after completion. We have also declared when the property vests in the purchaser, and explained when the purchase is completed.

12. Clause (a) of section 11 of the Bill as introduced, would have rendered a vendor liable for damage sustained by the purchaser owing to the loss of his bargain, and it would have made a vendor, like a mortgagor, warrant his title as against all the world. We think that in this respect his liability should be restricted, as it is in England, to acts done by himself or those through whom he claims. Section 11, clause (j), has been framed accordingly.

13. Clauses (c) and (f) of the same section, as introduced, are corollaries from the doctrine of equitable ownership and appear to us to be inconsistent with section 12, which declares that a mere contract for sale shall not transfer the property. Why, for instance, should the buyer be made liable to bear loss arising from destruction of property which is not his own? We have therefore omitted these clauses. Under any circumstances they would have been of little use in a country where, as a rule, the making of the contract is immediately followed by the completion of the purchase.

14. We have provided (section 12) for cases where, before completion, the buyer becomes insolvent. This provision is modelled on the present English Law, 32 and 33 Vic., c. 71, ss. 23, 24. We have also provided for the following matters:—

- (a) the liability to the seller of the buyer of a leasehold (section 13) :
- (b) the liability to the seller of the buyer of an equity of redemption (section 14) :
- (c) money received under a fire-policy by the seller for damage done after the date of the contract (section 15) :
- (d) joint-purchases (section 17) :
- (e) the rights arising where two estates are subjects to a common charge and one of the estates is sold (section 18) :
- (f) the exemption of *boná fide* buyers of trust-property from seeing to the application of the purchase-money (section 19) :
- (g) the rights of the seller where there is default on the part of the buyer and the rights of the buyer where there is default on the part of the seller (section 20).

CHAPTER IV.—*Exchanges.*

15. In this chapter, which corresponds with chapter V. of the Bill as introduced, we have made no substantial change except the insertion of a section (22), providing (in accordance with the Code Civil, Art. 1704) that if one of the parties prove that the other was not owner of the thing given or agreed to be given to the former in exchange, the former cannot be compelled to deliver that which he has promised in counter-exchange; but when he has received the thing given to him in exchange, he may be compelled to return it.

16. We have also provided, in accordance with the same Code, Art. 1705, that the party deprived of the thing he has received in exchange by reason of invalidity of title caused by 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.

CHAPTER V.—*Mortgages and Charges.*

17. We have made it clear that the mortgages here dealt with are only mortgages of immoveable property and sub-mortgages. Mortgages of policies, ships, machinery, furniture, cattle and other moveable property require to be separately treated.

18. We have inserted a section (26) requiring that every mortgage shall be created by an assurance signed by the mortgagor and attested by at least two witnesses. As mortgages by verbal agreement are now rarely if ever made, this will not substantially alter the present practice, and will obviously tend to prevent fraud and litigation.

19. The Bill as introduced permits the mortgagor to deposit the amount due only in the District Court. This might lead to much inconvenience, and we have modified section 28, clause (b), so as to allow the mortgagor to deposit in any Court in which he could have instituted a suit for redemption.

20. We have, in accordance with the present law, precluded (section 28) a person interested in part only of the mortgaged property from redeeming his own part only, and a person interested in part only of the mortgage-money from foreclosing his own part only.

21. We have given (section 29) the mortgagor the rights which he has under the covenants for title contained in an English mortgage-deed. When the mortgagee has a right to sue for the mortgage-money, these covenants are of no practical use during the continuance of the mortgage; but they become valuable after a foreclosure or sale.

22. We have declared (section 30) that, where the property is a lease for years and the mortgagee, while in possession, obtains a renewal, the mortgagor upon redemption shall have the benefit of the new lease.

23. We have imposed (section 32) on a mortgagor making a subsequent mortgage the duty of disclosing to the subsequent mortgagee the previous mortgages, and of giving notice to the prior mortgagees of the subsequent mortgage.

24. Although from the theoretical point of view there is much to be said in favour of discarding the distinctions between the various kinds of mortgages used in India, we think that the amount of simplicity gained would not justify the amount of disturbance created, and that, in practice, confusion and hardship would be caused if simple mortgagees and mortgagees by conditional sale were allowed (as they would be by the Bill as introduced) to take possession, or if simple and usufructuary mortgagees were allowed to foreclose. Moreover, any such extension of the power to foreclose would enable large classes of speculators and money-lenders to defeat the intentions with which the Legislature framed the new Code of Civil Procedure, sections 320—322, by obtaining simple mortgages and then instituting foreclosure-suits. We have therefore introduced (section 34) a clause the effect of which will be to maintain the law as it stands in this respect.

25. We have also (section 34) prohibited mortgagees from interfering with the right of the public to the continued use of undertakings, such as canals and railways, in the maintenance of which the public are interested. The remedy of such mortgagees will be, to obtain a receiver of the profits of the undertaking.

26. We have provided (section 36) for the case where the parties to a mortgage have omitted to stipulate expressly for interest.

27. We are of opinion that, in the absence of an express contract to the contrary, no mortgagee should be entitled as such to take possession, and we have inserted (section 37) a clause to this effect. We have, however, allowed the mortgagee to sue for a receiver after the expiration of one year from the time when the principal has become payable, or after interest has been in arrear for six months; and we have empowered the Court, in any suit for foreclosure or sale, to appoint a receiver pending the proceedings in the suit.

28. We think that the mortgagee should be allowed to sue for the mortgage-money in four cases only, namely, (1) where the mortgagor binds himself expressly to pay the loan, (2) where the mortgagor remains in possession and allows the property to be sold for arrears of revenue, (3) where the property is destroyed by diluvion, fire or other superior force, and (4) in the case of an usufructuary mortgage, where the mortgagor is unable to give or secure possession. We have inserted a section (38) to this effect.

29. We have considered the question as to whether we should validate powers of sale in mortgages of property situate in the Mufassal, and we have come to the same conclusion as the late Sadr Diwání Adálat came to in 1842, namely, that it would not be safe to entrust Indian money-lenders with powers so liable to abuse. We have therefore framed the section (39) corresponding with section 24 of the Bill as introduced, so as to invalidate such powers except where the lender is the Government, or the property is situate in the Presidency Towns or Rangoon.

30. We have limited (section 40) the right of a mortgagee in possession to insure to cases in which the property is insurable at ordinary rates. In the case of an inflammable property, the mortgagee might, under the Bill as introduced, impose an unfair burden on the mortgagor.

31. We have provided (section 41) for accessions to the mortgaged property.

32. We have framed the section (43) corresponding with section 17 of the Bill as introduced, so as to exempt mortgagees who, under a contract in writing, take the profits of the mortgaged property in lieu of interest, from keeping accounts of their receipts.

33. Where a mortgagor in possession fails to pay arrears of revenue and the estate is consequently sold, our Courts have ruled that the mortgagee has a charge on the surplus of the sale proceeds after payment thereof of such arrears. We have in section 45 adopted this ruling.

34. The Bill as introduced had nothing to shew that Lord Denman's doctrine in *Pickard v. Sears* applies to mortgages. We have therefore inserted the following :—

"46. 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."

35. The Bill should, we think, embody the equitable principles that a creditor who can satisfy his debt out of several funds shall so exercise his right as not to take from another creditor the fund which forms his only security, and that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone. We have therefore inserted sections (50, 51) as to what English lawyers call marshalling securities and contribution.

36. Though the matter is one rather of procedure than of substantive law, we have inserted a rule (section 52) as to the proper parties to suits for redemption, foreclosure or sale, which will save the right of subsequent incumbrancers to redeem, and, if a decree for sale is made, conclude them.

37. We have provided (sections 54 and 60) that in suits for foreclosure and redemption, upon good cause shewn, the time fixed by the Court for payment may be enlarged. We believe that this power (which is constantly exercised by Courts of equity) will be in accordance with the feelings of the people of many parts of India where, until recently, the power to redeem was held to last for ever, and even the long term of sixty years fixed by the Limitation Act is sometimes regarded as an unfair innovation.

38. We have designedly withheld power to open foreclosures.

39. We have enumerated the persons entitled to redeem as follows :—

"58. 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 :
- (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 the sale of the mortgaged property.

Explanation.—An easement is not an interest within the meaning of clause (a)."

40. When property is mortgaged for successive debts to successive mortgagees, we have expressly authorised (section 62) any mesne mortgagee to institute a suit to redeem the prior mortgagees and to foreclose those that are posterior to himself. We have given in the third schedule a form of the decree passed in such a suit.

41. We think that as a person having a charge has a mere right of realization, he should not be allowed to foreclose, and should be only entitled, under the proposed Act, to institute a suit for the sale of the property charged. We have framed section 68 accordingly. We have introduced a section (69) providing for the merger of charges. But the section in its present form is not to be understood as representing our final opinion on the subject.

CHAPTER VI.—*Leases.*

42. We have prefixed to this chapter a section (70) declaring the respective duties of proposing lessors and lessees to make disclosures of defects and advantages.

43. As the law stands, both in England and, as a general rule, in India, there is no implied warranty on the letting of land or an unfurnished house that it is fit for cultivation or occupation ; there is no implied obligation on the landlord to repair the premises, and, in the absence of a contract to the

contrary, the tenant is bound to keep and leave them in good repair; and the landlord does not warrant his title, but merely covenants that the tenant paying his rent and performing his covenants may peaceably enjoy the property during the term without interruption by the landlord or any one claiming through him. We think that the Bill should, in these respects, accord with the law as above stated, and we have therefore struck out, in section 44, of the Bill as introduced the latter half of clause (b) and the whole of clause (f), and substituted for clauses (c) and (d) a clause providing for quiet enjoyment by the lessee. But there is no doubt that, in certain parts of India and with regard to certain classes of houses, usages have become established with regard to repairs, with which it is undesirable to interfere. We have, therefore, made our provisions as to liability to repair subject to local usage.

44. Where part of the property leased is destroyed by superior force, we think that the lease should become void as to that part, that any rent or fine payable under the lease should proportionately abate, and that a proportionate part of any fine paid by the lessee should be returned. If the lessor reinstate the part destroyed, he and the lessee can come to a new agreement. We have altered clause (i) in accordance with these views.

45. We think that no lessee should, without the lessor's consent, erect any permanent structure on the property, except for agricultural purposes, and we have made provision to that effect in section 71, clause (m). Under the Bill as introduced the tenant might have erected unsightly buildings on his holding and thereby seriously injured the landlord's contiguous property.

46. We have struck out the words authorising a lessee to remove fixtures after the termination of his lease. They might have prevented the lessor from letting the property to another at the end of the term.

47. We have declared (section 71, clause r) that the power of transfer conferred on a lessee shall not be deemed to authorise an occupancy-ryot to assign his interest. This is the law in Bengal, in the absence of a special custom; the saving clause in section 2 will leave unaffected the right of occupancy-tenants in the Panjáb.

48. We have provided (section 73) for the insolvency of the lessee, and enabled the receiver of his property, with the leave of the Court, to disclaim the property leased. This provision, like the similar clause in chapter III, is founded on 32 & 33 Vic., c. 71, sections 23, 24.

49. We have declared (section 74), in accordance with the present law, that a tenancy begins on entry, and that a lessee before entry cannot sue for trespass.

50. We have stated (section 76) the various ways in which a lease may be determined: we have explained (section 77) the law as to the waiver of forfeiture or a notice to quit; and we have provided by the same section for relief against forfeiture for non-payment of rent. Power to grant such relief has long been exercised by Courts of equity on payment of arrears and the landlord's costs, and a like power was, by 23 & 24 Vic., c. 126, conferred on the Common-law Courts. Act X. of 1859, section 78, and Bengal Act VIII. of 1869, section 52, provide for stay of execution of a decree for ejectment on payment into Court within fifteen days from its date, and we propose to leave this procedure untouched.

CHAPTER VII.—*Settlements.*

51. Strong representations have been made to us that, in the case of European and East Indian married women, restraints on anticipation should continue to be allowed. We have therefore added a proviso to section 82 (corresponding with section 52 of the Bill as introduced) which will have the desired effect.

52. We think that section 83 in its present state requires further consideration. But in deference to the Indian Law Commissioners we have let the section stand as they framed it.

53. We think sections 85 and 86 (corresponding with sections 55 and 56 of the Bill as introduced) should not apply to Natives; and we have made a provision to this effect.

CHAPTER VIII.—*Discretion of the Courts to deal with settled Land.*

54. We think that the delicate jurisdiction which this chapter proposes to confer should be exercisable only by the High Courts. We have altered the wording of section 88 accordingly.

55. We have recast section 90 (=section 68 of the Bill as introduced) so as to restrict the privilege of appearing, &c., to persons interested in the land and to persons permitted by the Court to appear.

CHAPTER IX.—*Gifts for Religious and Charitable Purposes.*

56. We have exempted Natives from the operation of this chapter, which would have interfered with their religious usages: we have confined it expressly to immoveable property; and we have provided that notice of the assurances contemplated shall be given to the Local Government.

CHAPTER X.—*Owners of Limited Interests.*

57. It is said that Hindú law allows the person increasing by his own exertions the value of an estate a larger share in the increase than he possesses in the corpus. We have therefore saved (section 99) in such cases any benefit to which the persons making the increase is entitled under his personal law.

58. We have in the section (100) relating to the discovery of the deaths of tenants for life, taken care that the Court shall not be authorised to compel the appearance in public of pardah-women.

CHAPTER XI.—*Powers.*

59. We have here added rules declaratory of the present law, as to the following matters:—

- (a) the revocation of appointments (section 107):
- (b) the delegation of powers (section 108):
- (c) the application of the doctrine of election to appointments (section 120):
- (d) gifts by implication to the objects of powers (section 125):
- (e) the priority of interests created under powers (section 127):
- (f) the extinguishment of powers (section 128):

CHAPTER XII.—*Property held by several Persons.*

60. We have, at the request of our honourable colleague Mahárájá Jotindra Mohan Tagore, declared (section 130) that nothing in the clause authorising the Court in a suit for partition, to direct a sale and distribute the proceeds, shall apply to the property of an undivided family. But we have reason to believe that, in the Hindú community of Calcutta much difference of opinion exists as to the expediency of making such declaration, and we invite the special attention of the Local Governments to this matter.

61. We have provided (section 134) that the buyer or mortgagee of a share of undivided immovable property takes subject to the right of the co-owners to enforce a partition, and that, when such partition is effected, his right extends only to the share allotted to his transferor.

CHAPTER XIII.—*Assignments of Things in Action.*

62. When the debtor receives notice of the assignment, we have provided (section 137) that he shall give effect thereto unless he resides, or the property is situate, in a foreign country, and the title of the person in whose favour the assignment is made is not complete according to the law of such country.

The First Schedule.

63. We have added to the enactments proposed for repeal, 4 Wm. & Mary, c. 16, as to clandestine mortgages, a matter provided for by section 32 of the amended Bill, Act XXXI. of 1854, section 17, which is embodied in section 19 of the amended Bill, and Act I. of 1877, section 13, which is inconsistent with section 12 of the same Bill. We have also, by repealing the words 'in writing' in the Specific Relief Act, sections 35 and 36, rendered those sections applicable to oral contracts.

The Second Schedule.

64. We have added forms of an exchange and an English mortgage, and for the form of lease contained in the Bill as introduced, we have substituted forms of a lease of a dwelling-house and a farm.

65. We have now enumerated the changes which we have made in the substance of the Bill. We have also made some in its wording and arrangement.

66. We recommend that the Bill as now amended be republished with this report in the *Gazette of India* and sent to the several Local Governments for consideration and for republication in the local Gazettes. In order to give ample time for the further discussion of so important a measure, we think that no steps should be taken to pass it into law until the Council re-assembles next November.

67. We desire, in conclusion, to express our obligations to the gentlemen who have favoured us with criticisms on the Bill. We are especially indebted to the Honourable Raymond West, a Judge of the High Court of Bombay; Mr. Grant, Officiating Judicial Commissioner of the Central Provinces; Pandit Lakshmi Núráyana of Lucknow; Mr. J. W. Smyth, a Judge of the Panjáb Chief Court, Muttusámi Ayyar, C. I. E., Acting Judge of the Court of Small Causes at Madura, and Srínivása Rao, a Judge of the Court of Small Causes at Madras; and Mr. Stokes desires to acknowledge some valuable remarks privately communicated to him by Sir R. Garth.

WHITLEY STOKES.

E. C. BAYLEY.

A. J. ARBUTHNOT.

F. R. COCKERELL.

JOTINDRA MOHAN TAGORE

G. H. P. EVANS.

G. C. PAUL.

No. II.
THE TRANSFER OF PROPERTY
BILL, 1878.

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No. II.

A Bill to define and amend the law relating to the Transfer of Property, and for other purposes.

WHEREAS it is expedient to define and amend the law relating to the transfer of property, to owners of limited interests, and to powers, property held by several persons and apportionment; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

1. This Act may be called "The Transfer of Short title. Property Act, 1878."
 Extent. It extends to the whole of British India;
 And it shall come into force on the first day of January 1879.
 Commencement.
2. On and from that day the enactments specified in the first schedule hereto annexed shall be repealed to the extent mentioned in the third column thereof. But nothing herein contained shall be deemed to affect—
 Repeal of Acts.
- (a) the provisions of any enactment not hereby expressly repealed:
 Saving of certain Acts, incidents, rights, liabilities, &c. (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 tenant under any lease granted before this Act comes into force:
- (e) any right of pre-emption acquired after this Act comes into force:

(f) any sale in execution of a decree or order or for arrears of rent or revenue:

And nothing contained in sections 85 and 86 and Chapter IX. shall apply to Hindús, Muhammandans or Buddhists.

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

"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:

the person so creating, transferring or otherwise disposing, is called a grantor:
 "grantor."
 whose favour such creation, transfer or disposition is made, is called a grantee; and the operation effected by an assurance is called a grant:
 "grantee."
 "grant."

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

"affixed to the soil" means—

- (a) imbedded in the soil, as in the case of walls:
 "affixed to the soil."
 (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.

All words occurring in this Act and defined in the Indian Contract Act, 1872, shall have the meaning attributed to them respectively by that Act.
 Words defined in Act IX. of 1872.

CHAPTER II.

OF ASSURANCES OF IMMOVEABLE PROPERTY.

4. Every person competent to contract may make an assurance 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.
 Persons competent to make assurances.
5. An assurance may be made in the form in the second schedule hereto annexed, or in any other form which expresses an intention thereby, and without any further act on the part of the grantor, to create, transfer or otherwise dispose of any right, title or interest to or in immoveable property.
 Form of assurance.
6. Unless a contrary intention appears by the assurance, it shall be deemed to pass to the grantee all the interest
 Operation of assurance.

which the grantor is capable of passing in the object of the grant, and to comprise—

(a) standing trees and all other products of the soil;

(b) things affixed to the soil, and, in the case of machinery so affixed, the moveable parts thereof;

(c) in the case of a house, the locks, keys, bars, doors and windows.

7. The owner of immoveable property cannot

Title which grantor give to another a title immoveable property can thereto higher or more free give. from incumbrance than his own, and when 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:

Provided that where a grantor makes a grant as

Protection to innocent (a) the manager of the grantees for value. property of a minor or an undivided family, (b) a childless Hindú widow in possession of her deceased husband's property, or

(c) a benámídar or other ostensible owner, the grantee's title shall not be impeached if the grant has been made for a consideration and the grantee has acted in good faith and used due care and diligence to ascertain that the grantor had power to make the grant.

8. A contract in writing between the respective

Contracts restricting owners of two neighbour- mode of enjoyment of land. ing parcels of land, that one of them shall do or refrain from doing something on his parcel for the benefit of the other parcel, is binding on all persons claiming the former parcel under him with actual knowledge of the contract, and may be enforced by the owner of the latter parcel or his legal representative.

A contract in writing between the owner of certain land and any other person, that the former shall do or refrain from doing something on the land for the benefit of the public, is binding on all persons claiming the land under the former with actual knowledge of the contract, and may be enforced by the latter, or his legal representative, or by the Secretary of State for India in Council.

9. Where a grant of immoveable property for

Effect of payment by one a consideration is made person of consideration for to one person, and the con- which grant is made to an- sideration is paid by an- other. other, no trust shall result in favour of the person by whom such payment is made; but the property shall vest in the grantee, subject only to the provisions next following.

Every such grant shall be presumed to be fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favour of such creditors to the extent necessary to satisfy their just demands.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

10. A person proposing to sell immoveable

Disclosures required from proposing sellers and buyers. property need not disclose defects therein which the buyer might with ordinary

care discover: but the proposing seller must not conceal, or attempt to conceal, such defects, and he must disclose to the buyer all other defects therein of which the former is, and the latter is not, aware.

Where the proposing buyer stands, or has stood, as regards the property, in a fiduciary relation to the seller, he must disclose to the seller any fact which increases the value of the property itself, and of which the former has, during the existence of such relation, become aware. Save as aforesaid, a person proposing to buy immoveable property need not disclose any fact unknown to the seller which increases the value of the property itself: but the proposing buyer must disclose any such fact which increases the value of the seller's interest therein, and of which the former is, and the latter is not, aware.

Illustrations.

(a.) A proposes to sell a field to his neighbour B. A need not disclose the existence of an open foot-path over the field.

(b.) A proposes to sell a mine to B, who has the opportunity of examining it. A need not disclose the fact that he has himself worked the mine, but has abandoned the working as unprofitable.

(c.) A proposes to buy B's field. There is not, and never has been, any fiduciary relation between A and B. A need not disclose the fact that there are minerals under the field, though he knows that B is ignorant of it.

(d.) A proposes to buy from B his interest in certain property to which B is entitled on C's death. C, to the knowledge of A, but not of B, is actually dead or is about to die. A is bound to disclose this fact to B.

11. Unless a contrary intention appears from

Rights and liabilities of the buyer and the seller. the contract or assurance, of 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:

(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 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.

(b.) 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.

(c.) Unless the buyer has improperly declined to complete the purchase, 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 properly paid by the buyer in anticipation of the completion of the purchase,

and for interest on the amount of such payment; and, when the buyer properly declines to complete the purchase, also for the deposit (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.

(d). If the seller alter the property in any particular which does not admit of compensation or reinstatement, the buyer may decline to complete the purchase.

(e). When the buyer has been let into beneficial possession of the property before completion of the purchase, and the purchase is not completed owing to defects in the seller's title, the buyer is not liable to pay for his use of the property.

(f). 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.

(g). On payment or tender of the amount due in respect of the purchase-money, 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.

(h). On completion of the purchase, the property vests in the buyer, and the buyer is entitled to all documents of title relating to the property 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 portion of greatest value, must keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(i). In the absence of fraud, concealment and misrepresentation, the seller is not answerable for any defect in the property sold.

(j). Unless the sale is made by a person in a fiduciary character, the seller shall be deemed to contract with the buyer, *first*, that notwithstanding anything done by the seller or any person through whom he claims, the seller has power to grant 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 completion of the purchase.

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 granting it.

EXPLANATION.—A purchase is completed within the meaning of this chapter when possession of the property is delivered to the buyer. When the transfer is made by assurance, such delivery takes place when the assurance is executed by the seller and (if its registration be required by law) registered. When the transfer is not made by assurance, such delivery takes place, in the case of an incorporeal right, 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.

12. A contract for, or relating to, the sale of immovable property, shall not 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, the Specific Relief Act, 1877, and section twenty.

13. If, before completion of the purchase, the buyer is declared insolvent, the receiver of his property appointed under the Code of Civil Procedure, section 351, may, if the contract is unprofitable, by writing under his hand disclaim the same, and thereupon the contract shall be deemed to be determined from the date of the declaration: provided that the receiver shall not disclaim such contract in cases where an application in writing has been made to him by any person having any interest in the property, requiring him to decide whether he will disclaim or not, and the receiver has, for a period of not less than twenty-eight days after the receipt of such application or such further term as may be allowed by the Court, declined or neglected to give notice whether he disclaims the contract or not.

Any person injured by the operation of this section shall be deemed a creditor of the insolvent to the extent of such injury and may prove the same as a debt under the insolvency.

14. 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 completion of the purchase, to perform the contracts by the lessee, and to indemnify the seller and his legal representative against all claims for non-payment of such rent or breach or non-observance of such contracts.

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

contrary, bound (a) to pay to the mortgagee or his legal representative the principal sum which, on completion of the purchase, is owing on the security of the mortgage, and all interest for the time being due for the same, when payment thereof, respectively, is lawfully demanded, and (b) to indemnify the seller and his legal representative against the payment thereof, and against all claims for non-payment thereof, respectively.

16. 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 may actually receive under the policy, or so much thereof as may be necessary, to be applied in reinstating to property.

Money received under fire-policy.

17. When two or more persons purchase any immovable 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.

Joint purchases.

18. When two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller and his legal representative, 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.

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

19. When any property is sold, the proceeds of which are subject to any trust, the *bonâ fide* buyer of the property is not bound to see to the application of the purchase-money to the purposes of the trust.

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

20. When the buyer fails to perform any duty imposed on him, as such, by this Act or any other law for the time being in force, the seller may, notwithstanding anything contained in the Indian Contract Act, 1872, section 56, sue the buyer for compensation for such non-performance.

Remedies of buyer and seller.

When the seller fails to perform any duty imposed upon him, as such, by this Act or any other law for the time being in force, the buyer may either sue under the Specific Relief Act, 1877, to have the contract rescinded, or may affirm it and sue for compensation for its non-performance. In the latter case, the buyer may recover his expenses reasonably incurred, after the contract was entered into, in relation to the attempted purchase; and in each case he may recover his deposit (if any) with interest thereon.

CHAPTER IV.

OF EXCHANGES.

21. 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.

"Exchange" defined.

22. If one of the parties prove that the other was not owner of the thing given or agreed to be given to the former in exchange, the former cannot be compelled to deliver that which he has promised in counter-exchange; but when he has received the thing given to him in exchange, he may be compelled to return it.

When thing exchanged does not belong to party giving it.

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.

Right of party evicted from thing received in exchange.

23. 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.

Rights and liabilities of parties.

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

Exchange of money.

CHAPTER V.

OF MORTGAGES AND CHARGES.

25. When, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, one person transfers to another a right over specific immovable property, the transfer is called a mortgage, 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.

Mortgage, mortgagor and mortgagee defined.

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.

Where the mortgagor transfers the property to the mortgagee conditionally upon the non-payment of the mortgage-money at a certain date, the transaction is called an English mortgage.

English mortgage.

Where the mortgagor delivers possession of the property to the mortgagee, and authorises him to retain such possession and to pay himself from the rents and profits of the property the interest, or the principal and interest, of the mortgage-money, the transaction is called an usufructuary mortgage.

Usufructuary mortgage.

Where the mortgagor binds himself personally to repay the mortgage-money, and pledges the property as collateral security for the repayment,

Simple mortgage.

but does not deliver possession of the property, or contract that in default of payment of the principal and interest at a certain date the property shall pass to the mortgagee, the transaction is called a simple mortgage.

Where the mortgagor not so binding himself and not delivering possession of the property, contracts that, on default

Mortgage by conditional sale. of payment of the principal and interest at a certain date, the property shall pass to the mortgagee, the transaction is called a mortgage by conditional sale.

26. A mortgage can be effected only by assurance signed by the mortgagor and attested by at least two witnesses.

Mortgage to be by assurance.

27. The deposit of title-deeds with intent to create a mortgage on the property comprised therein, but without actual transfer of such property, shall be deemed to be only evidence of a contract to execute a mortgage of the property.

Effect of deposit of title deeds.

Rights and Liabilities of Mortgagor.

Right of mortgagor to redeem, tender or deposit.

28. A mortgagor has the following rights as against the mortgagee:—

(a) at any time after the mortgage-money has become payable, or has been paid, and before an order absolute has been made foreclosing his right to redeem the mortgaged property or the property is duly sold in pursuance of a decree or under a power conferred by the mortgage-deed, he may, on payment or tender of the mortgage-money remaining due, require the mortgagee to re-grant the property to him, or to execute an acknowledgment in writing that any right in derogation of his ownership or other interest granted to the mortgagee has been extinguished.

(b) at any time after the mortgage-money has become payable and before such suit is barred, he may tender to the mortgagee at a proper time and place, or 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 whole amount for the time being due on the mortgage.

Nothing in this section shall be deemed to authorise a person interested in part only of the mortgaged property to institute a suit for the redemption of his own part only, except where there is but one mortgagee and the mortgagor's interest in part of the property becomes vested in such mortgagee.

29. 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 property to the mortgagee, free from incumbrances; secondly, that the mortgagor and every person claiming any interest in the same 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; and, where the

Implied contracts by mortgagor.

property is leasehold; *thirdly*, 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.

30. 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.

31. A mortgagor in possession of the mortgaged property must not commit waste thereon, if the security is insufficient or will be rendered insufficient by such waste.

Waste by mortgagor in possession.

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 mortgage-money.

32. 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 making 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.

Notice to mesne incumbrancers.

A mortgagor failing to give any notice required by this section, in addition to any other liability resulting from such failure, 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.

33. 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.

Right to redeem one of two properties separately mortgaged.

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 the Mortgagee.

34. In the absence of a contract to the contrary, the mortgagee may, at any time after the mortgage-money has be-

Right to sue for foreclosure or sale.

come 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 foreclosure of his right to redeem the property with or without possession thereof, or (2) a suit for a sale of the property, or (3) a suit for such foreclosure or sale.

Nothing in this section shall be deemed—

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

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

(c) 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 of the suits mentioned in that clause, which, under this Act, he is authorized to institute, relating to the whole of the mortgaged property, making the other mortgagees, if they cannot or will not join as plaintiffs, defendants.

35. Where the mortgagor deposits money in court under section twenty-eight, 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 due to him under the mortgage, apply for and receive in payment of such amount the money so deposited.

36. When the mortgagor and mortgagee have contracted as to the payment of interest on the principal money for the time being due to the mortgagee under the mortgage, interest shall be payable in accordance with such contract: Provided that, where the mortgagor has tendered or deposited in court under section twenty-eight the whole amount due to the mortgagee, such interest 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.

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

37. In the absence of an express 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 principal 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 same.

In any suit for a foreclosure or sale, the Court may, if it think fit, appoint such a receiver pending the proceedings in the suit.

38. No mortgage shall be deemed to imply a debt for the recovery of which a suit will lie against the debtor; but the mortgagee may sue the mortgagor for the mortgage-money—

(a) where the mortgagor expressly binds himself to repay the same;

(b) where the mortgagor remains in possession of the property and fails to pay arrears of revenue due in respect thereof, and the property is consequently sold;

(c) where the property is destroyed by diluvion, fire or other superior force;

(d) in the case of an usufructuary mortgage, 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.

39. A power conferred by the mortgage-deed on the mortgagee 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 town of Calcutta, Madras, Bombay or Rangoon.

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

40. 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 a contract to the contrary, require any money which the mortgagor may actually receive under the policy, or so much thereof as may be necessary, to be laid out in reinstating the property.

41. 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, 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.

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

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

(b) he shall use his best endeavours to collect all rents and other profits arising out of the property;

(c) he shall, in the absence of an express contract to the contrary, out of the income of the property pay the Government revenue and all other charges of a public nature accruing due in respect thereof during such possession.

(d) he may spend such money as is necessary (1) for the due management of the property and the collection of the rents and other profits arising out of the same, (2) for its preservation from destruction, deterioration, 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 principal money secured, at the same rate of interest;

(e) he may eject the tenants (if any) in occupation of the property under leases made without the mortgagee's consent after the completion of the mortgage;

(f) where the property is by its nature insurable at ordinary rates, he may 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 principal money secured, 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;

(g) he shall, in the absence of an express contract to the contrary, keep 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;

(h) his receipts from the mortgaged property, after deducting the expenses mentioned in clauses (c), (d) and (f), shall be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the principal sum secured by the mortgage, and, so far as such receipts exceed any interest due, in reduction of such principal sum.

43. Nothing in section forty-two, clauses (g) and (h), applies to cases where there is an express contract in writing between the mortgagee and the mortgagor that such receipts, after deducting the said expenses, shall, so long as the mortgagee is in possession of the mortgaged property, be taken in lieu of interest on the principal sum secured by the mortgage.

44. A mortgagee in possession of the mortgaged property must not commit waste thereon.

45. When a mortgagor in possession of the mortgaged property fails to pay arrears of revenue due in respect thereof, and the property is consequently sold, the mort-

gagee has a charge on the surplus, if any, of the proceeds, after payment thereof of the said arrears.

Priority.

46. 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.

47. If a mortgage made to secure the balance of a running account presses the maximum to be secured thereby, a subsequent mortgage on the same property shall, if made with actual knowledge 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 subsequent mortgagee.

Illustration.

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

48. 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-seven, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

49. 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 to whom he has made such tender.

50. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person without actual knowledge of the former mortgage, the second mortgagee 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 pre-

Receipts in lieu of interest.

Right to pay off mortgagee in order to prevent sale.

Charge on proceeds of revenue-sale.

Marshalling securities.

and the property is consequently sold, the mort-

judice the rights of the first mortgagee or of any other person having an incumbrance on either property.

51. 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 fifty to the claim of the second mortgagee.

Suits for Redemption, Foreclosure or Sale.

52. 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 section twenty-eight or thirty-four, 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.

53. In a suit for foreclosure, or foreclosure or sale, if the plaintiff succeeds, 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.

54. If payment is so made of such amount and of such subsequent costs as are mentioned in section sixty-four, the de-

fendant shall (if necessary) be put into possession of the mortgaged property.

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 to 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.

Provided that the Court may, upon good cause shewn, 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.

55. In a suit for a sale under this chapter, if the plaintiff succeeds, the Court shall, and in any other suit by the mortgagee under this chapter, if the plaintiff succeeds the Court may at his instance, pass a decree ordering as provided in the first and second paragraphs of section fifty-three, 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.

When the mortgagee sues only for a foreclosure, if the Court considers that he will not be damaged 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.

56. If in any case under section fifty-five the defendant makes payment as mentioned in section fifty-four, 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-five and thereupon the defendant's right to redeem and the security shall both be extinguished.

57. When the net 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.

58. 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:

(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.

EXPLANATION.—An easement is not an interest within the meaning of clause (a).

59. 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) re-transfer 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.

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

In case of redemption, possession:

If such payment is not so made, the defendant 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 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; and thereupon the plaintiff's right to redeem and the security shall both be extinguished:

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

Power to enlarge time.

Redemption and Foreclosure.

61. 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.

The decree in such suit may be in the form set forth in the third schedule hereto annexed, with such variation as the circumstances of each case require.

62. If the mortgagee fail to perform any of the duties imposed upon him by section forty-two, 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.

Costs.

63. The mortgagee is ordinarily entitled to receive or add to his debt his costs properly incurred of any suit under this chapter. But such costs, or any part thereof, may be disallowed if the mortgagor has paid or tendered to the mortgagee, or has deposited in court, the whole amount due to him under the mortgage, and if the mortgagee has unreasonably refused to accept such tender or to take such money out of court in discharge of his claim, or if he has prevented a mortgagor willing and able to make such payment, tender or deposit from making it by refusing or neglecting to give him proper information as to the state of the accounts required to be kept under section forty-two.

64. 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 principal debt such costs of suit as have been properly incurred by him since

Costs of mortgagee subsequent to decree.

the decree for foreclosure, redemption or sale up to the time of actual payment.

Sale of Property subject to prior mortgage.

65. 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.

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

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 all principal moneys 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.

67. If property subject to a mortgage, or the right to receive mortgage-money, be transferred to a third person, the transferee has all the rights and powers of his transferor, under the mortgage, and is subject to the liabilities existing between his transferor and the mortgagor or mortgagee, as the case may be.

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

Charges.

68. 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 immovable 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 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 apply to the person having such charge.

69. Where a person is or becomes absolutely entitled to immovable property, of a charge or other incumbrance on which he is also the owner, the charge or incumbrance shall be extinguished, unless by an instrument in writing registered he expressly declares that it shall be kept on foot.

CHAPTER VI.

OF LEASES OF IMMOVABLE PROPERTY.

70. A person proposing to let immovable property need not disclose defects therein which the lessee might with ordinary care discover; but the proposing lessor must not conceal, or attempt to conceal, such defects, and he must disclose to the lessee all other defects therein of which the former is, and the latter is not, aware.

When the proposing lessee stands, or has stood, as regards the property, in a fiduciary relation to the lessor, he must disclose to the lessor any fact which increases the value of the property itself, and of which the former has, during the existence of such relation, become aware. Save as aforesaid, a person proposing to take a lease of immovable property need not disclose any fact unknown to the lessor which increases such value.

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

(a.) The lessor is bound to put the lessee in possession of the property leased:

(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 by the lessee may hold the property leased during the time limited by the lease without interruption by the lessor or his assigns, or any person lawfully claiming through him or them:

(c.) In the absence of fraud, concealment or misrepresentation, the lessor is not answerable for any defect in the property leased which the lessee could not with ordinary care have discovered:

(d.) During the continuance of the lease, the lessee is entitled to the enjoyment of all easements appendant to the property leased at the time when the lease was made until such easements are extinguished:

(e.) 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:

(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.) In case the lease is rescinded for the default of the lessee, he is bound to pay the rent up to the time of such rescission, and also to make compensation for any other loss resulting from his default; but in estimating such compensation, the Court shall take into account the fine (if any) paid under the lease :

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

(i.) 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 :

(j.) Every lessee who becomes aware of any proceeding to recover the property leased to him or any part thereof 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 :

(k.) The lessee is bound to give notice to the lessor, within a reasonable time, of any encroachment made upon, or any interference with the lessor's rights concerning, the property leased, which may come to his knowledge; and, in default of so doing, he is liable to make compensation to the lessor for any loss or expenses occasioned by such omission :

(l.) The lessee may use the soil and its products for all purposes of enjoyment as a reasonable owner would use them; but he may not fell timber, pull down or damage houses, open mines, or commit any other waste :

(m.) No lessee of immoveable property shall, without the lessor's consent, erect any permanent structure thereon, 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 :

(n.) Subject to the provisions of clause (m), 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 :

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

(p.) 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 land for the season current when the lease determines, and to free ingress and egress to reap and carry them :

(q.) 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, if the lessee pay rent to the lessor without having reason to believe that such transfer has been made, he shall not be liable to pay such rent over again to the transferee :

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 :

(r.) The lessee may transfer, absolutely or by way of mortgage, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason 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.

Nothing in this section shall be deemed to authorise a tenant having a right of occupancy to assign his interest as such.

72. 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 a trespass thereon.

73. When the lessee is declared an insolvent, the receiver of his property appointed under the Code of Civil Procedure, section 351, may, with the leave of the Court, by writing under his hand, disclaim the property leased, and thereupon the lease shall be deemed to be surrendered from the date of the declaration, and the Court may order the property to be delivered up to the lessor or make such other order as to the possession thereof as may be just :

Provided that the receiver shall not disclaim such property in cases where an application in writing has been made to him by any person interested therein, requiring him to decide whether he will disclaim or not, and the receiver has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not.

On the application of any person interested in the property, the Court may direct possession thereof to be delivered to him, or make such other order as to possession thereof as may be just.

Any person injured by the operation of this section shall be deemed to be a creditor of the insolvent to the extent of such injury; and may accordingly prove the same as a debt under the insolvency.

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

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.

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

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

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.

76. A lease determines—

- (a) by efflux of the time limited thereby;
- (b) by rescission;
- (c) by surrender in express terms;
- (d) by surrender by operation of law, 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;
- (e) 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 either by setting up a title in a third person or by claiming title in himself;

(f) on the expiration of a notice to quit duly given to the lessee.

77. A forfeiture or notice under section seventy-six, clause (e) or (f), is waived by receipt of rent which has become due since the breach or the expiration of the

notice, 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.

Where a lease 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.

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

78. If a lessee or sub-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 sub-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 seventy-four.

Illustrations.

(a.) A lets a house to B for five years. B sublets 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 VII. OF SETTLEMENTS.

79. "Settlement" means, in this chapter, any disposition in writing of moveable or immoveable property—

(a) which is not testamentary, and is not founded on any consideration, or

(b) which is made in consideration of marriage, or

(c) which is made for the purpose of dividing property of the settlor among his family or those for whom he desires to provide,

but does not include a gift made by a Hindú, Muhammañan or Baddhist.

80. A settlement, whether made for a consideration or not, is binding on the settlor and those claiming under him.

Consideration not necessary to make settlement binding.

81. A settlement made for the purpose of depriving present or future creditors or other persons of their demands against the settlor, is void against all present and future creditors of the settlor and

Voidability of settlement made in fraud of creditors.

their successors in interest, and against any person upon whom his property devolves in trust for the benefit of his creditors.

Nothing in this section affects the rights of persons who have acquired, in good faith and for consideration, any interest under the settlement.

82. A condition or limitation in a settlement or will, restraining any person from parting with or disposing of his interest, is void: provided that property may be settled or bequeathed for the benefit of a married woman who is not a Hindú, Muhammadan or Buddhist, so that she shall not have power to deprive herself of the income thereof in anticipation.

83. A condition or limitation contained in a settlement or will, making an interest thereby reserved or given to or in trust for any person to cease on his becoming insolvent, or endeavouring to transfer or dispose of the same, is void.

84. If, by a settlement, property be given to a person then living in general terms, without indicating the time when it is to be paid or delivered, such person has a vested interest therein from the day of the execution of the settlement, and if he dies without having received it, it shall (subject to any legal disposition thereof which he may have made) pass to his legal representative.

85. Where, by the terms of a settlement, property is given to a person not in existence, but he is not entitled to possession of it immediately upon his birth, a right to receive it at the proper time shall, unless a contrary intention appears by the settlement, become vested in such person upon his birth, and shall (subject to any legal disposition thereof which he may have made) pass to his legal representative if he dies before that time, and without having received it. And in such cases it is from his birth said to be vested in interest.

86. The provisions of the Indian Succession Act, 1865, sections 100 to 104, both inclusive, 107 and 108, 111 to 127, both inclusive, and 167, shall apply, *mutatis mutandis*, to gifts contained in settlements.

87. Whenever a person becomes entitled in possession, by virtue of a settlement, to money or any other property yielding income, he shall be entitled to receive the interest or income thereof from that time.

CHAPTER VIII.

OF THE DISCRETION OF THE COURTS TO DEAL WITH SETTLED LAND.

88. If any person having, under a settlement or will, a limited interest in possession in any land, apply under this section to the High Court within the limits of whose

appellate civil jurisdiction such land or any part thereof is situate, the Court may, if it deem it just and expedient to do so,—

(a) make such leases of the whole or any part of the land for such terms of years, for such rents, with such powers, and with such conditions, reservations and exceptions as the Court thinks fit;

(b) make such sales of the whole or any part of the land, for such sums, payable either at once or periodically, with such powers, and with such conditions, reservations and exceptions as the Court thinks fit;

(c) appropriate any part of the land for the formation of streets, roads, gardens or other open spaces, tanks, sewers, drains or water-courses, and authorize the erection of buildings and works thereon;

and generally deal with the land in any way the Court may think just and beneficial to the persons interested therein.

89. Every such application shall be in writing, and notice thereof shall be served through the Court on all trustees under the settlement or will, and on any other persons who in the opinion of the Court ought to be so served, and shall be published in such newspapers as the Court may direct.

90. The Court shall permit any person interested in the land, and may in its discretion permit any other person, to appear and be heard in opposition to, or in support of, any such application, on such terms as to costs or otherwise as it thinks fit.

91. The Court may order the costs of all or any parties to any such application to be paid out of any principal money receivable on account of any dealing with the land which is the subject of the application, or to be a charge on such land or on any other land belonging to the same owners.

92. Every lease made under section eighty-eight shall take effect in possession; and on every such lease shall be reserved the best rent that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine.

93. All or any part of the proceeds of any lease, sale or disposition under section eighty-eight may, if the Court think fit, be paid into court.

94. The Court shall declare what parts of such proceeds so received shall be considered as income, and may direct the same to be paid to the person for the time being entitled in possession to the land dealt with; and the residue of such money shall be applied as the Court shall

direct in one or more of the manners following :—

(a) the payment of the amount due in respect of any charge on the land dealt with ;

(b) the purchase of other property or the investment in securities for the benefit of the persons interested in the land dealt with ;

(c) the payment to any person becoming absolutely entitled to the land dealt with.

EXPLANATION.—In this section the term “securities” means—

(d) promissory notes, debentures, stock and other securities of the Government of India ;

(e) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India ;

(f) stock or debentures of, or shares in, Railway or other companies, the interest whereon has been guaranteed by the Government of India ; and

(g) debentures or other securities for money issued by or on behalf of any municipal body under the authority of any Act of an Indian legislature.

CHAPTER IX.

OF GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES.

95. No person having a nephew or niece, or Gift to charitable uses by person having certain relatives. any nearer relative, shall have power to give any immovable property to religious or charitable uses, unless by an assurance executed not less than twelve months before his death, and registered.

96. Subject to the provisions of the last preceding section, Assurance of property in perpetuity for use of any community or institution. immovable property may be assured in perpetuity for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. Provided that notice of such assurance shall be given, as soon as may be after its execution, to the Local Government and that no such assurance shall take effect until it has been sanctioned by some public authority to be designated by the Local Government by notification in the official Gazette.

The grant or refusal of such sanction may be notified by an entry in the book in which the assurance is registered, and the registering officer shall make such entry on receiving from the public authority aforesaid a written order in this behalf.

If no such order is made within two years next after the time when the property becomes applicable for the benefit of the public, it shall be deemed that sanction has been granted.

If such sanction is refused, the property shall devolve as if no such assurance had been made.

CHAPTER X.

OF CERTAIN RIGHTS AND LIABILITIES OF OWNERS OF LIMITED INTERESTS.

97. A person having a limited interest in any immovable property is not, as such, entitled to do or omit any act the doing or omitting of Rights and obligations of persons having limited interests.

which is destructive or permanently injurious to such property.

EXPLANATION.—No act done in the reasonable use and enjoyment of property is destructive or injurious within the meaning of this section, though it may exhaust the substance of the property.

Illustrations.

(a). A is a tenant for life of land on which a dwelling-house stands. He is not entitled, as such, to pull down the house. Nor must he suffer it to fall for want of necessary repairs.

(b). A is a tenant for life of land in which coal lies. He is entitled, as such, to work and use the coal.

(c). A is tenant for life of land planted with trees. He is entitled as such to cut the trees at maturity, but is not entitled, as such, to cut them when immature, except for the purpose of thinning out or otherwise benefiting the plantation.

Save as aforesaid, such person or his legal representative has the same right as a lessee to remove, during the continuance of such interest or within a reasonable time afterwards, all things which he has affixed to the soil in which he had such limited interest, and all crops growing upon the land for the season current when such limited interest determines.

98. A person having a limited interest in possession in any immovable property, is bound to discharge all taxes and other public periodical charges to which such property is liable and, to the extent of the rents and profits of the property which without his wilful default he might have received, all periodical payments accruing due on account of any mortgage or charge thereon taking effect during the continuance of his interest in priority to such interest.

99. Every advantage or increase of value accruing (accidentally or through the exertions of one or more persons) to any immovable property in which successive interests exist, belongs, in the absence of any personal law to the contrary, to all the persons having any interest in the property, in the same shares and manner as they are entitled to the property.

100. Any person claiming any immovable property after the death of any minor, married woman or other person, and having reason to believe that such minor, married woman or other person is dead, and that his or her death is concealed by his or her guardian, husband or any other person, may once a year move the High Court to order the person concealing or suspected to conceal such person to produce him or her at such time and place, and before such persons (if any), as the Court may direct. And the High Court, if it think fit, shall make such order, and in case of disobedience thereto by the person in possession of the property, the person so claiming the same may, by order of the Court, enter thereon and receive the profits thereof as if the person so concealed or suspected to be concealed were dead.

Nothing in this section shall be deemed to authorize the High Court to compel the produc-

tion in court of women who, according to the customs and manners of the country, ought not to be compelled to appear in public.

Saving of mortgagees and lessees.

101. Nothing in this chapter applies to mortgagees or lessees.

CHAPTER XI.

OF POWERS.

102. A person may be authorized to determine, with or without the consent of others, the disposition of property otherwise than by virtue of his ownership. A person so authorized is said to have power to appoint such property.

The person who gives the power is called the donor, the person to whom the power is given is called the donee, and the persons for whose benefit the power is to be exercised are called the objects of the power. A person to whom any property is appointed is called an appointee.

Illustrations.

(a). A grants land to B for B's life, with remainder to such of B's children as B shall appoint. B appoints to C and D, two of his children, in equal shares. A is the donor of the power, B the donee, B's children the objects, and C and D the appointees.

(b). A, the absolute owner of certain land, grants it to B to such uses as C, with the consent of D, shall by assurance appoint. C with D's consent appoints part of the land to E absolutely, and the rest to F for seven years. Here C is the donee and also the object of the power, and E and F are the appointees.

A power authorizing the donee to appoint to whomsoever and for whatsoever interest he pleases, is called a general power.

A power restricted in respect either of its objects or the interests that may be conferred under it, is called a special power.

Where the donee has neither a present nor a future interest in the property, the power is called a collateral power.

Rules as to all Powers.

103. Where a power is vested in several donees, all who are living must unite in its execution; but in case any one or more of them die during the continuance of the power, it may be exercised by the survivors or the survivor, unless a contrary intention appears by the instrument creating the power.

104. The donor may direct that the power shall be exercised by will only, or by non-testamentary instrument only.

If he directs that the power shall be exercised by will only, it must be exercised by will duly executed according to the provisions of the Indian

Succession Act, 1865, or according to such other law as at the time of the execution of the power may be applicable to a will executed by the donee.

If he directs that the power shall be exercised by non-testamentary instrument only, it must be exercised by such an instrument and registered.

If he imposes no such restriction on the exercise of the power, it may be exercised either by such will or by such assurance as lastly hereinbefore mentioned.

105. When the power is not properly exercised, no Court shall in any case compel the person in possession of the property to which the power relates to deliver the property as if the power had been properly exercised, or shall otherwise aid the defective execution, except as provided in the Specific Relief Act, 1877, chapter three.

106. All appointments made in the manner directed by section one hundred and four shall be deemed to be executed and attested in proper form, notwithstanding that some other mode of execution or attestation has been prescribed by the donor.

107. An appointment made by will may be revoked by a subsequent will; but it is not revoked by mere general words of revocation of all former wills, without a new appointment.

An appointment made by a non-testamentary instrument is irrevocable except where power to revoke the appointment is expressly reserved by such instrument.

108. A power exerciseable by will only cannot be delegated.

A special power involving the exercise of personal discretion by the donee cannot be delegated.

A power to do an act merely ministerial and involving no personal discretion may be delegated.

Illustrations.

(a). A has power under a settlement to dispose of an estate in such proportions as he thinks fit among the issue of his marriage with B. A by his will purports to delegate this power to B, to exercise as she thinks fit. The attempted delegation is void, and the dispositions, if any, in default of appointment take effect.

(b). A, the donee of a power to appoint to his children, determines to exercise it in favour of the objects equally. With this view he causes an instrument of appointment to be prepared. A may appoint an attorney to execute this instrument.

109. Where a power is to be exercised with the consent of several persons, all who are living must concur in the consent, but in case any one or more of them die during the continuance of the power, the consent of the survivors or the survivor is sufficient, unless a contrary intention appears by the instrument creating the power.

Consent to the exercise of a power must be given during the donee's lifetime by a non-testamentary instrument registered.

Consent to the exercise of a power need not be given by the instrument by which the power is exercised, but if it is given by a different instrument, such instrument must be executed at a time not later than the time at which the donee of the power executes the instrument by which he exercises the power.

110. If a person disposes of property in such manner as is authorized by a power vested in him, such disposition shall take effect under the power, notwithstanding that the power is not mentioned or referred to in the instrument of disposition.

Illustration.

Land is settled upon A for life with a special power to charge, by a non-testamentary instrument, portions in favour of his children. Subsequently, a general power to dispose of the land by any instrument is vested in A. He executes an assurance, by which he directs that a sum of money shall be raised out of the land and settled on his son B for life, with remainder to B's wife and children. Such an appointment cannot take effect under the special power, but may be treated as a valid exercise of the general power.

111. The donee of a power need not exercise it entirely and at once by a single instrument, but he may from time to time exercise any unexhausted part thereof at his discretion.

If the donee has purported to exercise his power in such a manner that his appointment is void, the power is, to that extent, unexhausted.

Illustrations.

(a). A has a general power. He may appoint the property at one time to B for his life and at another to C absolutely.

(b). Trustees under a settlement, having power to lend Rs. 10,000 to A, the tenant for life, lend the money accordingly. A repays it. The trustees may again lend Rs. 10,000 to A.

(c). A has power to raise Rs. 10,000 by sale or mortgage of Sultánpur. A exercises the power by mortgaging Sultánpur. He may afterwards exercise the power by selling Sultánpur in order to pay off the mortgage.

112. Where a power given by any instrument is void in its creation, no disposition or gift made appointed under void shall be deemed void merely because it is intended to take effect after the interests to be appointed under the power or in default of any such appointment.

Illustration.

A marriage-settlement provides that the settled property shall belong to the husband and wife successively for their lives; that after the death of the survivor of them, it shall go to such of the children of the marriage, and in such shares, as the husband and wife shall jointly appoint, the interest of each such child to become vested in him on his attaining the age of twenty-five years; and that in the event of

there being no child of the marriage who shall attain that age, or in default of appointment, the property shall belong to the husband or his legal representative.

Here the power to appoint the property is, under section eighty-six, void in its creation; but the ultimate interest given to the husband takes effect.

General Powers.

113. If the donor confers on the donee a general power, the donee shall, so far as regards his power of disposition, his creditors and all persons who contract with him for lawful consideration to obtain any interest in the property comprised in the power, be deemed to be the absolute owner of such property for such interest therein as the donor could dispose of.

This rule is to take effect notwithstanding that the donor has prescribed some particular method for executing the power.

Illustrations.

(a). A, the absolute owner of land, settles it on B for life with remainder to such purposes as B— shall appoint, or shall by deed appoint, or shall by will appoint, or shall by deed or will appoint, and in case B dies without making any such appointment, on C absolutely.

If B—

grants the land by assurance, or bequeathes it, or contracts to sell it, or incurs debt,

the property is liable, in the hands of either B or C, as the case may be, to the claims of B's grantee, legatee, purchaser or creditors, as the case may be.

If B dies having made no disposition of the property, C is entitled to it, subject to any claims which B's creditors may establish against it.

(b). A confers on B a general power, exercisable by a non-testamentary instrument, to appoint certain land. B appoints the land to certain persons in such shares as C shall fix. This appointment is valid.

114. If the donor confers on the donee a general power, and without disposition of property in case of non-appointment, the donee shall be considered as the absolute owner of the property or such interest therein as the donor could dispose of.

Illustration.

A, the absolute owner of property, settles it on B for life with remainder to such purposes as B shall appoint, and makes no gift over in default of appointment. B dies without making any disposition of the property. The property vests in the representatives of B, and does not revert to A or his representatives.

Special Powers.

115. If the donee has only a special power, he cannot confer any interest in the property comprised therein which could not have been conferred by the donor at the time of the creation of the power.

Illustrations.

(a). A settles a fund upon B for life with remainder to such purposes as B shall appoint. After the

settlement is made C is born. B then appoints the fund to C for life with remainder to C's children absolutely. The appointment is valid, though C has no children at the time.

(b). A settles a fund upon B for life with remainder to his children as he shall appoint. At the date of the settlement B has no child, but afterwards has a son C. B then appoints to C for his life, with remainder to his children. Such interest could not have been conferred by A, and B's appointment is void.

116. Where the donee of a special power purports, in exercise of the power, to appoint to objects authorized by the power and also to objects

Effect of appointment to objects, some authorized and others unauthorized.

not so authorized, the appointment in favour of the authorized objects shall take effect if their interests are independent of those of the unauthorized objects.

Illustration.

Property is settled on A for life, and after his death on such of his children as he shall appoint, and in default of appointment to all A's children equally. A appoints that the property shall go after his death to his widow for her life, and after her death to two of his sons, C and D, in equal shares. There are five children of A. The appointment in favour of A's widow is invalid, and the rents and profits of the property during her life will go to all the five children in equal shares, but after her death to C and D absolutely.

117. Where the donee of a special power purports, in exercise of the power, to confer a larger interest than is authorized thereby, such appointment shall, if the appointee so elect, be void only for the excess, and good for the residue, if they can be separated.

Appointment in excess of power when voidable at election of appointee.

for the excess, and good for the residue, if they can be separated.

Illustrations.

(a). A has a life-interest in Rámnagar, with power to grant leases thereof for 30 years. A makes a lease of Rámnagar for 50 years. Such lease is good for 30 years only.

(b). A having a life-interest in Rámnagar and Sultánpur, with power to grant leases of Rámnagar for 21 years, grants a lease comprising both Rámnagar and Sultánpur for 21 years. After A's death the lessee may, if he thinks fit, elect to retain the lease as a lease of Rámnagar only, till the end of the 21 years.

(c). A having power to charge Rámnagar with Rs. 7,000 charges it with Rs. 8,000. The appointment is good for the Rs. 7,000, but not for the residue.

118. Where, by an appointment under a special power, interests authorized and also interests unauthorized are created, and the interests authorized cannot be distinguished from those unauthorized, the whole is void.

Invalidity of appointment creating authorized and unauthorized interests not separable.

and the interests authorized cannot be distinguished from those unauthorized, the whole is void.

Illustrations.

(a). A fund is settled on A during his life, and after his death on his children as he shall appoint. A appoints the annual income for the benefit of his son B and B's wife and children, in such manner as trustees shall think fit. The appointment is wholly void.

(b). Under a similar settlement, A having legitimate children by B, his wife, and others by C and D, his concubines, appoints the property to be divided among his children by B, C and D, the shares of the sons to be double those of the daughters. Here the interests authorized and unauthorized cannot be distinguished, and the appointment is wholly void.

119. When a person exercising a special power annexes to the gift a condition or qualification which is not authorized

by the power, the gift is good and the condition or qualification only is void.

Illustrations.

(a). A, having a power to appoint a fund among his children, gives a part of it to his son B on condition that B shall settle it on B's children. The condition is void, and the gift is absolute.

(b). A, having a power to appoint a fund to a limited class of objects of whom B is one, appoints it to B, adding a condition that B shall release a debt owing to him by A, and also pay Rs. 1,000 to C. The appointment is good; but the condition is void.

120. Where the donee of a special power purports, in exercise of the power, to appoint to persons not objects of the power, and by the same instrument gives to the persons entitled, in default of appointment, to the property comprised in the power benefits out of other property, the persons so entitled shall elect either to confirm such appointment or to dissent from it, and in the latter case they shall relinquish the benefits so given to them.

Election.

The rules contained in the Indian Succession Act, 1865, sections 173 to 177, both inclusive, shall, *mutatis mutandis*, apply to elections under this section.

121. If a beneficial interest in immoveable property, and also a power to let it, are given to the same person, and he grants his interest in the property, he may enter into a contract not to exercise his power.

Contract not to exercise power of leasing.

to let it, are given to the same person, and he grants his interest in the property, he may enter into a contract not to exercise his power.

122. Save as provided by section one hundred and twenty-one, an agreement or undertaking not to exercise a power which is given for the benefit of persons other than the donee is void.

Invalidity of agreement not to exercise power.

to exercise a power which is given for the benefit of persons other than the donee is void.

123. Where a power given for the benefit of persons other than the donee is exercised with a view to the benefit, direct or indirect, of the donee, in any mode not intended by the donor, the appointment is void.

Frauds on powers.

of persons other than the donee is exercised with a view to the benefit, direct or indirect, of the donee, in any mode not intended by the donor, the appointment is void.

Illustrations.

(a). A, having power to appoint a fund in favour of any of her children, appoints the whole fund absolutely to one child, who has previously entered into an agreement with her to give one-half of the fund to A's husband absolutely. The appointment is void.

(b). A, having power to appoint a fund in favour of any of his children, appoints a portion of the fund to his son C, a minor, whom he knows to be suffering from a mortal disease; A being the person entitled to C's property in the event of his death. The appointment is void.

CHAPTER XII.

OF PROPERTY HELD BY SEVERAL PERSONS.

(c). A, having power to grant leases of certain settled land, exercises the power in favour of B in consideration of Rs. 1,000 paid to A by B as a fine or premium. The lease is void, and A holds the Rs. 1,000 in trust for the persons interested under the settlement.

124. If the instrument by which a power of appointment in favour of specified objects is created does not provide for the event of no appointment being made, the property belongs (subject to any appointment that may have been made) in equal shares to the said objects.

Right to property in default of appointment.

Illustration.

A settles property on B for life with remainder to B's children as he shall appoint, and makes no disposition in default of appointment. B has two children, C and D, and appoints Rs. 1,000, part of the property, to C. Then C dies. Then B dies without making any further appointment. After paying Rs. 1,000 to C or his representative, the residue of the property is divisible in equal moieties between D and the representative of C.

125. Where there is a power of appointment in favour of a certain class of objects, and there is also a disposition of the property comprised in the power in the event of there being no objects, if the power is not exercised and there are objects, the property belongs to them in equal shares.

Implied gifts to objects.

126. Under a power of appointment in favour of several objects, an appointment of the whole property to one or more of such objects exclusively of the others is valid:

Appointment of whole property to some only of several objects in favour of which power is given.

Provided that, where the assurance creating the power declares the minimum amount or value of the share from which no object of the power is to be excluded, the appointment shall be invalid so far as it excludes any such object from any such share, and no farther.

127. Interests authorized to be created under a power take effect when created as if they had been created by the original instrument conferring the power, unless where a contrary intention is expressed therein.

128. A power given to the owner of a limited interest in the property comprised in the power is extinguished when he becomes the absolute owner of such property.

Extinguishment of powers.

When the exercise of a power given to the owner of a limited interest in property would derogate from a previous grant of such interest by the donee, the power shall be deemed to have been extinguished by such grant.

Illustrations.

(a) Z, tenant for life of certain land with power to charge it with a jointure for his wife, becomes absolute owner of the land. The power is extinguished.

(b) A, tenant for life of certain land with power to grant leases thereof in possession, grants his life-interest in the land to B. The power is extinguished.

129. On the death of one of two or more persons entitled to property in their own right, his share shall become vested in his legal representative, unless the property is held under an instrument which expressly provides that on the death of one, his share shall accrue to the survivor or survivors.

Devolution of share of one of several persons entitled to property in their own right.

Nothing in this section applies to property belonging to an undivided family.

Nothing in this section applies to property belonging to an undivided family.

Illustrations.

A and B jointly advance money on mortgage, A contributing one-third. A died intestate. A's third belongs to his legal representative.

130. When immoveable property is held in possession by co-owners, any one of them may institute a suit in the proper Court, and such Court may direct a partition of the property to be made among the co-owners, and for the purposes of partition may, in order to equalise the value of the shares, direct any money to be paid by one to another or to be charged on one share in favour of another.

If it appear to the Court that a sale of the property and a distribution of the proceeds would be more beneficial for the persons interested than a division of the property between them, the Court may, on the application of any such person, direct a sale of the property.

Power to direct sale and to distribute proceeds.

Nothing in the second clause of this section shall be deemed to authorise the Court to direct a sale of the property of an undivided family.

131. On any sale under the last preceding section, the Court may, if it think fit, allow any of the persons interested in the property to bid at the sale, on such terms as to setting-off or accounting for the purchase-money or any part thereof, or as to any other matters, as to the Court seems reasonable.

Power to allow person interested to bid for property sold for purposes of partition.

132. All sums of money paid under the two last preceding sections may, if the Court think fit, be paid into Court.

Payment into Court.

133. Nothing in this chapter shall affect any local law for the time being in force relating to the partition of estates paying revenue to Government.

Saving of laws relating to partition of revenue-paying estates.

134. When undivided immoveable property is held in possession by co-owners and one of them transfers his share or any interest therein, by sale, mortgage or otherwise, the transferee takes the share or interest subject to the right of the other co-owners to enforce a partition of the

Right of transferee of share of undivided property.

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.

135. When one co-owner of immoveable property commits, or threatens to commit, waste on the same without the consent of the other joint-owner, that other may institute a suit to recover compensation for the injury caused to him by the waste, or to obtain an injunction to stay the waste, as the case may require.

CHAPTER XIII.

OF ASSIGNMENTS OF THINGS IN ACTION:

136. No assignment 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 assignment or charge is given to him, unless he is a party to such assignment or charge; and every dealing by such debtor or person, not being a party to, and not having received express notice of, an assignment or charge, with the debt or property shall be valid as against such assignment or charge.

Illustrations.

(a) A owes money to B, who assigns the debt to C. B. then demands the debt from A, who, having no notice of the assignment, 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 assigning 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.

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

138. On receiving such notice the debtor or person in whom the property is vested shall give effect to the assignment 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 assignment or charge is made is not complete according to the law of such country.

139. The person to whom a debt or charge is assigned shall take it subject to all the liabilities to which the assignor was subject in respect thereof at the date of the assignment.

Illustration.

(a) 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.

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

CHAPTER XIV.

OF APPORTIONMENT.

All rents, annuities, pensions, dividends and other periodical payments shall, upon the determination of interest of person entitled, 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.

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

THE FIRST SCHEDULE.

(a). STATUTES.

Year and chapter.	Subject.	Extent of repeal.
13 Ed. I, c. 22	Waste	The whole.
31 Hen. VIII, c. 1	Partition	The whole.
32 Hen. VIII, c. 62	Do.	The whole.
13 Eliz., c. 5.	Fraudulent Conveyances...	The whole.
27 Eliz., c. 4.	Do.	The whole.
4 Wm. & Mary, c. 16	Clandestine Mortgages ...	The whole.
6 Anne, c. 72	Discovery of deaths of tenants for life.	The whole.

(b). ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
XXIV. of 1841.	Illusory appointments, &c.	So far as regards illusory appointments. Section 17.
XXXI. of 1854.	Modes of conveying land	Illustration (g) to sec. 107.
X. of 1865	Succession	So far as it relates to Bengal Regulations I. of 1798 and XVII. of 1806.
IV. of 1872...	Panjab 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 Regulations XVII. of 1806.
I. of 1877	Specific Relief	Section 13, and 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.

THE SECOND SCHEDULE.

FORMS OF ASSURANCES.

(See Section 5.)

A.—TRANSFER OF IMMOVEABLE PROPERTY ON SALE.

This grant made the _____ day of _____ 18____, between *A B* of _____, and *C D* of _____. In consideration of _____ rupees paid to the said *A B* by the said *C D*, the receipt whereof the said *A B* hereby acknowledges, he, the said *A B*, hereby grants unto *C D* [here describe the property as provided in the Indian Registration Act, section 21]. In witness whereof, the said *A B* has signed these presents.

*A B.*Signed in the presence of *E F* of _____

B.—EXCHANGE.

This Exchange made the _____ day of _____ and _____ between *A B* of _____ and *C D* of _____. Whereas the said *A B* is the owner of the lands comprised in the first schedule hereunder written, free from incumbrances, and the said *C D* is the owner of the lands comprised in the second schedule hereunder written, free from incumbrances. And whereas the said *A B* and *C D* have agreed to make an exchange in manner hereinafter appearing of the said lands comprised in the said schedules respectively. In pursuance of the said agreement and in consideration of the lands intended to be hereinafter granted in exchange by the said *C D*, he the said *A B* hereby grants unto the said *C D* the lands situate in _____ specified in the first schedule hereunder written and delineated in the map in the margin of these presents and therein coloured red [or as the case may be] in exchange for the lands intended to be hereinafter granted by the said *C D*. And the said *C D* in further pursuance of the said agreement and in consideration of the lands hereinbefore conveyed in exchange by the said *A B* hereby grants to the said *A B* the lands situate in _____ specified in the said second schedule hereunder written and delineated in the map in the margin of these presents and therein coloured blue [or as the case may be] in exchange for the lands hereinbefore granted in exchange by the said *A B*. In witness whereof, we have signed these presents.

A B.
*C D.*Signed in the presence of *E F* of _____
(The first schedule above referred to).
(The second schedule above referred to).

C.—ENGLISH MORTGAGE OF IMMOVEABLE PROPERTY.

This mortgage-deed made the _____ day of _____ 18____ between *A B* of _____ and *C D* of _____. In consideration of Rs. _____ paid to the said *A B* by the said *C D*, the receipt whereof is hereby acknowledged, the said *A B* contracts with the said *C D* that the said *A B* will pay to the said *C D* the sum of Rs. _____ with interest for the same in the meantime at the rate of _____ per cent. per annum on the _____ day of _____ next; and for the consideration aforesaid, he, the said *A B*, hereby grants to the said *C D* [here describe the property as provided in the Indian Registration Act, section 21]; Provided that if the said *A B* pays to the said *C D* the said sum of Rs. _____ with interest thereon in the meantime at the said rate on the _____ day of _____ next, then the said *C D* will, upon the request and at the cost of the said *A B*, reconvey the said premises to the said *A B*, or as he shall direct, free from encumbrances by the said *C D*. In witness whereof the said *A B* has signed these presents.

Signed in the presence of *E F* of _____ and *G H* of _____

D.—CHARGE.

(a). This assurance made the _____ day of _____ 18____, between *A B* of _____, and *C D* of _____. The said *A B* hereby renders the lands specified in the schedule hereunder written security for the payment to the said *C D* of five thousand rupees and interest for the same at the rate of _____ per cent. per _____, payable on the _____ day of _____. In witness, &c.

Signed in the presence of *E F* of _____ and *G H* of _____

(The schedule above referred to).

(b). This assurance made the _____ day of _____ 18____ between *A B* of _____, and *C D* of _____.

The said *A B* hereby renders the lands and houses specified in the schedule hereunder written security for the payment to the said *C D* of the sum which shall be due to him on the balance of the account, of the said *A B*, not exceeding _____ rupees, together with interest thereupon at the rate of _____ per cent. per _____. In witness, &c.

Signed in the presence of *E F* of _____ and *G H* of _____

(The schedule above referred to).

E.—LEASE OF A DWELLING-HOUSE.

This lease made the _____ day of _____, between *A B* of _____, and *C D* of _____. The said *A B* hereby leases to the said *C D* [description of property as required by the Indian Registration Act, section 21], to hold the same from the _____ day of _____ for the term of _____ at the rent of _____ rupees, payable by the said *C D* to the said *A B* in equal _____ payments on the _____ day of _____ and the _____ day of _____ in each year [or in equal monthly payments or in equal quarterly payments, or as the case may be].

And the said *C D* hereby contracts with the said *A B*,

First, that he the said *C D*, during the said term will pay the said rent on the days and in manner aforesaid: and pay all rates and taxes payable in respect of the said premises: and keep in repair all the glass windows belonging to the said house, and not make any alteration in the said premises without the previous consent in writing of the said *A B*, and at the determination of the said term so yield up the same to the said *A B*,

Secondly, that the said *A B* and his agents and workmen may at all reasonable times during the said term enter upon the said premises to inspect the same:

Thirdly, that during the said term no offensive business or occupation or nuisance shall be carried on or committed on the said premises, and the same shall be used as a private dwelling-house only:

Fourthly, that the said *C D* will not assign or under-let the said premises without the consent in writing of the said *A B*:

Provided that on any breach or non-observance of any of the contracts hereinbefore contained, the said *A B* may re-enter upon the said premises and hold the same as if this lease had not been made.

And the said *A B* hereby contracts with the said *C D* that he the said *A B* will keep the said house in good and tenantable repair during the said term.

In witness whereof the said *A B* and *C D* have signed these presents.

A B.

C D.

Signed in the presence of *E F* of

F.—LEASE OF A FARM.

This lease made the day of 18 between *A B* of and *C D* of . The said *A B* hereby leases to the said *C D* the lands in called with the buildings thereon, the particulars whereof are specified in the schedule hereunder written, except all timber and other trees, and the right to enter and cut and remove the same. To hold the same, except as aforesaid, from the day of for the term of years from the day of the date of these presents at the rent of rupees payable by the said *C D* to the said *A B* in equal payments on the day of and the day of in each year [or as the case may be]. And the said *C D* hereby contracts with the said *A B*—

First, that the said *C D*, during the said term will pay the said rent on the days and in manner aforesaid; and pay all rates and taxes payable in respect of the said premises; and keep the buildings, fences, ditches, gates and fixtures upon or about the said lands in good condition and complete repair and without any alteration except such as the said *A B* shall approve; and will cultivate

and manage the said lands in a proper manner, and will not convert into arable land any land now in pasture without the consent of the said *A B*, and will, at the determination of the said term, yield up the said premises in such condition and repair and in proper order as aforesaid unto the said *A B*.

Secondly, that the said *A B*, and his agents and workmen may at all reasonable times during the said term enter upon the said premises to inspect the same and to cut and remove the timber and other trees.

Thirdly, that the said *C D* will not assign or under-let the said premises or any part thereof without the consent in writing of the said *A B*.

Provided that on any breach or non-observance of any of the contracts hereinbefore contained, the said *A B* may re-enter upon the said premises and hold the same as if this lease had not been made.

In witness whereof the said *A B* and *C D* have signed these presents.

Signed in the presence of *E F* of

(The schedule above referred to.)

THE THIRD SCHEDULE.

DECREE FOR SUCCESSIVE REDEMPTIONS.

(See section 61.)

[<i>A</i> , third mortgagee	... Plaintiff.
<i>B</i> first mortgagee in possession	} Defendants.]
<i>C</i> second mortgagee	
<i>D</i> owner of right of redemption	

Account of what is due to the defendant *B* for principal and interest in respect of the said mortgage of 1837, and for costs properly incurred in respect thereof, and tax him his costs of the suit.

Account of the rents and profits of the mortgaged property received by the said defendant *B*, or by any other person by his order or for his use, or which without his wilful neglect or default might have been received. Let what shall be owing on such last mentioned account be deducted from what shall be found due to the defendant *B* for principal, interest and costs as aforesaid.

And upon the defendant *C* paying to the said *B* the balance which shall be remaining due to him for such principal, interest and costs after such deduction within six months after such balance has been declared in court.

Let the said *B* assign the mortgaged property free from incumbrances created by him, or any one claiming under him, or those under whom he claims, and deliver upon oath all documents of title in his possession or power relating thereto to the said *C*, or as he shall appoint.

But in default of the said *C* paying to the said *B* such balance by the time aforesaid, let him stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute for the said *B* his subsequent interest on his said mortgage and tax him his subsequent costs of the said suit. And upon the plaintiff *A* paying to the said *B* what shall be found due to him for principal, interest and costs as aforesaid after such deduction as aforesaid within three months after such amount has been declared in court,

Let the defendant *B* assign the mortgaged property free from incumbrances, &c. [as above] and deliver upon oath, &c. [as above] to the said *A*, or as he shall appoint.

But in default of the said *A* paying to the said *B* what shall be found due to him as aforesaid by the time aforesaid, let the said *A* stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute the said *B* subsequent interest on his said mortgage and tax him his subsequent costs of the said suit, and upon the said *D* paying to the said *B* the amount found due to him for principal, interest and costs as aforesaid, within three months after such amount has been declared in court, let the said *B* assign the said mortgaged property free from incumbrances, &c. [as above] and deliver upon oath, &c. [as above] to the said *D*, or as he shall appoint.

But in default of the said *D* paying to the said *B* what shall be found due to him as aforesaid by the time aforesaid, let the said *D* stand absolutely foreclosed of all right to redeem such property.

But in case the said *C* should redeem the said *B* as aforesaid by the time aforesaid—

Let an account be taken of what is due to the said *C* for principal and interest in the mortgage of 1841, and for what the said *C* shall so pay to the said *D* for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said *C* his costs of the said suit.

And upon the said *A* paying to the said *C* what shall be found due to him for such principal, interest and costs within three months after such amount has been declared in court, let the said *C*

assign the said property free, &c. [as above] and deliver upon oath, &c. [as above] to the said *A*, or as he shall appoint.

But in default of the said *A* paying to the said *C* what shall be found due to him as aforesaid by the time aforesaid, let the said *A* stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute the said *C* his subsequent interest on his said mortgage and on what he shall have paid to the said *B* and tax him his subsequent costs of this suit. And upon the said *D* paying to the said *C* what shall be found due to him for principal, interest and costs as aforesaid within three months after such amount has been declared in court, let the said *C* assign, &c. [as above].

But in default of the said *D* paying to the said *C* what shall be found due to him as aforesaid by the time aforesaid, let the said *D* stand absolutely foreclosed, &c. [as above].

But in case the said *A* shall redeem the said *C* as aforesaid, let an account be taken of what was due to the said *A* for principal and interest on the mortgage of 1861 in the plaint mentioned, and for what the said *A* shall so pay the said *C* for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said *A* his costs of the said suit.

And upon the said *D* paying to the said *A* what shall be found due to him for such principal, interest and costs as aforesaid, within three months after such amount has been declared in court—

Let the said *A* assign the said property free, &c. [as above], deliver upon oath, &c. [as above], to the said *D*, or as he shall appoint.

But in default of the said *D* paying to the said *A* what shall be due to him for such principal, interest and costs by the time aforesaid, the said *D* is from thenceforth to be absolutely foreclosed, &c. [as above].

D. FITZPATRICK,
Secy. to the Govt. of India.

CHAPTER II.—*Assurances of Immoveable Property.*

4. We have struck out the section relating to easements, as it will more fitly come into the Bill relating to those rights, which is now in preparation.

5. Section 6 of the Bill as introduced would have often rendered persons liable to an obligation, or at least to be sued on an obligation, the existence of which was unknown to them. We think that this is obviously inexpedient, and have therefore made the section an embodiment of the well-known rule, that a contract between the respective owners of two neighbouring parcels of land, that one of them shall do or refrain from doing something on his parcel for the benefit of the other parcel, may be enforced in equity against all persons claiming the former parcel under him with notice of the contract.

6. We think that section 7 of the Bill, as introduced, should be omitted, as it would allow incidents of a novel kind to be devised and attached to property at the fancy or caprice of any owner. It would, moreover, allow the grantee's enjoyment of the property to be destroyed or materially lessened by the exercise of the right reserved.

7. We have also struck out section 9 of the Bill as introduced. The rules of construction therein referred to, besides being inapplicable in some respects to instruments executed *inter vivos*, are contained in the testamentary portion of the Succession Act, which does not apply to Mubammadans anywhere, and applies to Hindús only in the Presidency-towns and the Lower Provinces.

8. We have provided (section 7) rules as to the right of innocent grantees for valuable consideration without notice, of persons like the managers of the property of a minor or an undivided family, childless Hindú widows in possession of their deceased husband's property, and benámídar's and other ostensible owners, who have only a restricted power of alienation. Our rules on this head are in accordance with decisions of the Privy Council and the Calcutta High Court.

9. We have redrawn section 13 of the Bill as introduced, so as to save the rights of the creditors of the person paying the consideration for a benámí transaction, and as the section will apply to benámí leases as well as to benámí sales, we have transferred it to chapter II.

CHAPTER III.—*Sales.*

10. We have declared (section 10) the respective liabilities of an intending seller and an intending buyer to make disclosures of defects and advantages.

11. We have introduced into section 11 clauses as to the seller's duty to produce title-deeds for examination, to answer questions respecting the property and to discharge incumbrances; as to the buyer's right to abandon the contract when the seller materially alters the property; and as to the custody and production of title-deeds after completion. We have also declared when the property vests in the purchaser, and explained when the purchase is completed.

12. Clause (a) of section 11 of the Bill as introduced, would have rendered a vendor liable for damage sustained by the purchaser owing to the loss of his bargain, and it would have made a vendor, like a mortgagor, warrant his title as against all the world. We think that in this respect his liability should be restricted, as it is in England, to acts done by himself or those through whom he claims. Section 11, clause (j), has been framed accordingly.

13. Clauses (c) and (f) of the same section, as introduced, are corollaries from the doctrine of equitable ownership and appear to us to be inconsistent with section 12, which declares that a mere contract for sale shall not transfer the property. Why, for instance, should the buyer be made liable to bear loss arising from destruction of property which is not his own? We have therefore omitted those clauses. Under any circumstances they would have been of little use in a country where, as a rule, the making of the contract is immediately followed by the completion of the purchase.

14. We have provided (section 12) for cases where, before completion, the buyer becomes insolvent. This provision is modelled on the present English Law, 32 and 33 Vic., c. 71, ss. 23, 24. We have also provided for the following matters:—

- (a) the liability to the seller of the buyer of a leasehold (section 13):
- (b) the liability to the seller of the buyer of an equity of redemption (section 14):
- (c) money received under a fire-policy by the seller for damage done after the date of the contract (section 15):
- (d) joint-purchases (section 17):
- (e) the rights arising where two estates are subjects to a common charge and one of the estates is sold (section 18):
- (f) the exemption of *boná fide* buyers of trust-property from seeing to the application of the purchase-money (section 19):
- (g) the rights of the seller where there is default on the part of the buyer and the rights of the buyer where there is default on the part of the seller (section 20).

CHAPTER IV.—*Exchanges.*

15. In this chapter, which corresponds with chapter V. of the Bill as introduced, we have made no substantial change except the insertion of a section (22), providing (in accordance with the Code Civil, Art. 1704) that if one of the parties prove that the other was not owner of the thing given or agreed to be given to the former in exchange, the former cannot be compelled to deliver that which he has promised in counter-exchange; but when he has received the thing given to him in exchange, he may be compelled to return it.

16. We have also provided, in accordance with the same Code, Art. 1705, that the party deprived of the thing he has received in exchange by reason of invalidity of title caused by 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.

CHAPTER V.—*Mortgages and Charges.*

17. We have made it clear that the mortgages here dealt with are only mortgages of immovable property and sub-mortgages. Mortgages of policies, ships, machinery, furniture, cattle and other moveable property require to be separately treated.

18. We have inserted a section (26) requiring that every mortgage shall be created by an assurance signed by the mortgagor and attested by at least two witnesses. As mortgages by verbal agreement are now rarely if ever made, this will not substantially alter the present practice, and will obviously tend to prevent fraud and litigation.

19. The Bill as introduced permits the mortgagor to deposit the amount due only in the District Court. This might lead to much inconvenience, and we have modified section 28, clause (b), so as to allow the mortgagor to deposit in any Court in which he could have instituted a suit for redemption.

20. We have, in accordance with the present law, precluded (section 28) a person interested in part only of the mortgaged property from redeeming his own part only, and a person interested in part only of the mortgage-money from foreclosing his own part only.

21. We have given (section 29) the mortgagee the rights which he has under the covenants for title contained in an English mortgage-deed. When the mortgagee has a right to sue for the mortgage-money, these covenants are of no practical use during the continuance of the mortgage; but they become valuable after a foreclosure or sale.

22. We have declared (section 30) that, where the property is a lease for years and the mortgagee, while in possession, obtains a renewal, the mortgagor upon redemption shall have the benefit of the new lease.

23. We have imposed (section 32) on a mortgagor making a subsequent mortgage the duty of disclosing to the subsequent mortgagee the previous mortgages, and of giving notice to the prior mortgagees of the subsequent mortgage.

24. Although from the theoretical point of view there is much to be said in favour of distarding the distinctions between the various kinds of mortgages used in India, we think that the amount of simplicity gained would not justify the amount of disturbance created, and that, in practice, confusion and hardship would be caused if simple mortgagees and mortgagees by conditional sale were allowed (as they would be by the Bill as introduced) to take possession, or if simple and usufructuary mortgagees were allowed to foreclose. Moreover, any such extension of the power to foreclose would enable large classes of speculators and money-lenders to defeat the intentions with which the Legislature framed the new Code of Civil Procedure, sections 320—322, by obtaining simple mortgages and then instituting foreclosure-suits. We have therefore introduced (section 34) a clause the effect of which will be to maintain the law as it stands in this respect.

25. We have also (section 34) prohibited mortgagees from interfering with the right of the public to the continued use of undertakings, such as canals and railways, in the maintenance of which the public are interested. The remedy of such mortgagees will be to obtain a receiver of the profits of the undertaking.

26. We have provided (section 36) for the case where the parties to a mortgage have omitted to stipulate expressly for interest.

27. We are of opinion that, in the absence of an express contract to the contrary, no mortgagee should be entitled as such to take possession, and we have inserted (section 37) a clause to this effect. We have, however, allowed the mortgagee to sue for a receiver after the expiration of one year from the time when the principal has become payable, or after interest has been in arrear for six months; and we have empowered the Court, in any suit for foreclosure or sale, to appoint a receiver pending the proceedings in the suit.

28. We think that the mortgagee should be allowed to sue for the mortgage-money in four cases only, namely, (1) where the mortgagor binds himself expressly to pay the loan, (2) where the mortgagor remains in possession and allows the property to be sold for arrears of revenue, (3) where the property is destroyed by diluvion, fire or other superior force, and (4) in the case of an usufructuary mortgage, where the mortgagor is unable to give or secure possession. We have inserted a section (38) to this effect.

29. We have considered the question as to whether we should validate powers of sale in mortgages of property situate in the Mufassal, and we have come to the same conclusion as the late Sadr Diwani Adalat came to in 1842, namely, that it would not be safe to entrust Indian money-lenders with powers so liable to abuse. We have therefore framed the section (39) corresponding with section 24 of the Bill as introduced, so as to invalidate such powers except where the lender is the Government, or the property is situate in the Presidency Towns or Rangoon.

30. We have limited (section 40) the right of a mortgagee in possession to insure to cases in which the property is insurable at ordinary rates. In the case of an inflammable property, the mortgagee might, under the Bill as introduced, impose an unfair burden on the mortgagor.

31. We have provided (section 41) for accessions to the mortgaged property.

32. We have framed the section (43) corresponding with section 17 of the Bill as introduced, so as to exempt mortgagees who, under a contract in writing, take the profits of the mortgaged property in lieu of interest, from keeping accounts of their receipts.

33. Where a mortgagor in possession fails to pay arrears of revenue and the estate is consequently sold, our Courts have ruled that the mortgagee has a charge on the surplus of the sale proceeds after payment thereof of such arrears. We have in section 45 adopted this ruling.

34. The Bill as introduced had nothing to shew that Lord Denman's doctrine in *Pickard v. Sears* applies to mortgages. We have therefore inserted the following:—

“46. 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.”

35. The Bill should, we think, embody the equitable principles that a creditor who can satisfy his debt out of several funds shall so exercise his right as not to take from another creditor the fund which forms his only security, and that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone. We have therefore inserted sections (50, 51) as to what English lawyers call marshalling securities and contribution.

36. Though the matter is one rather of procedure than of substantive law, we have inserted a rule (section 52), as to the proper parties to suits for redemption, foreclosure or sale, which will save the right of subsequent incumbrancers to redeem, and, if a decree for sale is made, conclude them.

37. We have provided (sections 54 and 60) that in suits for foreclosure and redemption, upon good cause shewn, the time fixed by the Court for payment may be enlarged. We believe that this power (which is constantly exercised by Courts of equity) will be in accordance with the feelings of the people of many parts of India where, until recently, the power to redeem was held to last for ever, and even the long term of sixty years fixed by the Limitation Act is sometimes regarded as an unfair innovation.

38. We have designedly withheld power to open foreclosures.

39. We have enumerated the persons entitled to redeem as follows:—

“58. 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;
- (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 the sale of the mortgaged property.

Explanation.—An easement is not an interest within the meaning of clause (a).”

40. When property is mortgaged for successive debts to successive mortgagees, we have expressly authorised (section 62) any mesne mortgagee to institute a suit to redeem the prior mortgagees and to foreclose those that are posterior to himself. We have given in the third schedule a form of the decree passed in such a suit.

41. We think that as a person having a charge has a mere right of realization, he should not be allowed to foreclose, and should be only entitled, under the proposed Act, to institute a suit for the sale of the property charged. We have framed section 68 accordingly. We have introduced a section (69) providing for the merger of charges. But the section in its present form is not to be understood as representing our final opinion on the subject.

CHAPTER VI.—Leases.

42. We have prefixed to this chapter a section (70) declaring the respective duties of proposing lessors and lessees to make disclosures of defects and advantages.

43. As the law stands, both in England and, as a general rule, in India, there is no implied warranty on the letting of land or an unfurnished house that it is fit for cultivation or occupation; there is no implied obligation on the landlord to repair the premises, and, in the absence of a contract to the

contrary, the tenant is bound to keep and leave them in good repair; and the landlord does not warrant his title, but merely covenants that the tenant paying his rent and performing his covenants may peaceably enjoy the property during the term without interruption by the landlord or any one claiming through him. We think that the Bill should, in these respects, accord with the law as above stated, and we have therefore struck out, in section 44, of the Bill as introduced the latter half of clause (b) and the whole of clause (f), and substituted for clauses (c) and (d) a clause providing for quiet enjoyment by the lessee. But there is no doubt that, in certain parts of India and with regard to certain classes of houses, usages have become established with regard to repairs, with which it is undesirable to interfere. We have, therefore, made our provisions as to liability to repair subject to local usage.

44. Where part of the property leased is destroyed by superior force, we think that the lease should become void as to that part, that any rent or fine payable under the lease should proportionately abate, and that a proportionate part of any fine paid by the lessee should be returned. If the lessor reinstate the part destroyed, he and the lessee can come to a new agreement. We have altered clause (i) in accordance with these views.

45. We think that no lessee should, without the lessor's consent, erect any permanent structure on the property, except for agricultural purposes, and we have made provision to that effect in section 71, clause (m). Under the Bill as introduced the tenant might have erected unsightly buildings on his holding and thereby seriously injured the landlord's contiguous property.

46. We have struck out the words authorising a lessee to remove fixtures after the termination of his lease. They might have prevented the lessor from letting the property to another at the end of the term.

47. We have declared (section 71, clause r) that the power of transfer conferred on a lessee shall not be deemed to authorise an occupancy-ryot to assign his interest. This is the law in Bengal, in the absence of a special custom: the saving clause in section 2 will leave unaffected the right of occupancy-tenants in the Panjáb.

48. We have provided (section 73) for the insolvency of the lessee, and enabled the receiver of his property, with the leave of the Court, to disclaim the property leased. This provision, like the similar clause in chapter III, is founded on 32 & 33 Vic., c. 71, sections 23, 24.

49. We have declared (section 74), in accordance with the present law, that a tenancy begins on entry, and that a lessee before entry cannot sue for trespass.

50. We have stated (section 76) the various ways in which a lease may be determined: we have explained (section 77) the law as to the waiver of forfeiture or a notice to quit; and we have provided by the same section for relief against forfeiture for non-payment of rent. Power to grant such relief has long been exercised by Courts of equity on payment of arrears and the landlord's costs, and a like power was, by 23 & 24 Vic., c. 126, conferred on the Common-law Courts. Act X. of 1859, section 78, and Bengal Act VIII. of 1869, section 52, provide for stay of execution of a decree for ejection on payment into Court within fifteen days from its date, and we propose to leave this procedure untouched.

CHAPTER VII.—*Settlements.*

51. Strong representations have been made to us that, in the case of European and East Indian married women, restraints on anticipation should continue to be allowed. We have therefore added a proviso to section 82 (corresponding with section 52 of the Bill as introduced) which will have the desired effect.

52. We think that section 83 in its present state requires further consideration. But in deference to the Indian Law Commissioners we have let the section stand as they framed it.

53. We think sections 85 and 86 (corresponding with sections 55 and 56 of the Bill as introduced) should not apply to Natives; and we have made a provision to this effect.

CHAPTER VIII.—*Discretion of the Courts to deal with settled Land.*

54. We think that the delicate jurisdiction which this chapter proposes to confer should be exercisable only by the High Courts. We have altered the wording of section 88 accordingly.

55. We have recast section 90 (=section 68 of the Bill as introduced) so as to restrict the privilege of appearing, &c., to persons interested in the land and to persons permitted by the Court to appear.

CHAPTER IX.—*Gifts for Religious and Charitable Purposes.*

56. We have exempted Natives from the operation of this chapter, which would have interfered with their religious usages: we have confined it expressly to immoveable property; and we have provided that notice of the assurances contemplated shall be given to the Local Government.

CHAPTER X.—*Owners of Limited Interests.*

57. It is said that Hindú law allows the person increasing by his own exertions the value of an estate a larger share in the increase than he possesses in the corpus. We have therefore saved (section 99) in such cases any benefit to which the persons making the increase is entitled under his personal law.

58. We have in the section (100) relating to the discovery of the deaths of tenants for life, taken care that the Court shall not be authorised to compel the appearance in public of pardah-women.

CHAPTER XI.—*Powers.*

59. We have here added rules declaratory of the present law, as to the following matters:—

- (a) the revocation of appointments (section 107):
- (b) the delegation of powers (section 108):
- (c) the application of the doctrine of election to appointments (section 120):
- (d) gifts by implication to the objects of powers (section 125):
- (e) the priority of interests created under powers (section 127):
- (f) the extinguishment of powers (section 128).

CHAPTER XII.—*Property held by several Persons.*

60. We have, at the request of our honourable colleague Mahārājā Jotindra Mohan Tagore, declared (section 130) that nothing in the clause authorising the Court in a suit for partition, to direct a sale and distribute the proceeds, shall apply to the property of an undivided family. But we have reason to believe that, in the Hindū community of Calcutta much difference of opinion exists as to the expediency of making such declaration, and we invite the special attention of the Local Governments to this matter.

61. We have provided (section 134) that the buyer or mortgagee of a share of undivided immovable property takes subject to the right of the co-owners to enforce a partition, and that, when such partition is effected, his right extends only to the share allotted to his transferor.

CHAPTER XIII.—*Assignments of Things in Action.*

62. When the debtor receives notice of the assignment, we have provided (section 137) that he shall give effect thereto unless he resides, or the property is situate, in a foreign country, and the title of the person in whose favour the assignment is made is not complete according to the law of such country.

The First Schedule.

63. We have added to the enactments proposed for repeal, 4 Wm. & Mary, c. 16; as to clandestine mortgages, a matter provided for by section 32 of the amended Bill, Act XXXI. of 1854, section 17, which is embodied in section 19 of the amended Bill, and Act I. of 1877, section 13, which is inconsistent with section 12 of the same Bill. We have also, by repealing the words 'in writing' in the Specific Relief Act, sections 35 and 36, rendered those sections applicable to oral contracts.

The Second Schedule.

64. We have added forms of an exchange and an English mortgage, and for the form of lease contained in the Bill as introduced, we have substituted forms of a lease of a dwelling-house and a farm.

65. We have now enumerated the changes which we have made in the substance of the Bill. We have also made some in its wording and arrangement.

66. We recommend that the Bill as now amended be republished with this report in the *Gazette of India* and sent to the several Local Governments for consideration and for republication in the local Gazettes. In order to give ample time for the further discussion of so important a measure, we think that no steps should be taken to pass it into law until the Council re-assembles next November.

67. We desire, in conclusion, to express our obligations to the gentlemen who have favoured us with criticisms on the Bill. We are especially indebted to the Honourable Raymond West, a Judge of the High Court of Bombay; Mr. Grant, Officiating Judicial Commissioner of the Central Provinces; Pandit Lakshmi Nārāyana of Lucknow; Mr. J. W. Smyth, a Judge of the Panjāb Chief Court, Muttasāmi Ayyar, C. I. E., Acting Judge of the Court of Small Causes at Madura, and Srīnivāsa Rao, a Judge of the Court of Small Causes at Madras; and Mr. Stokes desires to acknowledge some valuable remarks privately communicated to him by Sir R. Garth.

WHITLEY STOKES.
E. C. BAYLEY.
A. J. ARBUTHNOT.
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JOTINDRA MOHAN TAGORE.
G. H. P. EVANS.
G. C. PAUL.

No. II.
THE TRANSFER OF PROPERTY
BILL, 1878.

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No. II.

A Bill to define and amend the law relating to the Transfer of Property, and for other purposes.

WHEREAS it is expedient to define and amend the law relating to the transfer of property, to owners of limited interests, and to powers, property held by several persons and apportionment; It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. This Act may be called "The Transfer of Property Act, 1878."
 Short title. Property Act, 1878."
 Extent. It extends to the whole of British India;
 Commencement. And it shall come into force on the first day of January 1879.

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

(a) the provisions of any enactment not hereby expressly repealed :
 Saving of certain Acts, incidents, rights, liabilities, &c. (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 tenant under any lease granted before this Act comes into force :

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

(f) any sale in execution of a decree or order or for arrears of rent or revenue :

And nothing contained in sections 85 and 86 and Chapter IX. shall apply to Hindús, Muhammadans or Buddhists.

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

"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 :

the person so creating, transferring or otherwise disposing, is called a grantor; the person in whose favour such creation, transfer or disposition is made, is called a grantee; and the operation effected by an assurance is called a grant :

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

"affixed to the soil" means—

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

(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.

All words occurring in this Act and defined in the Indian Contract Act, 1872, shall have the meaning attributed to them respectively by that Act.

CHAPTER II.

OF ASSURANCES OF IMMOVEABLE PROPERTY.

4. Every person competent to contract may make an assurance 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.

5. An assurance may be made in the form in the second schedule hereto annexed, or in any other form which expresses an intention thereby, and without any further act on the part of the grantor, to create, transfer or otherwise dispose of any right, title or interest to or in immoveable property.

6. Unless a contrary intention appears by the assurance, it shall be deemed to pass to the grantee all the interest

which the grantor is capable of passing in the object of the grant, and to comprise—

(a) standing trees and all other products of the soil;

(b) things affixed to the soil, and, in the case of machinery so affixed, the moveable parts thereof;

(c) in the case of a house, the locks, keys, bars, doors and windows.

7. The owner of immoveable property cannot give to another a title thereto higher or more free from incumbrance than his own, and when 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:

Provided that where a grantor makes a grant as Protection to innocent grantees for value. (a) the manager of the property of a minor or an undivided family, (b) a childless Hindú widow in possession of her deceased husband's property, or (c) a benámídar or other ostensible owner, the grantee's title shall not be impeached if the grant has been made for a consideration and the grantee has acted in good faith and used due care and diligence to ascertain that the grantor had power to make the grant.

8. A contract in writing between the respective owners of two neighbouring parcels of land, that one of them shall do or refrain from doing something on his parcel for the benefit of the other parcel, is binding on all persons claiming the former parcel under him with actual knowledge of the contract, and may be enforced by the owner of the latter parcel or his legal representative.

A contract in writing between the owner of certain land and any other person, that the former shall do or refrain from doing something on the land for the benefit of the public, is binding on all persons claiming the land under the former with actual knowledge of the contract, and may be enforced by the latter, or his legal representative, or by the Secretary of State for India in Council.

9. Where a grant of immoveable property for a consideration is made to one person, and the consideration is paid by another, no trust shall result in favour of the person by whom such payment is made; but the property shall vest in the grantee, subject only to the provisions next following.

Every such grant shall be presumed to be fraudulent as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favour of such creditors to the extent necessary to satisfy their just demands.

CHAPTER III.

OF SALES OF IMMOVEABLE PROPERTY.

10. A person proposing to sell immoveable property need not disclose defects therein which the buyer might with ordinary

Disclosures required from proposing sellers and buyers.

care discover: but the proposing seller must not conceal, or attempt to conceal, such defects, and he must disclose to the buyer all other defects therein of which the former is, and the latter is not, aware.

Where the proposing buyer stands, or has stood, as regards the property, in a fiduciary relation to the seller, he must disclose to the seller any fact which increases the value of the property itself, and of which the former has, during the existence of such relation, become aware. Save as aforesaid, a person proposing to buy immoveable property need not disclose any fact unknown to the seller which increases the value of the property itself: but the proposing buyer must disclose any such fact which increases the value of the seller's interest therein, and of which the former is, and the latter is not, aware.

Illustrations.

(a.) A proposes to sell a field to his neighbour B. A need not disclose the existence of an open foot-path over the field.

(b.) A proposes to sell a mine to B, who has the opportunity of examining it. A need not disclose the fact that he has himself worked the mine, but has abandoned the working as unprofitable.

(c.) A proposes to buy B's field. There is not, and never has been, any fiduciary relation between A and B. A need not disclose the fact that there are minerals under the field, though he knows that B is ignorant of it.

(d.) A proposes to buy from B his interest in certain property to which B is entitled on C's death. C, to the knowledge of A, but not of B, is actually dead or is about to die. A is bound to disclose this fact to B.

11. Unless a contrary intention appears from the contract or assurance, the rights and liabilities of 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:

(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 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.

(b.) 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.

(c.) Unless the buyer has improperly declined to complete the purchase, 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 properly paid by the buyer in anticipation of the completion of the purchase

and for interest on the amount of such payment; and, when the buyer properly declines to complete the purchase, also for the deposit (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.

(d). If the seller alter the property in any particular which does not admit of compensation or reinstatement, the buyer may decline to complete the purchase.

(e). When the buyer has been let into beneficial possession of the property before completion of the purchase, and the purchase is not completed owing to defects in the seller's title, the buyer is not liable to pay for his use of the property.

(f). 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.

(g). On payment or tender of the amount due in respect of the purchase-money, 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.

(h). On completion of the purchase, the property vests in the buyer, and the buyer is entitled to all documents of title relating to the property 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 portion of greatest value, must keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(i). In the absence of fraud, concealment and misrepresentation, the seller is not answerable for any defect in the property sold.

(j). Unless the sale is made by a person in a fiduciary character, the seller shall be deemed to contract with the buyer, *first*, that notwithstanding anything done by the seller or any person through whom he claims, the seller has power to grant 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 completion of the purchase.

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 granting it.

EXPLANATION.—A purchase is completed within the meaning of this chapter when possession of the property is delivered to the buyer. When the transfer is made by assurance, such delivery takes place when the assurance is executed by the seller and (if its registration be required by law) registered. When the transfer is not made by assurance, such delivery takes place, in the case of an incorporeal right, 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.

12. A contract for, or relating to, the sale of immovable property, shall not 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, the Specific Relief Act, 1877, and section twenty.

13. If, before completion of the purchase, the buyer is declared insolvent, the receiver of his property appointed under the Code of Civil Procedure, section 351, may, if the contract is unprofitable, by writing under his hand disclaim the same, and thereupon the contract shall be deemed to be determined from the date of the declaration: provided that the receiver shall not disclaim such contract in cases where an application in writing has been made to him by any person having any interest in the property, requiring him to decide whether he will disclaim or not, and the receiver has, for a period of not less than twenty-eight days after the receipt of such application or such further term as may be allowed by the Court, declined or neglected to give notice whether he disclaims the contract or not.

Any person injured by the operation of this section shall be deemed a creditor of the insolvent to the extent of such injury and may prove the same as a debt under the insolvency.

14. 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 completion of the purchase, to perform the contracts by the lessee, and to indemnify the seller and his legal representative against all claims for non-payment of such rent or breach or non-observance of such contracts.

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

contrary, bound (a) to pay to the mortgagee or his legal representative the principal sum which, on completion of the purchase, is owing on the security of the mortgage, and all interest for the time being due for the same, when payment thereof, respectively, is lawfully demanded, and (b) to indemnify the seller and his legal representative against the payment thereof, and against all claims for non-payment thereof, respectively.

16. 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 may actually receive under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

17. When two or more persons purchase any immovable 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.

18. When two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller and his legal representative, 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.

19. When any property is sold, the proceeds of which are subject to any trust, the *bonâ fide* buyer of the property is not bound to see to the application of the purchase-money to the purposes of the trust.

20. When the buyer fails to perform any duty imposed on him, as such, by this Act or any other law for the time being in force, the seller may, notwithstanding anything contained in the Indian Contract Act, 1872, section 56, sue the buyer for compensation for such non-performance.

When the seller fails to perform any duty imposed upon him, as such, by this Act or any other law for the time being in force, the buyer may either sue under the Specific Relief Act, 1877, to have the contract rescinded, or may affirm it and sue for compensation for its non-performance. In the latter case, the buyer may recover his expenses reasonably incurred, after the contract was entered into, in relation to the attempted purchase; and in each case he may recover his deposit (if any) with interest thereon.

CHAPTER IV.
OF EXCHANGES.

21. 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.

22. If one of the parties prove that the other was not owner of the thing given or agreed to be given to the former in exchange, the former cannot be compelled to deliver that which he has promised in counter-exchange; but when he has received the thing given to him in exchange, he may be compelled to return it.

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.

23. 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.

24. On an exchange of money, each party there- by warrants the genuineness of the money given by him.

CHAPTER V.

OF MORTGAGES AND CHARGES.

25. When, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, one person transfers to another a right over specific immovable property, the transfer is called a mortgage, 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.

Where the mortgagor transfers the property to the mortgagee conditionally upon the non-payment of the mortgage-money at a certain date, the transaction is called an English mortgage.

Where the mortgagor delivers possession of the property to the mortgagee, and authorises him to retain such possession and to pay himself from the rents and profits of the property the interest, or the principal and interest, of the mortgage-money, the transaction is called an usufructuary 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 deliver possession of the property, or contract that in default of payment of the principal and interest at a certain date the property shall pass to the mortgagee, the transaction is called a simple mortgage.

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

26. A mortgage can be effected only by assurance signed by the mortgagor and attested by at least two witnesses.

27. The deposit of title-deeds with intent to create a mortgage on the property comprised therein, but without actual transfer of such property, shall be deemed to be only evidence of a contract to execute a mortgage of the property.

Rights and Liabilities of Mortgagor.

28. A mortgagor has the following rights as against the mortgagee:—

(a) at any time after the mortgage-money has become payable, or has been paid, and before an order absolute has been made foreclosing his right to redeem the mortgaged property or the property is duly sold in pursuance of a decree or under a power conferred by the mortgage-deed, he may, on payment or tender of the mortgage-money remaining due, require the mortgagee to re-grant the property to him, or to execute an acknowledgment in writing that any right in derogation of his ownership or other interest granted to the mortgagee has been extinguished.

(b) at any time after the mortgage-money has become payable and before such suit is barred, he may tender to the mortgagee at a proper time and place, or 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 whole amount for the time being due on the mortgage.

Nothing in this section shall be deemed to authorise a person interested in part only of the mortgaged property to institute a suit for the redemption of his own part only, except where there is but one mortgagee and the mortgagor's interest in part of the property becomes vested in such mortgagee.

29. 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 property to the mortgagee, free from incumbrances; *secondly*, that the mortgagor and every person claiming any interest in the same 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; and, where the

property is leasehold; *thirdly*, 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.

30. 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.

31. A mortgagor in possession of the mortgaged property must not commit waste thereon, if the security is insufficient or will be rendered insufficient by such waste.

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 mortgage-money.

32. 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 making 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.

A mortgagor failing to give any notice required by this section, in addition to any other liability resulting from such failure, 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.

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

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 the Mortgagee.

34. In the absence of a contract to the contrary, the mortgagee may, at any time after the mortgage-money has been

come 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 foreclosure of his right to redeem the property with or without possession thereof, or (2) a suit for a sale of the property, or (3) a suit for such foreclosure or sale.

Nothing in this section shall be deemed—

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

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

(c) 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 of the suits mentioned in this section, which, under this Act, he is authorized to institute, relating to the whole of the mortgaged property, making the other mortgagees, if they cannot or will not join as plaintiffs, defendants.

35. Where the mortgagor deposits money in court under section twenty-eight, 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 due to him under the mortgage, apply for and receive in payment of such amount the money so deposited.

36. When the mortgagor and mortgagee have contracted as to the payment of interest on the principal money for the time being due to the mortgagee under the mortgage, interest shall be payable in accordance with such contract: Provided that, where the mortgagor has tendered or deposited in court under section twenty-eight the whole amount due to the mortgagee, such interest 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.

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

37. In the absence of an express 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 principal 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 same.

In any suit for a foreclosure or sale, the Court may, if it think fit, appoint such a receiver pending the proceedings in the suit.

38. No mortgage shall be deemed to imply a debt for the recovery of which a suit will lie against the debtor; but the mortgagee may sue the mortgagor for the mortgage-money—

(a) where the mortgagor expressly binds himself to repay the same:

(b) where the mortgagor remains in possession of the property and fails to pay arrears of revenue due in respect thereof, and the property is consequently sold:

(c) where the property is destroyed by diluvian, fire or other superior force:—

(d) in the case of an usufructuary mortgage, 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.

39. A power conferred by the mortgage-deed on the mortgagee 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 town of Calcutta, Madras, Bombay or Rangoon.

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

40. 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 a contract to the contrary, require any money which the mortgagor may actually receive under the policy, or so much thereof as may be necessary, to be laid out in reinstating the property.

41. 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, 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.

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

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

(b) he shall use his best endeavours to collect all rents and other profits arising out of the property;

(c) he shall, in the absence of an express contract to the contrary, out of the income of the property pay the Government revenue and all other charges of a public nature accruing due in respect thereof during such possession.

(d) he may spend such money as is necessary (1) for the due management of the property and the collection of the rents and other profits arising out of the same, (2) for its preservation from destruction, deterioration, 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 principal money secured, at the same rate of interest;

(e) he may eject the tenants (if any) in occupation of the property under leases made without the mortgagee's consent after the completion of the mortgage;

(f) where the property is by its nature insurable at ordinary rates, he may 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 principal money secured, 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;

(g) he shall, in the absence of an express contract to the contrary, keep 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;

(h) his receipts from the mortgaged property, after deducting the expenses mentioned in clauses (c), (d) and (f), shall be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the principal sum secured by the mortgage, and, so far as such receipts exceed any interest due, in reduction of such principal sum.

43. Nothing in section forty-two, clauses (g) and (h), applies to cases where there is an express contract in writing between the mortgagee and the mortgagor that such receipts, after deducting the said expenses, shall, so long as the mortgagee is in possession of the mortgaged property, be taken in lieu of interest on the principal sum secured by the mortgage.

44. A mortgagee in possession of the mortgaged property must not commit waste thereon.

45. When a mortgagor in possession of the mortgaged property fails to pay arrears of revenue due in respect thereof, and the property is consequently sold, the mort-

gagee has a charge on the surplus, if any, of the proceeds, after payment thereof of the said arrears.

Priority.

46. 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.

47. 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 actual knowledge 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 subsequent mortgage.

Illustration.

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

48. No mortgagee paying off a prior mortgage, whether with or without Tacking abolished. 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-seven, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

49. 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 to whom he has made such tender.

50. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person without actual knowledge of the former mortgage, the second mortgagee 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 pre-

judge the rights of the first mortgagee or of any other person having an incumbrance on either property.

51. 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 fifty to the claim of the second mortgagee.

Suits for Redemption, Foreclosure or Sale.

52. 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 section twenty-eight or thirty-four, 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.

53. In a suit for foreclosure, or foreclosure or sale, if the plaintiff succeeds, 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.

54. If payment is so made of such amount and of such subsequent costs as are mentioned in section sixty-four, the de-

fendant shall (if necessary) be put into possession of the mortgaged property.

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 to 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.

Provided that the Court may, upon good cause shewn, 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.

55. In a suit for a sale under this chapter, if the plaintiff succeeds, the Court shall, and in any other suit by the mortgagee under this chapter, if the plaintiff succeeds the Court may at his instance, pass a decree ordering as provided in the first and second paragraphs of section fifty-three, 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.

When the mortgagee sues only for a foreclosure, if the Court considers that he will not be damaged 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.

56. If in any case under section fifty-five the defendant makes payment as mentioned in section fifty-four, 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-five; and thereupon the defendant's right to redeem and the security shall both be extinguished.

Contribution to mortgage-debt.

Parties to suits for redemption, foreclosure and sale.

Decree in foreclosure suit.

Order absolute for foreclosure.

Decree for sale.

Power to decree sale at instance of mortgagee.

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

Procedure when defendant pays amount due and subsequent costs.

Order absolute for sale.

57. When the net 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.

58. 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:

(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.

EXPLANATION.—An easement is not an interest within the meaning of clause (a).

59. 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) re-transfer 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.

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

If such payment is not so made, the defendant 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 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; and thereupon the plaintiff's right to redeem and the security shall both be extinguished:

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

Redemption and Foreclosure.

61. 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.

The decree in such suit may be in the form set forth in the third schedule hereto annexed, with such variation as the circumstances of each case require.

62. If the mortgagee fail to perform any of the duties imposed upon him by section forty-two, 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.

Costs.

63. The mortgagee is ordinarily entitled to receive or add to his debt his costs properly incurred of any suit under this chapter. But such costs, or any part thereof, may be disallowed if the mortgagor has paid or tendered to the mortgagee, or has deposited in court, the whole amount due to him under the mortgage, and if the mortgagee has unreasonably refused to accept such tender or to take such money out of court in discharge of his claim, or if he has prevented a mortgagor willing and able to make such payment, tender or deposit from making it by refusing or neglecting to give him proper information as to the state of the accounts required to be kept under section forty-two.

64. 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 principal debt 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.

Sale of Property subject to prior mortgage.

65. If any property subject to 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.

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

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 all principal moneys 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.

67. If property subject to a mortgage, or the right to receive mortgage-money, be transferred to a third person, the transferee has all the rights and powers of his transferor, under the mortgage, and is subject to the liabilities existing between his transferor and the mortgagor or mortgagee, as the case may be.

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

Charges.

68. 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 immovable 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 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 apply to the person having such charge.

69. Where a person is or becomes absolutely entitled to immovable property, of a charge or other incumbrance on which he is also the owner, the charge or incumbrance shall be extinguished, unless by an instrument in writing registered he expressly declares that it shall be kept on foot.

CHAPTER VI.

OF LEASES OF IMMOVABLE PROPERTY.

70. A person proposing to let immovable property need not disclose defects therein which the lessee might with ordinary care discover; but the proposing lessor must not conceal, or attempt to conceal, such defects, and he must disclose to the lessee all other defects therein of which the former is, and the latter is not, aware.

When the proposing lessee stands, or has stood, as regards the property, in a fiduciary relation to the lessor, he must disclose to the lessor any fact which increases the value of the property itself, and of which the former has, during the existence of such relation, become aware. Save as aforesaid, a person proposing to take a lease of immovable property need not disclose any fact unknown to the lessor which increases such value.

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

(a.) The lessor is bound to put the lessee in possession of the property leased:

(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 by the lessee may hold the property leased during the time limited by the lease without interruption by the lessor or his assigns, or any person lawfully claiming through him or them:

(c.) In the absence of fraud, concealment or misrepresentation, the lessor is not answerable for any defect in the property leased which the lessee could not with ordinary care have discovered:

(d.) During the continuance of the lease, the lessee is entitled to the enjoyment of all easements appendant to the property leased at the time when the lease was made until such easements are extinguished:

(e.) 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:

(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.) In case the lease is rescinded for the default of the lessee, he is bound to pay the rent up to the time of such rescission, and also to make compensation for any other loss resulting from his default; but in estimating such compensation, the Court shall take into account the fine (if any) paid under the lease :

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

(i.) 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 :

(j.) Every lessee who becomes aware of any proceeding to recover the property leased to him or any part thereof 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 :

(k.) The lessee is bound to give notice to the lessor, within a reasonable time, of any encroachment made upon, or any interference with the lessor's rights concerning, the property leased, which may come to his knowledge; and, in default of so doing, he is liable to make compensation to the lessor for any loss or expenses occasioned by such omission :

(l.) The lessee may use the soil and its products for all purposes of enjoyment as a reasonable owner would use them; but he may not fell timber, pull down or damage houses, open mines, or commit any other waste :

(m.) No lessee of immoveable property shall, without the lessor's consent, erect any permanent structure thereon, 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 :

(n.) Subject to the provisions of clause (m), 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 :

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

(p.) 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 land for the season current when the lease determines, and to free ingress and egress to reap and carry them :

(q.) 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, if the lessee pay rent to the lessor without having reason to believe that such transfer has been made, he shall not be liable to pay such rent over again to the transferee :

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 :

(r.) The lessee may transfer, absolutely or by way of mortgage, the whole on any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason 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.

Nothing in this section shall be deemed to authorise a tenant having a right of occupancy to assign his interest as such.

72. 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 a trespass thereon.

73. When the lessee is declared an insolvent, the receiver of his property appointed under the Code of Civil Procedure, section 351, may, with the leave of the Court, by writing under his hand, disclaim the property leased, and thereupon the lease shall be deemed to be surrendered from the date of the declaration, and the Court may order the property to be delivered up to the lessor or make such other order as to the possession thereof as may be just :

Provided that the receiver shall not disclaim such property in cases where an application in writing has been made to him by any person interested therein, requiring him to decide whether he will disclaim or not, and the receiver has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not.

On the application of any person interested in the property, the Court may direct possession thereof to be delivered to him, or make such other order as to possession thereof as may be just.

Any person injured by the operation of this section shall be deemed to be a creditor of the insolvent to the extent of such injury, and may accordingly prove the same as a debt under the insolvency.

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

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

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.

75. Where the time limited by a lease 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.

Exclusion of day on which term commences.

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.

Duration of lease for a year.

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.

Option to determine lease.

76. A lease determines—

- (a) by efflux of the time limited thereby;
- (b) by rescission;
- (c) by surrender in express terms;
- (d) by surrender by operation of law, 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;
- (e) 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 either by setting up a title in a third person or by claiming title in himself;

(f) on the expiration of a notice to quit duly given to the lessee.

77. A forfeiture or notice under section seventy-six, clause (e) or (f), is waived by receipt of rent which has become due since the breach or the expiration of the

Waiver of forfeiture or notice to quit.

notice, 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.

Where a lease 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 ejection, 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.

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

78. If a lessee or sub-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 sub-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 seventy-four.

Effect of holding over.

Illustrations.

(a.) A lets a house to B for five years. B sublets 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 VII.

OF SETTLEMENTS.

79. "Settlement" means, in this chapter, any disposition in writing of moveable or immovable property—

(a) which is not testamentary, and is not founded on any consideration, or

(b) which is made in consideration of marriage, or

(c) which is made for the purpose of dividing property of the settlor among his family or those for whom he desires to provide,

but does not include a gift made by a Hindú, Muhammadan, or Buddhist.

80. A settlement, whether made for a consideration or not, is binding on the settlor and those claiming under him.

Consideration not necessary to make settlement binding.

81. A settlement made for the purpose of depriving present or future creditors or other persons of their demands against the settlor, is void against all present and future creditors of the settlor and

Voidability of settlement made in fraud of creditors.

their successors in interest, and against any person upon whom his property devolves in trust for the benefit of his creditors.

Nothing in this section affects the rights of persons who have acquired, in good faith and for consideration, any interest under the settlement.

82. A condition or limitation in a settlement or will, restraining any person from parting with or disposing of his interest, is void: provided that property may be settled or bequeathed for the benefit of a married woman who is not a Hindú, Muhammadan or Buddhist, so that she shall not have power to deprive herself of the income thereof in anticipation.

83. A condition or limitation contained in a settlement or will, making an interest thereby reserved or given to or in trust for any person to cease on his becoming insolvent, or endeavouring to transfer or dispose of the same, is void.

84. If, by a settlement, property be given to a person then living in general terms, without indicating the time when it is to be paid or delivered, such person has a vested interest therein from the day of the execution of the settlement, and if he dies without having received it, it shall (subject to any legal disposition thereof which he may have made) pass to his legal representative.

85. Where, by the terms of a settlement, property is given to a person not in existence, but he is not entitled to possession of it immediately upon his birth, a right to receive it at the proper time shall, unless a contrary intention appears by the settlement, become vested in such person upon his birth, and shall (subject to any legal disposition thereof which he may have made) pass to his legal representative if he dies before that time, and without having received it. And in such cases it is from his birth said to be vested in interest.

86. The provisions of the Indian Succession Act, 1865, sections 100 to 104, both inclusive, 107 and 108, 111 to 127, both inclusive, and 167, shall apply, *mutatis mutandis*, to gifts contained in settlements.

87. Whenever a person becomes entitled in possession, by virtue of a settlement, to money or any other property yielding income, he shall be entitled to receive the interest or income thereof from that time.

CHAPTER VIII.

OF THE DISCRETION OF THE COURTS TO DEAL WITH SETTLED LAND.

88. If any person having, under a settlement or will, a limited interest in possession in any land, apply under this section to the High Court within the limits of whose

appellate civil jurisdiction such land or any part thereof is situate, the Court may, if it deem it just and expedient to do so,—

(a) make such leases of the whole or any part of the land for such terms of years, for such rents, with such powers, and with such conditions, reservations and exceptions as the Court thinks fit;

(b) make such sales of the whole or any part of the land, for such sums, payable either at once or periodically, with such powers, and with such conditions, reservations and exceptions as the Court thinks fit;

(c) appropriate any part of the land for the formation of streets, roads, gardens or other open spaces, tanks, sewers, drains or water-courses, and authorize the erection of buildings and works thereon;

and generally deal with the land in any way the Court may think just and beneficial to the persons interested therein.

89. Every such application shall be in writing, and notice thereof shall be served through the Court on all trustees under the settlement or will, and on any other persons who in the opinion of the Court ought to be so served, and shall be published in such newspapers as the Court may direct.

90. The Court shall permit any person interested in the land, and may in its discretion permit any other person, to appear and be heard in opposition to, or in support of, any such application, on such terms as to costs or otherwise as it thinks fit.

91. The Court may order the costs of all or any parties to any such application to be paid out of any principal money receivable on account of any dealing with the land which is the subject of the application, or to be a charge on such land or on any other land belonging to the same owners.

92. Every lease made under section eighty-eight shall take effect in possession; and on every such lease shall be reserved the best rent that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine.

93. All or any part of the proceeds of any lease, sale or disposition under section eighty-eight may, if the Court think fit, be paid into court.

94. The Court shall declare what parts of such proceeds so received shall be considered as income, and may direct the same to be paid to the person for the time being entitled in possession to the land dealt with; and the residue of such money shall be applied as the Court shall

direct in one or more of the manners following:—

(a) the payment of the amount due in respect of any charge on the land dealt with;

(b) the purchase of other property or the investment in securities for the benefit of the persons interested in the land dealt with;

(c) the payment to any person becoming absolutely entitled to the land dealt with.

EXPLANATION.—In this section the term “securities” means—

(d) promissory notes, debentures, stock and other securities of the Government of India;

(e) bonds, debentures and annuities charged by the Imperial Parliament on the revenues of India;

(f) stock or debentures of, or shares in, Railway or other companies, the interest whereon has been guaranteed by the Government of India; and

(g) debentures or other securities for money issued by or on behalf of any municipal body under the authority of any Act of an Indian legislature.

CHAPTER IX.

OF GIFTS FOR RELIGIOUS AND CHARITABLE PURPOSES.

95. No person having a nephew or niece, or Gift to charitable uses any nearer relative, shall by person having certain relatives. have power to give any immovable property to religious or charitable uses, unless by an assurance executed not less than twelve months before his death, and registered.

96. Subject to the provisions of the last Assurance of property in preceding section, imperpetuity for use of any moveable property may community or institution. be assured in perpetuity for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind. Provided that notice of such assurance shall be given, as soon as may be after its execution, to the Local Government and that no such assurance shall take effect until it has been sanctioned by some public authority to be designated by the Local Government by notification in the official Gazette.

The grant or refusal of such sanction may be notified by an entry in the book in which the assurance is registered, and the registering officer shall make such entry on receiving from the public authority aforesaid a written order in this behalf.

If no such order is made within two years next after the time when the property becomes applicable for the benefit of the public, it shall be deemed that sanction has been granted.

If such sanction is refused, the property shall devolve as if no such assurance had been made.

CHAPTER X.

OF CERTAIN RIGHTS AND LIABILITIES OF OWNERS OF LIMITED INTERESTS.

97. A person having a limited interest in any immovable property is not, as such, entitled to do or omit any act the doing or omitting of

Rights and obligations of persons having limited interests.

which is destructive or permanently injurious to such property.

EXPLANATION.—No act done in the reasonable use and enjoyment of property is destructive or injurious within the meaning of this section, though it may exhaust the substance of the property.

Illustrations.

(a). A is a tenant for life of land on which a dwelling-house stands. He is not entitled, as such, to pull down the house. Nor must he suffer it to fall for want of necessary repairs.

(b). A is a tenant for life of land in which coal lies. He is entitled, as such, to work and use the coal.

(c). A is a tenant for life of land planted with trees. He is entitled as such to cut the trees at maturity, but is not entitled, as such, to cut them when immature, except for the purpose of thinning out or otherwise benefiting the plantation.

Save as aforesaid, such person or his legal representative has the same right as a lessee to remove, during the continuance of such interest or within a reasonable time afterwards, all things which he has affixed to the soil in which he had such limited interest, and all crops growing upon the land for the season current when such limited interest determines.

98. A person having a limited interest in possession in any immovable property, is bound to discharge all taxes and other public periodical charges to which such property is liable and, to the extent of the rents and profits of the property which without his wilful default he might have received, all periodical payments accruing due on account of any mortgage or charge thereon taking effect during the continuance of his interest in priority to such interest.

99. Every advantage or increase of value accruing (accidentally or through the exertions of any one having a limited interest) to any immovable property in which successive interests exist, belongs, in the absence of any personal law to the contrary, to all the persons having any interest in the property, in the same shares and manner as they are entitled to the property.

100. Any person claiming any immovable property after the death of any minor, married woman or other person, and having reason to believe that such minor, married woman or other person is dead, and that his or her death is concealed by his or her guardian, husband or any other person, may once a year move the High Court to order the person concealing or suspected to conceal such person to produce him or her at such time and place, and before such persons (if any) as the Court may direct. And the High Court, if it think fit, shall make such order, and in case of disobedience thereto by the person in possession of the property, the person so claiming the same may, by order of the Court, enter thereon and receive the profits thereof as if the person so concealed or suspected to be concealed were dead.

Nothing in this section shall be deemed to authorize the High Court to compel the produc-

tion in court of women who, according to the customs and manners of the country, ought not to be compelled to appear in public.

Saving of mortgages and lessees.

101. Nothing in this chapter applies to mortgages or lessees.

CHAPTER XI.

OF POWERS.

102. A person may be authorized to determine, with or without the consent of others, the disposition of property otherwise than by virtue of his ownership. A person so authorized is said to have power to appoint such property.

The person who gives the power is called the donor, the person to whom the power is given is called the donee, and the persons for whose benefit the power is to be exercised are called the objects of the power. A person to whom any property is appointed is called an appointee.

Illustrations.

(a). A grants land to B for B's life, with remainder to such of B's children as B shall appoint. B appoints to C and D, two of his children, in equal shares. A is the donor of the power, B the donee, B's children the objects, and C and D the appointees.

(b). A, the absolute owner of certain land, grants it to B to such uses as C, with the consent of D, shall by assurance appoint. C with D's consent appoints part of the land to E absolutely, and the rest to F for seven years. Here C is the donee and also the object of the power, and E and F are the appointees.

A power authorizing the donee to appoint to whomsoever and for whatsoever interest he pleases, is called a general power.

A power restricted in respect either of its objects or the interests that may be conferred under it, is called a special power.

Where the donee has neither a present nor a future interest in the property, the power is called a collateral power.

Rules as to all Powers.

103. Where a power is vested in several donees, all who are living must unite in its execution; but in case any one or more of them die during the continuance of the power, it may be exercised by the survivors or the survivor, unless a contrary intention appears by the instrument creating the power.

104. The donor may direct that the power shall be exercised by will only, or by non-testamentary instrument only.

If he directs that the power shall be exercised by will only, it must be exercised by will duly executed according to the provisions of the Indian

Succession Act, 1865, or according to such other law as at the time of the execution of the power may be applicable to a will executed by the donee.

If he directs that the power shall be exercised by non-testamentary instrument only, it must be exercised by such an instrument and registered.

If he imposes no such restriction on the exercise of the power, it may be exercised either by such will or by such assurance as lastly hereinbefore mentioned.

105. When the power is not properly exercised, no Court shall in any case compel the person in possession of the property to which the power relates to deliver the property as if the power had been properly exercised, or shall otherwise aid the defective execution, except as provided in the Specific Relief Act, 1877, chapter three.

106. All appointments made in the manner directed by section one hundred and four shall be deemed to be executed and attested in proper form, notwithstanding that some other mode of execution or attestation has been prescribed by the donor.

107. An appointment made by will may be revoked by a subsequent will; but it is not revoked by mere general words of revocation of all former wills, without a new appointment.

An appointment made by a non-testamentary instrument is irrevocable except where power to revoke the appointment is expressly reserved by such instrument.

108. A power exercisable by will only cannot be delegated.

A special power involving the exercise of personal discretion by the donee cannot be delegated.

A power to do an act merely ministerial and involving no personal discretion may be delegated.

Illustrations.

(a). A has power under a settlement to dispose of an estate in such proportions as he thinks fit among the issue of his marriage with B. A by his will purports to delegate this power to B, to exercise as she thinks fit. The attempted delegation is void, and the dispositions, if any, in default of appointment take effect.

(b). A, the donee of a power to appoint to his children, determines to exercise it in favour of the objects equally. With this view he causes an instrument of appointment to be prepared. A may appoint an attorney to execute this instrument.

109. Where a power is to be exercised with the consent of several persons, all who are living must concur in the consent, but in case any one or more of them die during the continuance of the power, the consent of the survivors or the survivor is sufficient, unless a contrary intention appears by the instrument creating the power.

Consent to the exercise of a power must be given during the donee's lifetime by a non-testamentary instrument registered.

Consent to the exercise of a power need not be given by the instrument by which the power is exercised, but if it is given by a different instrument, such instrument must be executed at a time not later than the time at which the donee of the power executes the instrument by which he exercises the power.

110. If a person disposes of property in such manner as is authorized by a power vested in him, such disposition shall take effect under the power, notwithstanding that the power is not mentioned or referred to in the instrument of disposition.

Recital of power not necessary.

Illustration.

Land is settled upon A for life with a special power to charge, by a non-testamentary instrument, portions in favour of his children. Subsequently, a general power to dispose of the land by any instrument is vested in A. He executes an assurance, by which he directs that a sum of money shall be raised out of the land and settled on his son B for life, with remainder to B's wife and children. Such an appointment cannot take effect under the special power, but may be treated as a valid exercise of the general power.

111. The donee of a power need not exercise it entirely and at once by a single instrument, but he may from time to time exercise any unexhausted part thereof at his discretion.

Power exercisable by several instruments executed at different times.

If the donee has purported to exercise his power in such a manner that his appointment is void, the power is, to that extent, unexhausted.

Illustrations.

(a). A has a general power. He may appoint the property at one time to B for his life and at another to C absolutely.

(b). Trustees under a settlement, having power to lend Rs. 10,000 to A, the tenant for life, lend the money accordingly. A repays it. The trustees may again lend Rs. 10,000 to A.

(c). A has power to raise Rs. 10,000 by sale or mortgage of Sultánpur. A exercises the power by mortgaging Sultánpur. He may afterwards exercise the power by selling Sultánpur in order to pay off the mortgage.

112. Where a power given by any instrument is void in its creation, no disposition or gift made by the same instrument shall be deemed void merely because it is intended to take effect after the interests to be appointed under the power or in default of any such appointment.

Illustration.

A marriage-settlement provides that the settled property shall belong to the husband and wife successively for their lives; that after the death of the survivor of them, it shall go to such of the children of the marriage, and in such shares, as the husband and wife shall jointly appoint, the interest of each such child to become vested in him on his attaining the age of twenty-five years; and that in the event of

there being no child of the marriage who shall attain that age, or in default of appointment, the property shall belong to the husband or his legal representative.

Here the power to appoint the property is, under section eighty-six, void in its creation; but the ultimate interest given to the husband takes effect.

General Powers.

113. If the donor confers on the donee a general power, the donee shall, so far as regards his power of disposition, his creditors and all persons who contract with him for lawful consideration to obtain any interest in the property comprised in the power, be deemed to be the absolute owner of such property for such interest therein as the donor could dispose of.

This rule is to take effect notwithstanding that the donor has prescribed some particular method for executing the power.

Illustrations.

(a). A, the absolute owner of land, settles it on B for life with remainder to such purposes as B— shall appoint, or shall by deed appoint, or shall by will appoint, or shall by deed or will appoint, and in case B dies without making any such appointment, on C absolutely.

If B—

grants the land by assurance, or bequeathes it, or contracts to sell it, or incurs debt,

the property is liable, in the hands of either B or C, as the case may be, to the claims of B's grantee, legatee, purchaser or creditors, as the case may be.

If B dies having made no disposition of the property, C is entitled to it, subject to any claims which B's creditors may establish against it.

(b). A confers on B a general power, exercisable by a non-testamentary instrument, to appoint certain land. B appoints the land to certain persons in such shares as C shall fix. This appointment is valid.

114. If the donor confers on the donee a general power, and makes no disposition of the property in the event of non-appointment, the donee shall be considered as the absolute owner of the property or such interest therein as the donor could dispose of.

Illustration.

A, the absolute owner of property, settles it on B for life with remainder to such purposes as B shall appoint, and makes no gift over in default of appointment. B dies without making any disposition of the property. The property vests in the representatives of B, and does not revert to A or his representatives.

Special Powers.

115. If the donee has only a special power, he cannot confer any interest in the property comprised therein which could not have been conferred by the donor at the time of the creation of the power.

Illustrations.

(a). A settles a fund upon B for life with remainder to such purposes as B shall appoint. After the

settlement is made C is born. B then appoints the fund to C for life with remainder to C's children absolutely. The appointment is valid, though C has no children at the time.

(b). A settles a fund upon B for life with remainder to his children as he shall appoint. At the date of the settlement B has no child, but afterwards has a son C. B then appoints to C for his life, with remainder to his children. Such interest could not have been conferred by A, and B's appointment is void.

116. Where the donee of a special power purports, in exercise of the power, to appoint to objects authorized by the power and also to objects not so authorized, the appointment in favour of the authorized objects shall take effect if their interests are independent of those of the unauthorized objects.

Effect of appointment to objects, some authorized and others unauthorized.

Illustration.

Property is settled on A for life, and after his death on such of his children as he shall appoint, and in default of appointment to all A's children equally. A appoints that the property shall go after his death to his widow for her life, and after her death to two of his sons, C and D, in equal shares. There are five children of A. The appointment in favour of A's widow is invalid, and the rents and profits of the property during her life will go to all the five children in equal shares, but after her death to C and D absolutely.

117. Where the donee of a special power purports, in exercise of the power, to confer a larger interest than is authorized thereby, such appointment shall, if the appointee so elect, be void only for the excess, and good for the residue, if they can be separated.

Appointment in excess of power when voidable at election of appointee.

Illustrations.

(a). A has a life-interest in Rámnagar, with power to grant leases thereof for 30 years. A makes a lease of Rámnagar for 50 years. Such lease is good for 30 years only.

(b). A having a life-interest in Rámnagar and Sultánpur, with power to grant leases of Rámnagar for 21 years, grants a lease comprising both Rámnagar and Sultánpur for 21 years. After A's death the lessee may, if he thinks fit, elect to retain the lease as a lease of Rámnagar only, till the end of the 21 years.

(c). A having power to charge Rámnagar with Rs. 7,000 charges it with Rs. 8,000. The appointment is good for the Rs. 7,000, but not for the residue.

118. Where, by an appointment under a special power, interests authorized and also interests unauthorized are created, and the interests authorized cannot be distinguished from those unauthorized, the whole is void.

Invalidity of appointment creating authorized and unauthorized interests not separable.

Illustrations.

(a). A fund is settled on A during his life, and after his death on his children as he shall appoint. A appoints the annual income for the benefit of his son B and B's wife and children, in such manner as trustees shall think fit. The appointment is wholly void.

(b). Under a similar settlement, A having legitimate children by B, his wife, and others by C and D, his concubines, appoints the property to be divided among his children by B, C and D, the shares of the sons to be double those of the daughters. Here the interests authorized and unauthorized cannot be distinguished, and the appointment is wholly void.

119. When a person exercising a special power annexes to the gift a condition or qualification which is not authorized by the power, the gift is good and the condition or qualification only is void.

Appointment with unauthorized condition.

Illustrations.

(a). A, having a power to appoint a fund among his children, gives a part of it to his son B on condition that B shall settle it on B's children. The condition is void, and the gift is absolute.

(b). A, having a power to appoint a fund to a limited class of objects of whom B is one, appoints it to B, adding a condition that B shall release a debt owing to him by A, and also pay Rs. 1,000 to C. The appointment is good; but the condition is void.

120. Where the donee of a special power purports, in exercise of the power, to appoint to persons not objects of the power, and by the same instrument gives to the persons entitled, in default of appointment, to the property comprised in the power benefits out of other property, the persons so entitled shall elect either to confirm such appointment or to dissent from it, and in the latter case they shall relinquish the benefits so given to them.

Election.

The rules contained in the Indian Succession Act, 1865, sections 173 to 177, both inclusive, shall, *mutatis mutandis*, apply to elections under this section.

121. If a beneficial interest in immoveable property, and also a power to let it, are given to the same person, and he grants his interest in the property, he may enter into a contract not to exercise his power.

Contract not to exercise power of leasing.

122. Save as provided by section one hundred and twenty-one, an agreement or undertaking not to exercise a power which is given for the benefit of persons other than the donee is void.

Invalidity of agreement not to exercise power.

123. Where a power given for the benefit of persons other than the donee is exercised with a view to the benefit, direct or indirect, of the donee, in any mode not intended by the donor, the appointment is void.

Frauds on powers.

Illustrations.

(a). A, having power to appoint a fund in favour of any of her children, appoints the whole fund absolutely to one child, who has previously entered into an agreement with her to give one-half of the fund to A's husband absolutely. The appointment is void.

(b). A, having power to appoint a fund in favour of any of his children, appoints a portion of the fund to his son C, a minor, whom he knows to be suffering from a mortal disease; A being the person entitled to C's property in the event of his death. The appointment is void.

(c). A, having power to grant leases of certain settled land, exercises the power in favour of B in consideration of Rs. 1,000 paid to A by B as a fine or premium. The lease is void, and A holds the Rs. 1,000 in trust for the persons interested under the settlement.

124. If the instrument by which a power of appointment in favour of specified objects is created does not provide for the event of no appointment being made, the property belongs (subject to any appointment that may have been made) in equal shares to the said objects.

Right to property in default of appointment.

Illustration.

A settles property on B for life with remainder to B's children as he shall appoint, and makes no disposition in default of appointment. B has two children, C and D, and appoints Rs. 1,000, part of the property, to C. Then C dies. Then B dies without making any further appointment. After paying Rs. 1,000 to C or his representative, the residue of the property is divisible in equal moieties between D and the representative of C.

125. Where there is a power of appointment in favour of a certain class of objects, and there is also a disposition of the property comprised in the power in the event of there being no objects, if the power is not exercised and there are objects, the property belongs to them in equal shares.

Implied gifts to objects.

126. Under a power of appointment in favour of several objects, an appointment of the whole property to one or more of such objects exclusively of the others is valid:

Appointment of whole property to some only of several objects in favour of which power is given.

Provided that, where the assurance creating the power declares the minimum amount or value of the share from which no object of the power is to be excluded, the appointment shall be invalid so far as it excludes any such object from any such share, and no farther.

127. Interests authorized to be created under a power take effect when created as if they had been created by the original instrument conferring the power, unless where a contrary intention is expressed therein.

Priority of interests created under powers.

128. A power given to the owner of a limited interest in the property comprised in the power is extinguished when he becomes the absolute owner of such property.

Extinguishment of powers.

When the exercise of a power given to the owner of a limited interest in property would derogate from a previous grant of such interest by the donee, the power shall be deemed to have been extinguished by such grant.

Illustrations.

(a). Z, tenant for life of certain land with power to charge it with a jointure for his wife, becomes absolute owner of the land. The power is extinguished.

(b). A, tenant for life of certain land with power to grant leases thereof in possession, grants his life-interest in the land to B. The power is extinguished.

CHAPTER XII.

OF PROPERTY HELD BY SEVERAL PERSONS.

129. On the death of one of two or more persons entitled to property in their own right, his share shall become vested in his legal representative, unless the property is held under an instrument which expressly provides that on the death of one, his share shall accrue to the survivor or survivors.

Nothing in this section applies to property belonging to an undivided family.

Illustrations.

A and B jointly advance money on mortgage, A contributing one-third. A died intestate. A's third belongs to his legal representative.

130. When immoveable property is held in possession by co-owners, any one of them may institute a suit in the proper Court, and such Court may direct a partition of the property to be made among the co-owners, and for the purposes of partition may, in order to equalise the value of the shares, direct any money to be paid by one to another or to be charged on one share in favour of another.

Partition of immoveable property.

If it appear to the Court that a sale of the property and a distribution of the proceeds would be more beneficial for the persons interested than a division of the property between them, the Court may, on the application of any such person, direct a sale of the property.

Power to direct sale and to distribute proceeds.

Nothing in the second clause of this section shall be deemed to authorise the Court to direct a sale of the property of an undivided family.

131. On any sale under the last preceding section, the Court may, if it think fit, allow any of the persons interested in the property to bid at the sale, on such terms as to setting-off or accounting for the purchase-money or any part thereof, or as to any other matters, as to the Court seems reasonable.

Power to allow person interested to bid for property sold for purposes of partition.

132. All sums of money paid under the two last preceding sections may, if the Court think fit, be paid into Court.

Payment into Court.

133. Nothing in this chapter shall affect any local law for the time being in force relating to the partition of estates paying revenue to Government.

Saving of laws relating to partition of revenue-paying estates.

134. When undivided immoveable property is held in possession by co-owners and one of them transfers his share or any interest therein, by sale, mortgage or otherwise, the transferee takes the share or interest subject to the right of the other co-owners to enforce a partition of the

Right of transferee of share of undivided property.

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.

135. When one co-owner of immoveable property commits, or threatens to commit, waste on the same without the consent of the other joint-owner, that other may institute a suit to recover compensation for the injury caused to him by the waste, or to obtain an injunction to stay the waste, as the case may require.

CHAPTER XIII.

OF ASSIGNMENTS OF THINGS IN ACTION.

136. No assignment 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 assignment or charge is given to him, unless he is a party to such assignment or charge; and every dealing by such debtor or person, not being a party to, and not having received express notice of, an assignment or charge, with the debt or property shall be valid as against such assignment or charge.

Illustrations.

(a). A owes money to B, who assigns the debt to C. B then demands the debt from A, who, having no notice of the assignment, 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 assigning 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.

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

138. On receiving such notice the debtor or person in whom the property is vested shall give effect to the assignment 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 assignment or charge is made is not complete according to the law of such country.

139. The person to whom a debt or charge is assigned shall take it subject to all the liabilities to which the assignor thereof at the date of the assignment.

Illustration.

(a). 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.

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

CHAPTER XIV.

OF APPORTIONMENT.

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.

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

THE FIRST SCHEDULE.

(a). STATUTES.

Year and chapter.	Subject.	Extent of repeal.
13 Ed. I, c. 22	Waste	The whole.
31 Hen. VIII, c. 1	Partition	The whole.
32 Hen. VIII, c. 62	Do.	The whole.
13 Eliz., c. 5.	Fraudulent Conveyances...	The whole.
27 Eliz., c. 4.	Do.	The whole.
4 Wm. & Mary, c. 16	Clandestine Mortgages ...	The whole.
6 Anne, c. 72	Discovery of deaths of tenants for life.	The whole.

(b). ACTS OF THE GOVERNOR GENERAL IN COUNCIL.

Number and year.	Subject.	Extent of repeal.
XXIV. of 1841.	Illusory appointments, &c.	So far as regards illusory appointments.
XXXI. of 1854.	Modes of conveying land	Section 17.
X. of 1865	Succession	Illustration (g) to sec. 107.
IV. of 1872...	Panjab 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	Section 13, and 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.

THE SECOND SCHEDULE.

FORMS OF ASSURANCES.

(See Section 5.)

A.—TRANSFER OF IMMOVEABLE PROPERTY ON SALE.

This grant made the _____ day of _____ 18____, between *A B* of _____, and *C D* of _____. In consideration of _____ rupees paid to the said *A B* by the said *C D*, the receipt whereof the said *A B* hereby acknowledges, he, the said *A B*, hereby grants unto *C D* [*here describe the property as provided in the Indian Registration Act, section 21*]. In witness whereof, the said *A B* has signed these presents.

Signed in the presence of *E F* of _____*A B*,

B.—EXCHANGE.

This Exchange made the _____ day of _____ between *A B* of _____ and *C D* of _____. Whereas the said *A B* is the owner of the lands comprised in the first schedule hereunder written, free from incumbrances, and the said *C D* is the owner of the lands comprised in the second schedule hereunder written, free from incumbrances. And whereas the said *A B* and *C D* have agreed to make an exchange in manner hereinafter appearing of the said lands comprised in the said schedules respectively. In pursuance of the said agreement and in consideration of the lands intended to be hereinafter granted in exchange by the said *C D*, he the said *A B* hereby grants unto the said *C D* the lands situate in _____ specified in the first schedule hereunder written and delineated in the map in the margin of these presents and therein coloured red [*or as the case may be*] in exchange for the lands intended to be hereinafter granted by the said *C D*. And the said *C D* in further pursuance of the said agreement and in consideration of the lands hereinbefore conveyed in exchange by the said *A B* hereby grants to the said *A B* the lands situate in _____ specified in the said second schedule hereunder written and delineated in the map in the margin of these presents and therein coloured blue [*or as the case may be*] in exchange for the lands hereinbefore granted in exchange by the said *A B*. In witness whereof, we have signed these presents.

A B.
C D.Signed in the presence of *E F* of _____
(The first schedule above referred to).
(The second schedule above referred to).

C.—ENGLISH MORTGAGE OF IMMOVEABLE PROPERTY.

This mortgage-deed made the _____ day of _____ 18____ between *A B* of _____ and *C D* of _____. In consideration of Rs. _____ paid to the said *A B* by the said *C D*, the receipt whereof is hereby acknowledged, the said *A B* contracts with the said *C D* that the said *A B* will pay to the said *C D* the sum of Rs. _____ with interest for the same in the meantime at the rate of _____ per cent. per annum on the _____ day of _____ next; and for the consideration aforesaid, he, the said *A B*, hereby grants to the said *C D* [*here describe the property as provided in the Indian Registration Act, section 21*]; Provided that if the said *A B* pays to the said *C D* the said sum of Rs. _____ with interest thereon in the meantime at the said rate on the _____ day of _____ next, then the said *C D* will, upon the request and at the cost of the said *A B*, reconvey the said premises to the said *A B*, or as he shall direct, free from encumbrances by the said *C D*. In witness whereof the said *A B* has signed these presents.

Signed in the presence of *E F* of _____ and *G H* of _____

D.—CHARGE.

(a). This assurance made the _____ day of _____ 18____, between *A B* of _____, and *C D* of _____. The said *A B* hereby renders the lands specified in the schedule hereunder written security for the payment to the said *C D* of five thousand rupees and interest for the same at the rate of _____ per cent. per _____, payable on the _____ day of _____. In witness, &c.

Signed in the presence of *E F* of _____ and *G H* of _____

(The schedule above referred to).

(b). This assurance made the _____ day of _____ 18____ between *A B* of _____, and *C D* of _____.

The said *A B* hereby renders the lands and houses specified in the schedule hereunder written security for the payment to the said *C D* of the sum which shall be due to him on the balance of the account, of the said *A B*, not exceeding _____ rupees, together with interest thereupon at the rate of _____ per cent. per _____. In witness, &c.

Signed in the presence of *E F* of _____ and *G H* of _____

(The schedule above referred to).

E.—LEASE OF A DWELLING-HOUSE.

This lease made the _____ day of _____, between *A B* of _____, and *C D* of _____. The said *A B* hereby leases to the said *C D* [*description of property as required by the Indian Registration Act, section 21*], to hold the same from the _____ day of _____ for the term of _____ at the rent of _____ rupees, payable by the said *C D* to the said *A B* in equal _____ payments on the _____ day of _____ and the _____ day of _____ in each year [*or in equal monthly payments or in equal quarterly payments, or as the case may be*].

And the said *C D* hereby contracts with the said *A B*,

First, that he the said *C D*, during the said term will pay the said rent on the days and in manner aforesaid: and pay all rates and taxes payable in respect of the said premises: and keep in repair all the glass windows belonging to the said house, and not make any alteration in the said premises without the previous consent in writing of the said *A B*, and at the determination of the said term so yield up the same to the said *A B*,

Secondly, that the said *A B* and his agents and workmen may at all reasonable times during the said term enter upon the said premises to inspect the same:

Thirdly, that during the said term no offensive business or occupation or nuisance shall be carried on or committed on the said premises, and the same shall be used as a private dwelling-house only:

Fourthly, that the said *C D* will not assign or under-let the said premises without the consent in writing of the said *A B*:

Provided that on any breach or non-observance of any of the contracts hereinbefore contained, the said *A B* may re-enter upon the said premises and hold the same as if this lease had not been made.

And the said *A B* hereby contracts with the said *C D* that he the said *A B* will keep the said house in good and tenantable repair during the said term.

In witness whereof the said *A B* and *C D* have signed these presents.

A B.
C D.

Signed in the presence of *E F* of

F.—LEASE OF A FARM.

This lease made the day of 18
between *A B* of and *C D* of . The said
A B hereby leases to the said *C D* the lands
in called with the buildings
thereon, the particulars whereof are specified in
the schedule hereunder written, except all timber
and other trees, and the right to enter and cut
and remove the same. To hold the same, except
as aforesaid, from the day of for the term
of years from the day of the date of these
presents at the rent of rupees payable by
the said *C D* to the said *A B* in equal payments
on the day of and the day of
in each year [or as the case may be]. And the said
C D hereby contracts with the said *A B*—

First, that the said *C D*, during the said term will pay the said rent on the days and in manner aforesaid; and pay all rates and taxes payable in respect of the said premises; and keep the buildings, fences, ditches, gates and fixtures upon or about the said lands in good condition and complete repair and without any alteration except such as the said *A B* shall approve; and will cultivate

and manage the said lands in a proper manner, and will not convert into arable land any land now in pasture without the consent of the said *A B*, and will, at the determination of the said term, yield up the said premises in such condition and repair and in proper order as aforesaid unto the said *A B*.

Secondly, that the said *A B*, and his agents and workmen may at all reasonable times during the said term enter upon the said premises to inspect the same and to cut and remove the timber and other trees.

Thirdly, that the said *C D* will not assign or under-let the said premises or any part thereof without the consent in writing of the said *A B*.

Provided that on any breach or non-observance of any of the contracts hereinbefore contained, the said *A B* may re-enter upon the said premises and hold the same as if this lease had not been made.

In witness whereof the said *A B* and *C D* have signed these presents.

Signed in the presence of *E F* of

(The schedule above referred to.)

THE THIRD SCHEDULE.

DECREE FOR SUCCESSIVE REDEMPTIONS.

(See Section 61.)

[*A*, third mortgagee ... Plaintiff.
B first mortgagee in possession }
C second mortgagee ... } Defendants.]
D owner of right of redemption }

Account of what is due to the defendant *B* for principal and interest in respect of the said mortgage of 1837, and for costs properly incurred in respect thereof, and tax him his costs of the suit.

Account of the rents and profits of the mortgaged property received by the said defendant *B*, or by any other person by his order or for his use, or which without his wilful neglect or default might have been received. Let what shall be owing on such last mentioned account be deducted from what shall be found due to the defendant *B* for principal, interest and costs as aforesaid.

And upon the defendant *C* paying to the said *B* the balance which shall be remaining due to him for such principal, interest and costs after such deduction within six months after such balance has been declared in court.

Let the said *B* assign the mortgaged property free from incumbrances created by him, or any one claiming under him, or those under whom he claims, and deliver upon oath all documents of title in his possession or power relating thereto to the said *C*, or as he shall appoint.

But in default of the said *C* paying to the said *B* such balance by the time aforesaid, let him stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute for the said *B* his subsequent interest on his said mortgage and tax him his subsequent costs of the said suit. And upon the plaintiff *A* paying to the said *B* what shall be found due to him for principal, interest and costs as aforesaid after such deduction as aforesaid within three months after such amount has been declared in court,

Let the defendant *B* assign the mortgaged property free from incumbrances, &c. [*as above*] and deliver upon oath, &c. [*as above*] to the said *A*, or as he shall appoint.

But in default of the said *A* paying to the said *B* what shall be found due to him as aforesaid by the time aforesaid, let the said *A* stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute the said *B* subsequent interest on his said mortgage and tax him his subsequent costs of the said suit, and upon the said *D* paying to the said *B* the amount found due to him for principal, interest and costs as aforesaid, within three months after such amount has been declared in court, let the said *B* assign the said mortgaged property free from incumbrances, &c. [*as above*] and deliver upon oath, &c. [*as above*] to the said *D*, or as he shall appoint.

But in default of the said *D* paying to the said *B* what shall be found due to him as aforesaid by the time aforesaid, let the said *D* stand absolutely foreclosed of all right to redeem such property.

But in case the said *C* should redeem the said *B* as aforesaid by the time aforesaid—

Let an account be taken of what is due to the said *C* for principal and interest in the mortgage of 1841, and for what the said *C* shall so pay to the said *D* for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said *C* his costs of the said suit.

And upon the said *A* paying to the said *C* what shall be found due to him for such principal, interest and costs within three months after such amount has been declared in court, let the said *C*

assign the said property free, &c. [*as above*] and deliver upon oath, &c. [*as above*] to the said *A*, or as he shall appoint.

But in default of the said *A* paying to the said *C* what shall be found due to him as aforesaid by the time aforesaid, let the said *A* stand absolutely foreclosed of all right to redeem such property.

And in case of such foreclosure, compute the said *C* his subsequent interest on his said mortgage and on what he shall have paid to the said *B* and tax him his subsequent costs of this suit. And upon the said *D* paying to the said *C* what shall be found due to him for principal, interest and costs as aforesaid within three months after such amount has been declared in court, let the said *C* assign, &c. [*as above*].

But in default of the said *D* paying to the said *C* what shall be found due to him as aforesaid by the time aforesaid, let the said *D* stand absolutely foreclosed, &c. [*as above*].

But in case the said *A* shall redeem the said *C* as aforesaid, let an account be taken of what was due to the said *A* for principal and interest on the mortgage of 1861 in the plaint mentioned, and for what the said *A* shall so pay the said *C* for principal, interest and costs as aforesaid, and for interest thereon, and also tax the said *A* his costs of the said suit.

And upon the said *D* paying to the said *A* what shall be found due to him for such principal, interest and costs as aforesaid, within three months after such amount has been declared in court—

Let the said *A* assign the said property free, &c. [*as above*], and deliver upon oath, &c. [*as above*], to the said *D*, or as he shall appoint.

But in default of the said *D* paying to the said *A* what shall be due to him for such principal, interest and costs by the time aforesaid, the said *D* is from thenceforth to be absolutely foreclosed, &c. [*as above*].

D. FITZPATRICK,
Secy. to the Govt. of India.