

LAWS OF KENYA

**ORDERS IN COUNCIL AND APPLIED ACTS
GROUP 8**

TRANSFER OF PROPERTY

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THE TRANSFER OF PROPERTY ACT, 1882, OF INDIA

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THE TRANSFER OF PROPERTY ACT, 1882,
OF INDIA*

Act IV of 1882,
Act III of 1885,
Act II of 1900,
Act VI of 1904,
Ord. 9 of 1959,
6 of 1984,
19 of 1985,
14 of 1991.

[Printed as amended by the Transfer of Property Act (1882) Amendment Act, 1885, the Transfer of Property Act, 1900, the Transfer of Property (Amendment) Act, 1904, and the Indian Transfer of Property Act (Amendment) Ordinance, 1959]†

**An Act to amend the law relating to the transfer of property
by act of parties**

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

CHAPTER I - PRELIMINARY

1. This Act may be called the Transfer of Property Act, 1882.

Short title.
III of 1885,
ss. 1 and 2,
VI of 1904, s. 2.

It shall come into force on the 1st day of July 1882.

Commencement.

It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of Punjab and the Chief Commissioner of British Burma.

Extent.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, *extend this Act or any part thereof to the whole or any specified part of the territories under its administration.

And any Local Government may, with the previous consent of the Governor-General in Council, from time to time by notification in the local official Gazette, exempt, either retrospectively, or prospectively, any part of the territories administered by such Local Government from any or all of the following provisions, namely: sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three.

Notwithstanding any thing in the foregoing part of this section,

* The Act was applied to Kenya by section 11 (b) of the East Africa Order in Council, 1897. It should be read in conjunction with the Indian Act (Amendments) Ordinance (Cap. 2 (1948)).

†The amending Acts of 1900 and 1904 apply by virtue of section 2 of the Indian Acts (Amendments) Ordinance (Cap. 2 (1948)).

sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven and one hundred and twenty-three shall not extend or be extended to any district or tract of country for the time being excluded from the operation of the Indian Registration Act, 1877, under the power conferred by the first section of that Act, or otherwise.

Repeal of Acts.
Saving of certain enactments, incidents, rights, liabilities, etc.

2. In the territories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect -

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

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability; or

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction;

and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law.

Interpretation clause.
11 of 1900, s. 2,
9 of 1959, s. 2.

3. In this Act, unless there is something repugnant in the subject or context -

“immovable property” does not include standing timber, growing crops or grass;

“insolvent” includes, in relation to a company, the winding up thereof;

“mortgagee in possession” means a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property, and “mortgaged property in possession of the mortgagee” shall be construed accordingly;

“instrument” means a non-testamentary instrument.

“registered” means registered in British India under the law for the time being in force regulating the registration of documents;

“attach to the earth” means-

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings;
or
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;

a person is said to have notice of a fact when he actually knows that fact or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I. - Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property, or any part thereof or any interest therein, shall be deemed to have notice of such instrument as from the date of registration thereof if the instrument has been duly registered in accordance with the provisions of the Crown Lands Ordinance, or, as the case may be, the Land Titles Act or the Registration of Titles Act.

Cap. 280.
Cap. 282.
Cap. 281.

Explanation II. - Any person acquiring any immovable property, or any interest therein, shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession of the property.

Explanation III. - A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that if the agent fraudulently conceals that fact the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

4. The Chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872;

and sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read

Enactments relating to contracts to be taken as part of Act IX of 1872. Ill of 1885, s. 3.

III of 1877.

as supplemental to the Indian Registration Act, 1877.

CHAPTER II - OF TRANSFERS OF PROPERTY BY ACT OF PARTIES

(A) Transfer of Property, whether movable or immovable

“Transfer of property” defined.
9 of 1959, s. 3.

5. (1) In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act.

(2) In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

What may be transferred.
III of 1885, s. 4,
II of 1900, s. 3.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force -

- (a) the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred;
- (b) a mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby;
- (c) an easement cannot be transferred apart from the dominant heritage;
- (d) an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him;
- (e) a mere right to sue cannot be transferred;
- (f) a public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable;
- (g) stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred;
- (h) no transfer can be made (1) in so far as it is opposed to the

nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be transferee;

IX of 1872.

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

7. Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by any law for the time being in force.

Persons competent to transfer.

8. Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Operation of transfer.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the movable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and the locks, keys, bars, doors, windows and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

Condition restraining alienation.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him:

Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Restriction repugnant to interest created.

11. Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immovable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

Condition making interest determinable on insolvency or attempted alienation.

12. Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

Transfer for benefit of unborn person.

13. Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

14. No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

15. If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in sections 13 and 14, such interest fails as regards the whole class.

Transfer to class some of whom come under sections 13 and 14.

16. Where an interest fails by reason of any of the rules contained in sections thirteen, fourteen and fifteen, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Transfer to take effect on failure of prior transfer.

17. The restrictions in sections fourteen, fifteen and sixteen shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

18. Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Direction for accumulation.

Where the property is immovable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

Exception.

19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

Vested interest.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation. -An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the

interest shall pass to another person.

When unborn person acquires vested interest on transfer for his benefit.

20. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

Contingent interest.

21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception - Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Transfer to members of a class who attain a particular age.

22. Where, on a transfer of property, an interest therein is created in favour of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

Transfer contingent on happening of specified uncertain event.

23. Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer to such of certain persons as survive at some period not specified.

24. Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Illustration

A transfers property to B for life and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

25. An interest created on a transfer of property and dependent upon a condition fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy. Conditional transfer.

Illustrations

(a) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b) A gives Rs. 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c) A transfers Rs. 500 to B on condition that she shall murder C. The transfer is void.

(d) A transfers Rs. 500 to his niece C, if she will desert her husband. The transfer is void.

26. Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with. Fulfilment of condition precedent.

Illustrations

(a) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs. 5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

27. Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor. Conditional transfer to one person coupled with transfer to another on failure of prior disposition.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

(a) A transfers Rs. 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(b) A transfers property to his wife; but, in case she should die in his life-time, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

Ulterior transfer conditional on happening or not happening of specified event.

28. On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in sections 10, 12, 21, 22, 23, 24, 25 and 27.

Fulfilment of condition subsequent.

29. An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustration

A transfers Rs. 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor or marries without C's consent, the Rs. 500 shall go to D. B marries when only 17 years of age without C's consent. The transfer to D takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

30. If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration

A transfers a farm to B for her life, and, if she does not desert her husband, to C. B is entitled to the farm during her life as if no condition had been inserted.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

31. Subject to the provisions of section 12, on a transfer of property an interest therein may be created with the condition (superadded) that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations

(a) A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect.

B cuts down the wood. He loses his life-interest in the farm.

(b) A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

32. In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest. Such condition must not be invalid.

33. Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act. Transfer conditional on performance of act, no time being specified for performance.

34. Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefitted by non-fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled. Transfer conditional on performance of act, time being specified.

Election

35. Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, Election when necessary.

subject nevertheless, where the transfer is gratuitous and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration,

to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations

The farm of Sultanpur is the property of C and worth Rs. 800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs. 1,000 to C. C elects to retain the farm. He forfeits the gift of Rs. 1,000.

In the same case, A dies before the election. His representative must out of the Rs. 1,000 pay Rs. 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who is in his one capacity takes a benefit under the transaction may in another dissent therefrom.

Exception to the Last Preceding Four Rules. - Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

Apportionment

36. In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

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

37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Apportionment of benefit of obligation on severance.

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Local Government by notification in the official Gazette so directs.

Illustrations

(a) A sells to B, C and D a house situate in a village and leased to

E at an annual rent of Rs. 30, and delivery of one fat sheep, B having provided half the purchase money and C and D one-quarter each. E, having notice of this, must pay Rs. 15 to B, Rs. 7 1/2 to C, and Rs. 7 1/2 to D, and must deliver the sheep according to the joint direction of B, C and D.

(b) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A, B, C and D severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such direction as B, C and D may join in giving.

(B) Transfer of Immovable Property

Transfer by person authorized only under certain circumstances to transfer.

38. Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Illustration

A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

Transfer where third person is entitled to maintenance.

39. Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Illustration

A, a Hindu, transfers Sultanpur to his sister-in-law B, in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that,

if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as she may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

40. Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property or to compel its enjoyment in a particular manner, or

Burden of obligation imposing restriction on use of land.

where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,

or of obligation annexed to ownership, but not amounting to interest or easement.

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

41. Where, with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Transfer by ostensible owner.

42. Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Transfer by person having authority to revoke former transfer.

Illustration

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made,

lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

Transfer by unauthorized person who subsequently acquires interest in property transferred.

43. Where a person erroneously represents that he is authorized to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

Illustration

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields Z does not belong to A, it having been retained by B on the partition; but on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Transfer by one co-owner.

44. Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Joint transfer for consideration.

45. Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interest in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

46. Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interest in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Transfer for consideration by persons having distinct interests.

Illustrations

(a) A, owning a moiety, and B and C each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(b) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs. 1,000. A's life-interest is ascertained to be worth Rs. 600, the reversion Rs. 400. A is entitled to receive Rs. 600 out of the purchase-money, B and C to receive Rs. 400.

47. Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Transfer by co-owner of share in common property.

Illustration

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

48. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights created by transfer.

Transferee's right under policy.

49. Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Rent bona fide paid to holder under defective title.

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

Illustration

A lets a field to B at a rent of Rs. 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

Improvements made by bona fide holders under defective titles.

51. When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement be estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Transfer of property pending suit relating thereto.

52. During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

53. Every transfer of immovable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed.

Fraudulent transfer.

Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

53A. Where any person contracts to transfer for consideration any immovable property or any interest therein by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and-

Part performance.
9 of 1959, s.4

- (a) the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract; and
- (b) the transferee has done some act in furtherance of the contract; and
- (c) the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor and any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

CHAPTER III- OF SALES OF IMMOVABLE PROPERTY

54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

"Sale" defined.

Sale how made.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale.

A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

Rights and liabilities of buyer and seller.

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

(1) The seller is bound-

- (a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;
- (b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;
- (c) to 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;
- (d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place;
- (e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession

as an owner of ordinary prudence would take of such property and documents;

- (f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;
- (g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

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

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

(3) Where the whole of the purchase money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b) 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 (a) the seller, and in case (b) 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, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled-

- (a) to the rents and profits of the property till the ownership

thereof passes to the buyer;

- (b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound-

- (a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;
- (b) to pay or tender, at the time and place of completing the sale, the purchase money to the seller or such person as he directs:

Provided that, where the property is sold free from encumbrances, the buyer may retain out of the purchase money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

- (c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;
- (d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled-

- (a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;
- (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer in

anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

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

Sale of one of two properties subject to a common charge.

Discharge of Encumbrances on Sale

57. (a) Where immovable property subject to any encumbrance, whether immediately payable or not, is sold by the Court or in execution of a decree, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court-

Provision by Court for encumbrance and sale freed therefrom.

(1) in case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property, of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property, of the amount sufficient to meet the encumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the encumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the encumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale and give directions for the retention and investment of the money in Court.

- (c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.
- (d) An appeal shall lie from any declaration, order or direction under this section as if the same were a decree.
- (e) In this section “Court” means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

CHAPTER IV- OF MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES

“Mortgage”,
“mortgagor”,
“mortgagee”,
“mortgage-money”
and “mortgage-deed”
defined.

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

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

Simple mortgage.

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

Mortgage by
conditional sale.

- (c) Where the mortgagor ostensibly sells the mortgaged property-

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

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

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

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

(d) Where the mortgagor delivers possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

Usufructuary mortgage.

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

English mortgage.

59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Mortgage when to be by assurance. VI of 1904, ss.3 and 4.

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

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, Rangoon, Moulmein, Bassein and Akyab, by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon.

59A. Unless otherwise expressly provided, reference in this Chapter to mortgagors and mortgagees or to chargors and chargees shall be deemed to include references to persons deriving title from them respectively.

References to mortgagors and mortgagees, etc., to include persons deriving title from them.

9 of 1959, s. 5.

Rights and Liabilities of Mortgagee

Right of mortgagee to redeem.
19 of 1985.

60. At any time after the principal money has become payable, the mortgagee has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (*a*) to deliver the mortgage-deed, if any, to the mortgagee, (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagee, and (*c*) at the cost of the mortgagee either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court and is exercised before the mortgagee has, under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property.

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

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

Redemption of portion of mortgaged property.

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

Obligation to transfer to third party instead of retransferring to mortgagee.
9 of 1959, s.6.

60A. (1) Where a mortgagee is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a retransfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage debt and transfer the mortgaged property to such third person as the mortgagee may direct; and the mortgagee shall be bound to assign and transfer accordingly.

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

encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section shall not apply in the case of a mortgagee who is or has been in possession or to an equitable mortgage or charge by deposit of documents of title protected by registration of a memorandum thereof under the Government Lands Act, the Land Titles Act or the Registration of Titles Act.

Cap. 280.
Cap. 282.
Cap. 281.
L.N. 2/1964.

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

Right to inspection and production of documents.
9 of 1959, s. 6.

61. Whenever separate properties of a mortgagor are respectively subject to different mortgages in favour of the same mortgagee, the mortgagor shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

Right to redeem separately or simultaneously.
9 of 1959, s.7.

62. In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property-

Right of usufructuary mortgagor to recover possession.

- (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, when such money is paid;
- (b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money, when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

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

Accession to mortgaged property.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must

Accession acquired in virtue of transferred ownership.

be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

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

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

Improvements to mortgaged property. 9 of 1959, s. 8.

63A. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in subsection (2) of this section or section 72 of this Act, be liable to pay the cost thereof.

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

Renewal of mortgaged lease.

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

Implied contracts by mortgagor.

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

- (a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;
- (b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;
- (c) that the mortgagor will, so long as the mortgagee is not in

possession of the mortgaged property, pay all public charges accruing due in respect of the property;

- (d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;
- (e) and, where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance.

Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of a usufructuary mortgage.

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

65A. (1) Subject to the provisions of this section, a mortgagor while in possession of the mortgaged property shall, as against every encumbrancer, have power to make from time to time any such lease of the property, or any part thereof, as is by this section authorized:

Leasing powers of mortgagor and mortgagee in possession.
9 of 1959, s. 9.

Provided that such power shall not be exercisable by a mortgagor under a mortgage by conditional sale, an usufructuary mortgage, or, subject to the provisions of section 98 of this Act, an anomalous mortgage.

(2) Subject to the provisions of this section, a mortgagee while in possession of the mortgaged property shall, as against all prior encumbrancers, if any, and as against the mortgagor, have power to make from time to time any such lease as aforesaid:

Provided that such power shall not be exercisable by a mortgagee under a simple mortgage, or, subject to the provisions of section 98 of this Act, an anomalous mortgage.

(3) The leases which this section authorizes are -

- (i) agricultural or occupation leases for any term not exceeding twenty-one years; and
- (ii) building leases for any term not exceeding ninety-nine years.

(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any premium or fine being taken.

(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased an improvement for or in connexion with building purposes; every agreement made under or in accordance with this subsection shall be in the form of a condition providing for re-entry by the lessor on breach thereof.

(10) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11) In case of a lease by the mortgagor, he shall, within one

month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.

(12) A contract to make or accept a lease under this section may be enforced, to the extent to which it is enforceable as between the contracting parties, by or against every person on whom the lease if granted would be binding.

(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage instrument, or otherwise by agreement in writing duly registered, and has effect subject to the terms of the mortgage instrument or any such writing and to the provisions therein contained.

(14) The mortgagor and mortgagee may, by agreement in writing duly registered, whether or not contained in the mortgage instrument, reserve to or confer on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences:

Provided that the powers so reserved or conferred shall not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement.

(15) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the encumbrancers, if this section had not been passed:

Provided that in the case of a mortgage of leasehold land, a lease granted under this section shall reserve a reversion of not less than one day.

(16) This section applies to any mortgage made after the date of commencement* of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, but the provisions thereof, or any of them, may, by agreement in writing made after that date between mortgagor and mortgagee and duly registered, be applied to a mortgage made before that date, so nevertheless that any any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

9 of 1959, s. 9.

*5th May, 1959.

Cap. 280.
Cap.282.
Cap.281.

(17) Notwithstanding the provisions of the Government Lands Act, the Land Titles Act or the Registration of Titles Act, in the case of a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act, or of an equitable mortgage or charge by deposit of documents of title, protected by registration of a memorandum thereof under any of the said Acts, any such contrary intention or agreement as is referred to in subsection (13), (14) or (16) of this section may either form part of or be endorsed on or annexed to the charge, or, as the case may be, the memorandum presented for registration, or if the agreement is made after registration of the charge or memorandum be in such form as is sufficient to show the effect of the agreement and shall then be duly registered.

(18) The powers of leasing conferred by this section shall, after a receiver of the income of the mortgaged property or any part thereof has been appointed by a mortgagee under the mortgagee's power of appointment of a receiver, and so long as the receiver acts, be exercisable by such mortgagee instead of by the mortgagor, as respects any property affected by the receivership, in like manner as if such mortgagee were in possession of the property, and the mortgagee may, by writing, delegate any of such powers to the receiver.

Cap.323.

(19) Nothing in this section shall affect the provisions of the Land and Agricultural Bank Act with respect to the leasing of mortgaged property by mortgagors.

Powers of mortgagor
and mortgagee in
possession to accept
surrenders of leases.
9 of 1959, s. 9.

65B. (1) Subject to the provisions of this section, for the purpose only of enabling a lease (in this section referred to as an authorized lease) authorized under section 65A of this Act, or under any agreement made pursuant to that section, or by the mortgage instrument to be granted, a mortgagor while in possession of the mortgaged property shall, as against every encumbrance, have, by virtue of this Act, power to accept from time to time a surrender of any lease of the mortgaged property or any part thereof comprised in the lease, and, on a surrender of the lease so far as it comprises part only of the mortgaged property, the rent may be apportioned.

(2) Subject to the provisions of this section, for the same purpose, a mortgagee while in possession of the mortgaged property shall, as against all prior or other encumbrancers, if any, and as against the mortgagor, have by virtue of this Act power to accept from time to time any such surrender as aforesaid.

(3) On a surrender of part only of the property leased, the original lease may be varied by registered instrument, provided that the lease when varied would have been valid as an authorized lease if granted by the person accepting the surrender; and, on a surrender and the making

of a new or other lease, whether for the same or for any extended or other term, and whether subject or not to the same or to any other covenants, provisions or conditions, the value of the lessee's interest in the lease surrendered may, subject to the provisions of this section, be taken into account in the determination of the amount of the rent to be reserved, and of the nature of the covenants, provisions and conditions to be inserted in the new or other lease.

(4) Where any consideration for the surrender, other than an agreement to accept an authorized lease, is given by or on behalf of the lessee to or on behalf of the person accepting the surrender, nothing in this section authorizes a surrender to a mortgagor without the consent of the encumbrancers, or authorizes a surrender to a second or subsequent encumbrancer without the consent of every prior encumbrancer.

(5) No surrender shall, by virtue of this section, be rendered valid unless-

- (a) an authorized lease duly registered is granted of the whole of the property comprised in the surrender to take effect in possession immediately or within one month after the date of the surrender; and
- (b) the term certain or other interest granted by the new lease is not less in duration than the unexpired term or interest which would have been subsisting under the original lease if that lease had not been surrendered; and
- (c) where the whole of the property originally leased has been surrendered, the rent reserved by the new lease is not less than the rent which would have been payable under the original lease if it had not been surrendered; or, where part only of the property has been surrendered, the aggregate rents respectively remaining payable or reserved under the original lease and new lease are not less than the rent which would have been payable under the original lease if no partial surrender had been accepted.

(6) A contract to make or accept a surrender under this section may, to the extent to which it is enforceable as between the contracting parties, be enforced by or against every person on whom the surrender, if completed, would be binding.

(7) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage instrument, or otherwise by agreement in writing duly registered, and shall have effect subject to the terms of the mortgage instrument or of

any such writing and to the provisions therein contained.

9 of 1959.

(8) The section applies to a mortgage made after the date of commencement* of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, but the provisions of this section, or any of them, may, by agreement in writing made after that date between mortgagor and mortgagee and duly registered, be applied to a mortgage made before that date, so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(9) The mortgagor and mortgagee may, by agreement in writing duly registered, whether or not contained in the mortgage instrument, reserve or confer on the mortgagor or mortgagee, or both, any further or other powers relating to the surrender of leases; and any further or other powers so conferred or reserved shall be exercisable, as far as possible, as if they were conferred by this Act, and with all the like incidents, effects and consequences:

Provided that the powers so reserved or conferred shall not prejudicially affect the rights of any mortgagee interested under any other mortgage subsisting at the date of the agreement, unless that mortgagee joins in or adopts the agreement.

Cap. 280.
Cap. 282.
Cap. 281

(10) Notwithstanding the provisions of the Government Lands , in the Land Titles Act or Registration of Titles Act, in the case of a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act, or of an equitable mortgage or charge by deposit of documents of title protected by registration of a memorandum thereof under any of the said Acts, any such contrary intention or agreement as is referred to in subsection (7), (8) or (9) of this section may either form part of or be endorsed on or annexed to the charge, or, as the case may be, †the memorandum presented for registration, or if the agreement is made after registration of the charge or memorandum be in such form as is sufficient to show the effect of the agreement and shall then be duly registered.

(11) Nothing in this section operates to enable a mortgagor or mortgagee to accept a surrender which could not have been accepted by the mortgagee with the concurrence of all the encumbrancers if this Act and the enactments replaced by this section had not been passed.

(12) The powers of accepting surrenders conferred by this section shall, after a receiver of the income of the mortgaged property or any part thereof has been appointed by the mortgagee under the mortgagee's power of appointment of a receiver and so long as the receiver acts, be

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exercisable by such mortgagee instead of by the mortgagor, as respects any property affected by the receivership, in like manner as if such mortgagee were in possession of the property; and the mortgagee may, by writing, delegate any of such powers to the receiver.

(13) Nothing in this section shall affect the provisions of the Land and Agricultural Bank Act with respect to the leasing of mortgaged property by mortgagors. Cap. 323.

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

Rights and Liabilities of Mortgagee

67. In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold. Right to foreclosure or sale. 9 of 1959, s. 10. L.N. 2/1964.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Whenever a mortgagee under an English mortgage or a chargee under a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act institutes a suit for the sale of the mortgaged property, the Court shall inquire whether such suit has been brought by reason only of the fact that the mortgage instrument was not attested and did not bear a certificate as required by subsection (4) of section 69 of this Act, or whether such mortgagee or chargee is entitled, or may by giving notice under paragraph (a) of section 69A of this Act become entitled, to exercise the mortgagee's statutory power of sale, and, if it appears to the Court that the suit was brought for the reason aforesaid or that the mortgagee or chargee was so entitled, the Court shall, unless it sees special reason to the contrary, order that all the costs of the suit, including such costs as may properly be incurred Cap. 281.

between the order for sale and the time of actual payment, shall be paid by the mortgagee or chargee.

Nothing in this section shall be deemed -

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

When mortgagee bound to bring one suit on several mortgages.
9 of 1959, s. 11.

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

Right to sue for mortgage-money.
9 of 1959, s. 12.

68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only-

- (a) where the mortgagor binds himself to repay the same;
- (b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;
- (c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person;
- (d) in the case of every mortgage, not being a mortgage by conditional sale or an usufructuary mortgage, although the

mortgagor does not expressly bind himself in the mortgage instrument to repay the same.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable.

Power of sale.
9 of 1959, s. 13.

(2) The mortgagee's statutory power of sale includes the following powers as incident thereto (namely)-

- (a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of property, or with respect to any other thing; and
- (b) a power to sell the mortgaged property, or any part thereof-
 - (i) with or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold; and

(ii) with or without covenants by the purchaser to expend money on the property sold.

(3) The provisions of this Act with respect to the mortgagee's statutory power of sale, comprised in this section, or in any other section regulating the exercise of such power, may be varied or extended by the mortgage instrument, and, as so varied or extended, shall, as far as possible, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

(4) This section shall apply only-

(a) if the mortgagor's signature to the mortgage instrument has been witnessed by an advocate and if the said instrument bears a certificate signed by that advocate to the effect that he has explained to the mortgagor the effect of subsection (1) of this section and he was satisfied that the mortgagor understood the same; and

(b) if and as far as a contrary intention is not expressed in the mortgage instrument; and

(c) if the mortgage instrument is †executed after the commencement* of the Indian Transfer of Property Act (Amendment) Ordinance, 1959.

9 of 1959.

Regulation
of exercise of
mortgagee's statutory
power of sale.

9 of 1959, s. 13,
14 of 1991.

69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.

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(d) in the case of agricultural land, notice of the exercise of the statutory power of sale has been served on the District Commissioner of the area in which the mortgaged land is situated at least one month before the sale and the period specified by the court pursuant to subsection (2) has expired.

(2) The District Commissioner shall, within fourteen days of the service on him of the notice under paragraph (d) of subsection (1), apply by originating summons to the High Court for an order that the sale be postponed, and the court may, if it is satisfied that the sale would result in persons (other than the mortgagor and his family) being evicted from the land and that the eviction of such persons would cause undue social difficulties or cause public disorder in the neighborhood, order that the sale shall be postponed for such period not exceeding six months as it shall think fit.

69B. (1) A mortgagee exercising the mortgagee's statutory power of sale shall have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights, and encumbrances to which the mortgage has priority, but subject to all estates, interests, rights, and encumbrances which have priority to the mortgage.

Transfer on sale by mortgagee.
9 of 1959, s. 13.

(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

- (a) that no case had arisen to authorize the sale; or
- (b) that due notice was not given; or
- (c) that the power was otherwise improperly or irregularly exercised,

and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) A transfer on sale by a mortgagee, made after the commencement* of the Indian Transfer of Property Act (Amendment) Ordinance, 1959, shall ^sbe deemed to have been made in exercise of

9 of 1959.

* 5th May, 1959.

the mortgagee's statutory power of sale unless a contrary intention appears.

Application of proceeds of sale. 9 of 1959, s. 13.

69C. The money which is received by a mortgagee, arising from a sale by him under the mortgagee's statutory power of sale, after discharge of prior encumbrances to which the sale is not made subject, if any, or after payment into Court of a sum to meet any prior encumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage-money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

Provisions as to exercise of power of sale. 9 of 1959, s. 13.

69D. (1) The mortgagee's statutory power of sale may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage-money.

(2) The mortgagee's statutory power of sale does not affect the provisions of this Act with respect to foreclosure or, except as provided by section 67 of this Act, sale by order of the Court.

(3) The mortgagee shall not be answerable for any involuntary loss happening in or about the exercise or execution of the mortgagee's statutory power of sale, or of any trust connected therewith, or of any power or provision contained in the mortgage instrument.

(4) At any time after the mortgagee's statutory power of sale has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, right, or encumbrance in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

Mortgagee's receipts, discharges, etc. 9 of 1959, s. 13.

69E. (1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the mortgagee's statutory power of sale, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the mortgagee's statutory power of sale, but

with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money on securities, and of conversion of securities into money, instead of those incident to sale.

69F. (1) A mortgagee shall, subject to the provisions of this section, by virtue of this Act, have power, when the mortgage-money has, within the meaning of subsection (1) of section 69 of this Act become due, to appoint a receiver of the income, rents and profits, of the mortgaged property, or any part thereof:

Appointment of receiver.
9 of 1959, s. 13.
L.N. 2/1964.

Provided that such power shall not be exercisable by a mortgagee under a simple mortgage, or, subject to the provisions of section 98 of this Act, an anomalous mortgage.

The power of appointment of a receiver aforesaid is in this Act referred to as the mortgagee's power of appointment of a receiver.

The provisions of this Act with respect to the mortgagee's power of appointment of a receiver may be varied or extended by the mortgage instrument, and, as so varied or extended, shall, so far as possible, operate in a like manner and with all the like incidents, effects and consequences as if such variations or extensions were contained in this Act.

(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage instrument, and has effect subject to the terms of the mortgage instrument and to the provisions therein contained but the provisions of this section, or any of them, may, by agreement in writing made after that date between the mortgagor and mortgagee and duly registered, be applied to a mortgage made before that date, so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(4) Notwithstanding the provisions of the Government Lands Act, the Land Titles Act or the Registration of Titles Act, in the case of a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act, or of an equitable mortgage, or a charge, by deposit of documents of title, protected by registration of a memorandum thereof under any of the said Acts, any such variation or contrary intention as is referred to in subsection (2) or (3) of this section may either form part of or be endorsed or annexed to the charge, or, as the case may be, the memorandum presented for registration, or if the agreement is made after registration of the charge or memorandum be in such form as is sufficient to show the effect of the agreement and be duly registered.

Cap. 280.
Cap. 282.
Cap. 281.

9 of 1959.

(5) This section applies where the mortgage instrument is executed after the commencement* of the Indian Transfer of Property Act (Amendment) Ordinance, 1959.

Appointment,
powers, remuneration
and duties of
receiver.

9 of 1959, s. 13.

69G. (1) A mortgagee entitled to exercise the mortgagee's power of appointment of a receiver shall not appoint a receiver until either -

- (a) he has become entitled to exercise the mortgagee's statutory power of sale; or
- (b) in the case of an equitable mortgage or charge by deposit of documents protected by registration of a memorandum thereof under the Government Lands Act, the Land Titles Act or the Registration of Titles Act, or the case of a conditional mortgage or an usufructuary mortgage, notice requiring payment of the mortgage-money has been served on the mortgagor or chargor, or one of two or more of them, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service,

Cap.280.

Cap.282.

Cap.281.

L.N. 2/1964.

but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) A receiver appointed under the mortgagee's power of appointment of a receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage instrument otherwise provides.

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action, distress, or otherwise, in the name¹ either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

* 5th May, 1959

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

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the land or not, being of an insurable nature.

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

- (a) in discharge of all rents, rates, taxes, and outgoings whatever affecting the mortgaged property; and
- (b) in keeping down all annual sums or other payments, and the interest on all mortgage-moneys, having priority to the mortgage in right whereof he is receiver; and
- (c) in payment of his commission, and of the premiums on fire, life, or other insurance, if any, properly payable under the mortgage instrument or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
- (d) in payment of the interest accruing due in respect of any mortgage-money due under the mortgage; and
- (e) in or towards discharge of the mortgage-money if so directed in writing by the mortgagee,

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

Accession to mortgaged property.

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

Illustrations

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

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

Renewal of mortgaged lease.

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

Rights of mortgagee in possession.

72. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary -

- (a) for the due management of the property and the collection of the rents and profits thereof;
- (b) for its preservation from destruction, forfeiture or sale;
- (c) for supporting the mortgagor's title to the property;
- (d) for making his own title thereto good against the mortgagor; and
- (e) when the mortgaged property is a renewable 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, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of 9 per cent per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such

insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

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

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

Right to proceeds of revenue-sale, or to compensation on acquisition.
9 of 1959, s.14.

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

1 of 1894.

(3) Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money and the mortgage has not become due.

74. Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Right of subsequent mortgagee to pay off prior mortgagee.

75. Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

Rights of mesne mortgagee against prior and subsequent mortgagees.

Liabilities of mortgagee in possession.

76. When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property-

- (a) he must manage the property as a person of ordinary prudence would manage if it were his own;
- (b) he must use his best endeavours to collect the rents and profits thereof;
- (c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature accruing due in respect thereof during such possession and any arrears of rent in default of payment of which the property may be summarily sold;
- (d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- (e) he must not commit any act which is destructive or permanently injurious to the property;
- (f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;
- (g) he must keep clear, full and accurate 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, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-

money; the surplus, if any, shall be paid to the mortgagor;

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

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

Loss occasioned by his default.

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

Receipts in lieu of interest.

Priority

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

Postponement of prior mortgagee.

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Mortgage to secure uncertain amount when maximum is expressed.

Illustration

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

priority over C.

Tacking abolished.

80. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Marshalling and Contribution

Marshalling securities.

81. If the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Contribution to mortgage-debt.

82. Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debts secured by the mortgage, after deducting from the value of each property the amount of any other encumbrance to which it is subject at the date of the mortgage.

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

Nothing in this section applies to a property liable under section 81 to the claim of the second mortgagee.

Deposit in Court

Power to deposit in Court money due on mortgage.

83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaintiffs) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Right to money deposited by mortgagor.

84. When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Cessation of interest.

Nothing in this section or in section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

Suits for Foreclosure, Sale or Redemption

85. Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this Chapter relating to such mortgage: provided that the plaintiff has notice of such interest.

Parties to suits for foreclosure, sale and redemption.
XIV of 1882.

Foreclosure and Sale

86. In a suit for foreclosure if the plaintiff succeeds, the Court shall make 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, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

Decree in foreclosure-suit.

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 property to the defendant free from all encumbrances 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 property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

Procedure in case of
payment of amount
due.

87. If payment is made of such amount and of such subsequent costs as are mentioned in section 94, the defendant shall (if necessary) be put into possession of the mortgaged property.

Order absolute for
foreclosure.

If such payment is not so made, the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff:

Power to enlarge
time.

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day appointed for such payment.

XIV of 1882.

On the passing of an order under the second paragraph of this section the debt secured by the mortgage shall be deemed to be discharged. In the Code of Civil Procedure, Schedule IV, No. 122, for the words "Final decree," the words "Decree absolute" shall be substituted.

Decree for sale.

88. In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, if any, be paid to the defendant or other persons entitled to receive the same.

Power to decree sale
in foreclosure-suit.

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court to meet the expenses of sale and to secure the performance of the terms.

Procedure when
defendant pays
amount due.

89. If in any case under section 88 the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the costs, if any, awarded to him and such subsequent costs as are mentioned in section 94, the defendant 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 88; and thereupon the defendant's right to redeem and the security shall both be extinguished.

Order absolute for sale.

90. When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

Recovery of balance due on mortgage.

Redemption

91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property -

Who may sue for redemption.

- (a) any person (other than the mortgagee of the interest sought to be redeemed) 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 on behalf of such minor;
- (e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;
- (f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;
- (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.

92. In a suit for redemption, if the plaintiff succeeds, the Court shall pass a decree ordering -

Decree in redemption-suit.

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of this suit, if any, awarded to

him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree;

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 retransfer it to the plaintiff free from the mortgage and from all encumbrances 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; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

93. If payment is made of such amount and of such subsequent costs as are mentioned in section 94, the plaintiff shall, if necessary be put into possession of the mortgaged property. If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold. If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

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

On the passing of any order under this section the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished:

Provided that the Court may, upon good cause shown, and upon such terms, if any, as it thinks fit, from time to time postpone the day fixed under section 92 for payment to the defendant.

In case of
redemption,
possession;

in default,
foreclosure or sale.

Power to enlarge
time

94. Subject to the provisions of section 67 of this Act, in finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale, by the Court under this Chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption or sale up to the time of actual payment.

Costs of mortgagee subsequent to decree. 9 of 1959, s.15.

95. Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

Charge of one of several co-mortgagors who redeems.

Sale of Property Subject to Prior Mortgage

96. 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.

Sale of property subject to prior mortgage.

97. 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 property incurred in any attempted sale;

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

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

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

lastly, 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 interest therein or upon their joint receipt.

Nothing in this section or in section 96 shall be deemed to affect the powers conferred by section 57.

Anomalous Mortgages

Mortgage not described in section 58, clauses (b), (c), (d) and (e).
9 of 1959, s. 16.

98. In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, such a charge or mortgage as is referred to in paragraph (a), (b) or (c) of subsection (2) of section 100A of this Act, or an English mortgage, or a combination of the first and third or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Attachment of Mortgaged Property

Attachment of mortgaged property.
XIV of 1882.

99. Where a mortgagee, in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

Charges

Charges.

100. Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

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

Charges; and equitable mortgagor and charges by deposit.
9 of 1959, s. 17.
Cap.281.

100A. (1) A chargee under a charge executed in accordance with the provisions of section 46 of the Registration of Titles Act and duly registered under that Act shall have the same rights, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rent and profits, or any of them) as if the charge were an English mortgage to which section 69 of this Act applies.

(2) All the provisions of this Act with respect to the rights, powers or remedies, or the duties, liabilities or obligations, of mortgagors, or mortgagees, shall, except in so far as the contrary intention is expressed

or implied, apply not only to mortgagors, or mortgagees, under the forms of mortgage specified in section 58 of this Act but also to mortgagors, or mortgagees, or, as the case may be, chargors, or chargees, under -

- (a) charges executed in accordance with the provisions of section 46 of the Registration of Titles Act, attested and certified in accordance with the provisions of subsection (4) of section 69 of this Act and duly registered under the said Act; and
- (b) equitable mortgages by deposit of documents of title, duly protected by registration of a memorandum thereof under the Government Lands Act or the Land Titles Act; and
- (c) charges by deposit of documents of title, duly protected by registration of a memorandum thereof under the Registration of Titles Act,

Cap. 280.
Cap. 282.

and references in any such provision to a mortgage, mortgage-deed or mortgage instrument, or to mortgaged property, or to mortgage-money or a mortgage debt, or otherwise in relation to mortgages, shall be construed accordingly.

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

Extinguishment of
charges.

Notice and Tender

102. (1) Any notice required or authorized by this Chapter to be served on a mortgagor shall be sufficient although addressed to the mortgagor by that designation only, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

Service of notices
and tender.
9 of 1959, s. 18.

(2) Any notice required or authorized by this Chapter to be served shall be sufficiently served if either-

- (a) it is left at the last known place of abode or business in Kenya of the mortgagee, mortgagor, or other person to be served; or
- (b) in the case of a notice required or authorized to be served on a mortgagor, it is affixed in a conspicuous position to the

property comprised in the mortgage; or

- (c) it is served on an agent or attorney holding a power of attorney or authority from the mortgagee or mortgagor whereunder such agent or attorney is duly authorized to accept such service; or
- (d) it is sent by post in a registered letter addressed to the mortgagee, mortgagor, or other person to be served, by name, at his last known postal address, and if that letter is not returned through the post office undelivered; service by post as aforesaid shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(3) The foregoing provisions do not apply to notices served in proceedings in the Court.

(4) Where the person to whom any tender is to be made under this Chapter cannot be found by or is not known to the person desiring to make the tender, the latter person may either-

- (a) make the tender to any agent or attorney holding a power of attorney or authority from the person to whom the tender is to be made whereunder such agent or attorney is duly authorized to accept such tender; or
- (b) deposit in any Court in which a suit might be brought for redemption of the mortgaged property the amount sought to be tendered,

and such tender or deposit shall have the effect of a tender to the person to whom tenders is to be made under this Chapter.

Notice, etc., to or by person incompetent to contract.

103. Where, under the provisions of this Chapter, a notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served or tender or deposit made, accepted or taken, by the legal curator of the property of such person; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this Chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice, or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract; and

the provisions of Chapter XXXI of the Code of Civil Procedure shall, so far as may be, apply to such application and to the parties thereto and to the guardian appointed thereunder. XIV of 1882.

104. The High Court may, from time to time, make rules consistent with this Act for carrying out, in itself and in the Courts of Civil Judicature, subject to its superintendence, the provisions contained in this Chapter. Power to make rules.

CHAPTER V-OF LEASES OF IMMOVABLE PROPERTY

105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. "Lease" defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. "Lessor", "lessee", "premium" and "rent" defined.

106. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of 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 person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

107. A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. Leases how made. VI of 1904. s. 5.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession:

Provided that the Local Government may, with the previous sanction of the Governor-General in Council, from time to time, by

notification in the local official Gazette, direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery possession.

Rights and liabilities
of lessor and lessee.

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

(A) Rights and Liabilities of the Lessor

- (a) the lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;
- (b) the lessor is bound on the lessee's request to put him in possession of the property;
- (c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee

- (d) if during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;
- (e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the

benefit of this provision;

- (f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;
- (g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor;
- (h) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth, provided he leaves the property in the state in which he received it;
- (i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;
- (j) the lessee may transfer absolutely or by way of mortgage or sublease 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 only of such transfer, cease to be subject to any of the liabilities attaching to the lease;

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

- (k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest;
- (l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;
- (m) the lessee is bound to keep, and on the termination of the

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

- (n) if the lessee becomes aware of any proceedings to recover the property of any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;
- (o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;
- (p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;
- (q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Rights of lessor's transferee.

109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

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

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

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 terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

Option to determine lease.

111. A lease of immovable property determines-

Determination of lease.
9 of 1959, s. 19.

- (a) by efflux of the time limited thereby;
- (b) where such time is limited conditionally on the happening of some event-by the happening of such event;
- (c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event-by the happening of such event;
- (d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;
- (e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;
- (f) by implied surrender;
- (g) by forfeiture; that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof, the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or (3) the lessee is adjudicated or becomes

an insolvent and the lease provides that the lessor may re-enter on the happening of such event; and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease;

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

Illustration to Clause (f)

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

Waiver of forfeiture.

112. A forfeiture under section 111, clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

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

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

Waiver of notice to quit.

113. A notice given under section 111, clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

Illustrations

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

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

Relief against forfeiture for non-payment of rent.

114. Where a lease of immovable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee 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.

114A. (1) Where a lease of immovable property has determined, or is liable to determination, by forfeiture for a breach of an express covenant or condition which provides that on breach thereof the lessor may re-enter, no suit for ejection shall lie unless and until the lessor has served on the lessee a notice in writing -

Relief against forfeiture in certain other cases.
9 of 1959, s. 20.

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach;

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

(2) Where the lessee complies with such a notice within a reasonable time as aforesaid he shall continue to hold and enjoy the property leased according to the terms and conditions of the lease.

(3) Nothing in this section shall apply to an express covenant or condition against the assigning, underletting, parting with the possession, or disposing, of the property leased or to an express condition relating to forfeiture in case of non-payment of rent.

(4) A lessor shall be entitled to recover as a debt due to him from the lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of an advocate and surveyor or valuer, or otherwise, in reference to any breach of covenant or condition to which this section applies, giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved under the provisions of this section.

(5) A notice served by a lessor on a lessee under this section shall, where the circumstances so admit, have effect also as a notice under the provisions of paragraph (g) of section 111 of this Act.

115. (1) The surrender, express or implied, of a lease of immovable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, not being an under-lease granted in breach of the terms or conditions of the original lease, but,

Effect of surrender and forfeiture on under-leases.
9 of 1959, s. 21.

unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the underlessee shall be respectively payable to and enforceable by the lessor.

(2) The forfeiture of such lease annuls every such under-lease, except -

- (a) where the forfeiture is procured by the lessor in fraud of the underlessee; or
- (b) where relief against the forfeiture is, as the case may be, granted to, or obtained by the lessee under section 114 or 114A of this Act,

but nothing in this subsection contained shall prejudicially affect the provisions of subsection (3) of this section.

(3) Where a lessor is proceeding by action or otherwise to enforce a forfeiture under any covenant or condition in a lease, or for non-payment of rent, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to execution and registration of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case may think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease:

Provided that nothing in this subsection shall apply to a forfeiture arising on a breach, to which the underlessee is a party, of an express covenant of condition against the underletting, parting with the possession or disposing of the property leased.

Effect of holding
over.

116. If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106.

Illustrations

(a) A lets a house to B for five years. B underlets 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.

117. None of the provisions of this Chapter apply to leases for agricultural purposes, except in so far as the Local Government, with the previous sanction of the Governor-General in Council, may by notification published in the local official Gazette declare all or any of such provisions to be so applicable in the case of all or any of such leases, together with, or subject to, those of the local law, if any, for the time being in force.

Exemption of leases for agricultural purposes.
VI of 1904, s. 6.

Such notification shall not take effect until the expiry of six months from the date of its publication.

CHAPTER VI - OF EXCHANGES

118. When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

"Exchange" defined.

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

119. In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

120. 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.

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

Exchange of money.

CHAPTER VII - OF GIFTS

122. "Gift" is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person,

"Gift" defined.

called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void.

Transfer how effected.

123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Gift of existing and future property.

124. A gift comprising both existing and future property is void as to the latter.

Gift to several, of whom one does not accept.

125. A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

When gift may be suspended or revoked.

126. The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

Illustrations

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

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

127. Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

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

Onerous gift to disqualified person.

Illustrations

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

(b) A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

128. Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

Universal donee.

129. Nothing in this Chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section 123, any rule of Hindu or Buddhist law.

Saving of donations *mortis causa* and Muhammadan law.

CHAPTER VIII - OF TRANSFERS OF ACTIONABLE CLAIMS

130. (1) The transfer of an actionable claim shall be effected only

Transfer of actionable claim.

11 of 1900, s. 4.

by the execution of an instrument in writing signed by the transferor or his duly authorized agent, and shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not:

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings and without making him a party thereto.

Exception.-Nothing in this section applies to the transfer of a marine or fire policy of insurance.

Illustrations

(i) A owes money to B, who transfers the debt to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in subsection (1) of section 130 and to the provisions of section 132.

Notice to be in writing, signed.
11 of 1900, s. 4.

131. Every notice of transfer of actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Liability of transferee of actionable claim.
11 of 1900, s. 4.

132. The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him, although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

133. Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration. Warranty of solvency of debtor.
11 of 1900, s. 4.

134. Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, 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 or other person entitled to receive the same. Mortgaged debt.
11 of 1900, s. 4.

135. Every assignee, by endorsement or other writing, of a policy of marine insurance or of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself. Assignment of rights under marine or fire policy of insurance.
11 of 1900, s. 4.

136. No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid. Incapacity of officers connected with Courts of Justice.
11 of 1900, s. 4.

137. Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods. Saving of negotiable instruments, etc.
11 of 1900, s. 4.

Explanation.- The expression “mercantile document of title to goods” includes a bill of lading, dock-warrant, warehouse-keeper’s certificate, railway receipt, warrant or order for the delivery of goods,

and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

CHAPTER IX - APPLICATION IN RELATION TO CROWN GRANTS

Act not to apply to Crown grants; and such grants to take effect according to their tenor
9 of 1959, s. 22.

Cap. 280.

21 of 1902.

138. Nothing in this Act contained shall affect, or be deemed ever to have affected, the construction or operation of any grant or other transfer of land or of any interest therein heretofore made, or hereafter to be made, by or on behalf of Her Majesty, her heirs or successors, to, or in favour of, any person whomsoever; but, subject to the provisions of the Government Lands Act, or as the case may be, the Government Lands Act, 1902, every such grant or transfer shall be construed and take effect as if this Act had not been passed and, subject as aforesaid, all provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor.

SCHEDULE

Year and Chapter	Subject	Extent of Repeal
	(a) STATUTES	
27 Hen. VIII, c.10 ..	Uses	The whole.
13 Eliz., c. 5	Fraudulent conveyances...	The whole.
27 Eliz., c. 4	Fraudulent conveyances...	The whole.
4 Wm. And Mary, c. 16.....	Clandestine mortgages... ..	The whole.
(b) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL		
IX of 1842	Lease and release	The whole.
XXXI of 1854	Modes of conveying land	Section 17.
XI of 1855	Mesne profits and Improvements.	Section I; in the title the words "to mesne profits and", and in the preamble "to limit the liability for mesne profits and".
XXVII of 1866	Indian Trustee Act	Section 31.
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 Regulation XVII of 1806.
I of 1877	Specific Relief	In sections 35 and 36, the words "in writing".
(c) REGULATIONS		
Bengal Regulation I of 1798.	Conditional sales	The whole Regulation.
Bengal Regulation XVII of 1806.	Redemption	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgement of debts; Interests; Mortgages in possession.	Section 15.

Rules under section 104 of the Transfer of Property Act, 1882**THE TRANSFER OF PROPERTY (MORTGAGE SUITS) RULES**

1. These Rules may be cited as the Transfer of Property (Mortgage Suits) Rules.

2. If in any suit on a mortgage of immovable property it shall, on application or otherwise, appear necessary or expedient that such immovable property or any interest therein or any part thereof be sold, the court or a judge may order the same to be sold, and any party bound by the order and in possession of the said estate or in receipt of the rents and profits thereof shall be compelled to deliver up such possession or receipt to the purchaser or such other person as may be thereby directed.

R.E. 1948,
Vol. V, p. 506.

3. In all cases where a sale, mortgage, partition or exchange is ordered, the court or a judge shall have power, in addition to the powers already existing, with a view to avoiding expense or delay, or for other good reason, to authorize the same to be carried out, as at present by laying proposals before the judge in chambers for his sanction; or by proceedings altogether out of court; any moneys produced thereby being paid into court or to trustees, or otherwise dealt with as the judge in chambers may order:

Provided always that the judge shall not authorize the said proceedings altogether out of court, unless and until he is satisfied by such evidence as he shall deem sufficient that all persons interested in the estate to be sold, mortgaged, partitioned, or exchanged are before the court or are bound by the order for sale, mortgage, partition or exchange, and every order authorizing the said proceeding altogether out of court shall be prefaced by a declaration that the judge is so satisfied as aforesaid, and a statement of the evidence upon which such declaration is made.

4. In debenture holders' actions, where the debenture holders are entitled to a charge by virtue of the debentures or of a trust deed or otherwise, and the plaintiff is suing on behalf of himself only or on behalf of himself and other debenture holders, and where the judge is satisfied that there must eventually be a sale, he may in his discretion direct a sale before judgment, and also after judgment before all the persons interested are ascertained, whether served or not.

5. Before any immovable property or any interest therein shall be put up for sale under a judgment or order, an abstract of title shall,

unless otherwise ordered, be prepared by the advocate for the plaintiff or other party having the conduct of the sale, and shall be signed by such advocate or party and filed in court within such time as the court may order, to enable proper directions to be given respecting the conditions of sale and other matters connected with the sale. Such directions may be obtained on summons supported by affidavit. As soon as particulars of the property and conditions of sale have been prepared and approved by the advocate for the plaintiff or otherwise as the case may be, they shall be placed on the court file for record purposes.

6. Where a judgment or order is given or made, whether in court or in chambers, directing any immovable property or any interest therein to be sold, unless otherwise ordered, the same shall be sold with the approbation of the judge by whom the cause or matter has been dealt with to the best purchaser and all proper parties shall if necessary join in the sale and conveyance as the judge shall direct.

7. Upon the court determining who shall have the carriage of the sale, a notification of sale shall issue under the hand of the judge embodying the conditions of sale as settled as aforesaid, which notification and conditions shall be signed by the judge. The ultimate result of the sale shall be certified under the hand of the auctioneer or where the carriage of the sale is entrusted to an advocate under his hand.

8. The notification of sale shall embody the particulars of the property to be sold as supplied by the advocate for the party applying for an order of sale.

9. A notification of such sale and conditions thereof embodying the schedule of property supplied to the court by the party applying for the order of sale shall be in or as nearly as possible in the Form 1 in the Schedule hereto, provided that such conditions of sale may be modified or added to as in the opinion of the advocate having the carriage of the sale may seem fit, but subject to the supervision of the court.

10. The warrant of sale shall be in the Form 2 in the Schedule hereto, adapted to the circumstances of the case. Where the carriage of the sale is entrusted to an advocate the form shall be adapted to meet that circumstance.

11. The Forms 3 to 11 inclusive appearing in the Schedule hereto shall be used in the preparation of decrees of court in mortgage suits adapted to the circumstances of individual cases.

12. Where a direction has been made by the judge as to the proper parties who shall join in the sale of a mortgaged property and conveyance

thereof in terms of rule 6 the purchaser may prepare a draft of the conveyance which he requires to complete his title, and shall transmit the same under registered cover to the persons ordered by the judge to join in the conveyance, calling upon them within seven days from the date of receipt thereof to signify their approval to the draft conveyance and to undertake to execute such conveyance when called upon. Where any such person objects to the draft conveyance his objection shall be stated in writing and served on the purchaser within the said period of seven days and failing agreement with him the purchaser shall submit the draft to the court with a note of such objections for adjudication thereon by the judge in chambers. The registrar shall thereafter return the draft conveyance to the purchaser incorporating any amendments directed by the judge.

13. Where a person ordered by the judge to join in a conveyance fails to undertake to execute the same when called upon in pursuance of rule 12 or having given such undertaking fails to execute the conveyance or fails to execute the same as amended by direction of the judge (as the case may be) when called upon the purchaser shall lodge the engrossment of the conveyance with the court for execution by the judge together with an affidavit setting out the facts.

14. The judge or such other officer as may be appointed in this behalf shall when the engrossment is filed for signature execute the document so delivered. The attestation clause on the conveyance where it is signed by the judge or such other officer may be in the following or similar terms-

“Signed (sealed and delivered) by
 Judge of the Court (or otherwise as
 the case may be) at for A B, the mortgagor (or
 otherwise as the case may be) in a suit by
 against the said (or otherwise as the case may
 be)”;

and such execution shall have the same effect as the execution of the document by the party ordered to execute the same.

15. The onus of registering the conveyance shall be on the purchaser.

16. Pursuant to the provisions of rule 6 the plaintiff may in his application for sale of the mortgaged premises embody a request for directions as to the proper parties to join in the conveyance, but nothing herein contained shall debar the plaintiff or the purchaser from making such a request subsequently where directions have not already been given.

17. Where it is impracticable for the purchaser to obtain a conveyance under rules 12 and 13 or where undue delay or expense would be caused in obtaining such conveyance or where any necessary party is not within the jurisdiction of the court or for any other sufficient reason the purchaser may apply by chamber summons *ex parte* in the first instance, supported by affidavit as to the facts, for an order vesting in him the property the subject matter of the suit. The judge may, in his discretion, direct service of such summons on such person or persons as he shall think fit.

18. Where a vesting order is sought reference shall be made in the application to the provisions of section 48 of the Trustee Act, and this rule shall be read subject to the provisions of the above-mentioned section of the Trustee Act.

19. A vesting order shall be in terms of Form 12 in the Schedule hereto adapted to the circumstances of individual cases.

20. Where the proceeds of sale of a mortgaged property are insufficient to meet the full amount due under the final decree and the plaintiff desires a personal decree to issue in his favour in terms of the preliminary decree for sale in respect of the personal obligation contained in or implied by any mortgage, charge or other document in respect of which the suit has been brought he may apply to the registrar in writing for the same setting forth the amount found due at the end of the period of redemption together with such further interest as may have accrued or costs as may have been incurred and giving credit for the amount received at the sale. No personal decree for the balance due shall issue where the court is not satisfied that the applicant is so entitled.

Cap. 167.

21. Notwithstanding that the court may order accounts to be taken as between the mortgagor and any other parties joined as defendants no personal decree shall issue against the mortgagor for the balance payable to any party who is not a plaintiff in the suit.

22. A purchaser of a property sold by virtue of an order of court in a mortgage suit may on payment of the full purchase price apply for and obtain a certificate of sale from the auctioneer. Such certificate shall be in terms of Form 13 in the Schedule to these rules.

SCHEDULE

FORM 1- NOTIFICATION OF SALE OF IMMOVABLE PROPERTY

In the Court at

Civil Case No. of 19.....

..... Plaintiff

v.

..... Defendant

Notification of Sale

Notice is hereby given that an order has been passed by this court for the sale of the attached property mentioned in the annexed Schedule, in satisfaction of the decree in the mortgage suit herein, certified by the (District) Registrar at Sh. cts. together with interest at per cent p.a. from till payment.

The sale will be by public auction, and the property will be put up for sale as specified in the Schedule.

The sale will be of all the immovable property (or the interest therein) of the judgment-debtor as described in the Schedule hereto, and subject to the liabilities and claims attaching to the said property, so far as they have been ascertained.

In the absence of any order of postponement, the sale will be held by commencing at o'clock on the at In the event, however, of the debt above specified with interest and costs as also costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid either personally or by duly authorized agent. No bid by or on behalf of the judgment-creditor, however, will be accepted nor will any sale to him be valid without the express permission of the court previously given.

The following are the further conditions of sale:-

Conditions of Sale

1. The particulars specified in the Schedule below have been stated according to the information supplied to the court, byThe abstract of title may be seen on application to this court.

2. The amount by which the bidding is to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder the auction shall continue

from the last undisputed bid.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided it shall be in the discretion of the court or person conducting the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to any order of court as to the date of sale.

5. The person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent of the amount of his purchase money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

6. The full amount of the purchase money shall be paid by the purchaser before the court closes on the fifteenth day after the sale of the property, exclusive of such day, or if such fifteenth day be a Sunday or other holiday, then on the first office day after such fifteenth day, or within such further time as the court may order.

7. In default of payment of the balance of purchase money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale.

8. If the purchaser shall not pay the purchase money within the period prescribed by condition 6 or within such extended period as the court may order and in all other respects perform these conditions an order may be made by the court upon application at chambers for the re-sale of the lot purchased by such purchaser and for payment by the purchaser of the deficiency, if any, in the price which may be obtained by such re-sale and of all costs and expenses incurred by such default. The deposit made in terms of condition 5 may if the court shall think fit be applied towards such subsequent moneys as may be obtained on a re-sale and the defaulting purchaser may be deemed to have forfeited such deposit in whole or in part.

Given under my hand and the seal of the court, this
day of, 19.....

.....
Judge

SCHEDULE OF PROPERTY

No. of lot	Description of property to be sold with the name of registered owner or owners	Details of conveyance to registered owner	Details of any encumbrances to which the property is liable including that on which the suit was instituted	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value

FORM 2-WARRANT OF SALE OF IMMOVABLE PROPERTY IN EXECUTION OF DECREE IN MORTGAGE SUIT

In the Court at

Civil Case of 19.....

..... Plaintiff

v.

..... Defendant

To (Court broker or other person having carriage of sale)

.....

These are to authorize you to sell by auction, after giving days' previous notice by affixing the same in this court-house, and after making due proclamation, the immovable property (or equity of redemption) described hereunder in execution of a decree in favour of in Civil Case No. of 19.....

You are commanded to return this warrant on or before the day of, 19....., with an endorsement certifying the manner in which it has been executed, or the reason why it has not been executed, together with a statement of the manner in which the said sale has been advertised.

You are further authorized to expend a sum not exceeding Sh. in advertising the said sale in the and and such other newspapers as you may deem sufficient to give due publicity to the said sale.

Given under my hand and the seal of this court, this day of, 19.....

.....
Judge.

[Description of property to be sold]

FORM 3-PRELIMINARY DECREE FOR FORECLOSURE
(Title)

This suit coming on this day, etc.: It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of, 19....., is Sh. as appears by the registrar’s certificate in the First Schedule hereto.

And it is decreed as follows:-

(1) That if the defendant pays into court the amount so declared due on or before the said day of, 19....., 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, if so required, retransfer the property to the defendant free from the mortgage and from all encumbrances created by the plaintiff or any person claiming under him. (Where the plaintiff claims by derived title add “or those under whom he claims”.) (Where the plaintiff is in possession add “and shall put the defendant in possession of the property”.)

(2) That if such payment is not made on or before the said day of, 19....., the defendant shall be debarred from all right to redeem the property.

FIRST SCHEDULE

[Registrar's certificate]

SECOND SCHEDULE

[Description of the mortgaged property]

FORM 4 - PRELIMINARY DECREE FOR SALE

(Title)

This suit coming on this day, etc.: It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of, 19...., is Sh. as appears by the registrar's certificate in the First Schedule hereto and that such amount shall carry interest at the rate of per cent per annum until realization, and it is decreed as follows: -

(1) That if the defendant pays into court the amount so declared due on or before the said day of, 19...., 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, if so required, retransfer the property to the defendant free from the mortgage and from all encumbrances created by the plaintiff or any person claiming under him. (Where the plaintiff claims by derived title add "or by those under whom he claims".) (Where the plaintiff is in possession add "and shall put the defendant in possession of the property".)

(2) That if such payment is not made on or before the said day of, 19...., the mortgaged property or a sufficient part thereof shall be sold and the proceeds of sale (after defraying thereout the expenses of the sale) shall be paid into court and applied to payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and the balance, if any, shall be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

FIRST SCHEDULE

[Registrar's certificate]

SECOND SCHEDULE

[Description of the mortgaged property]

FORM 5 - PRELIMINARY DECREE FOR REDEMPTION

(Title)

This suit coming on this day, etc.: It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19....., is Sh. as appears by the registrar's certificate in the First Schedule hereto.

And it is decreed as follows: -

(1) That if the plaintiff pays into court the amount so declared due on or before the said , day of, 19.. ., 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 so required, retransfer the property to the plaintiff free from the mortgage and from all encumbrances created by the defendant or any person claiming under him. (Where the defendant claims by derived title add "or by those under whom he claims".) (Where the defendant is in possession add "and shall put the plaintiff in possession of the property".)

(2) That if such payment is not made on or before the said..... day of 19, the plaintiff shall be debarred from all right to redeem the property.

FIRST SCHEDULE

[Registrar's certificate]

SECOND SCHEDULE

[Description of the mortgaged property]

FORM 6 - DECREE FOR FORECLOSURE - FIRST MORTGAGEE *v.* SECOND MORTGAGEE AND MORTGAGOR - SUCCESSIVE PERIODS FOR REDEMPTION*(Title)*

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the..... day of, 19....., (a) is Sh. x, and that on the day of, 19....., (b) there will be due to the plaintiff for interest the further sum of Sh. y, and it is further declared that on the day of, 19....., (b), there will be due to the first defendant on account of principal, interest and costs Sh. z.

And it is decreed as follows: -

(1) That if the first defendant pays into court the said sum of Sh. x on or before the said day of 19., (a) the plaintiff shall deliver up, etc. (as in Form 3).

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and, if the second defendant pays into court the said sum of Sh. y, on or before the day of, 19., (b) the plaintiff shall deliver up, etc. (as in Form 3).

(4) That in default of the second defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into court the said sums of Sh. y and Sh. z on or before the day of 19....., (b) the first defendant shall deliver up, etc. (as in Form 3).

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. (Where the second defendant is in possession add “and shall put the first defendant in possession of the property”.)

FORM 7 - DECREE FOR SALE - FIRST MORTGAGEE *v.* SECOND MORTGAGEE
AND MORTGAGOR - ONE PERIOD FOR REDEMPTION
(Title)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of, 19....., is Sh. x and that on the said day there will be due to the first defendant on account of principal, interest and costs, Sh. y.

And it is decreed as follows: -

(1) That if the defendants or either of them pay into court the said sum of Sh. x on or before the said day of19....., the plaintiff shall deliver up, etc. (as in Form 4).

(2) That if payment of the said sum is not made on or before the day of, 19....., 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 to the credit of this suit, and applied, first in payment to the plaintiff of the said sum of Sh. x and such subsequent interest and costs as may be allowed by the court; secondly, in payment to the first defendant of the said sum of Sh. y and

such subsequent interest and costs as aforesaid, and that the balance, if any, be paid to the second defendant.

(3) That in case the defendants or either of them shall pay the sum of Sh. x as aforesaid, he or they shall be at liberty to apply to the court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Sh. x and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

FORM 8-DECREE FOR SALE-SECOND MORTGAGEE *v.* FIRST MORTGAGEE
AND MORTGAGOR-ONE PERIOD FOR REDEMPTION
(Title)

(Insert declarations of the amounts due to the plaintiff Sh. y and to the first defendant Sh. x as in Form 7.)

And it is decreed as follows:-

(1) That if the plaintiff or the second defendant pays into court the said sum of Sh. x on or before the said day of, 19, the first defendant shall deliver up, etc. (as in Form 4).

(2) That if payment of the said sum is not made on or before the day of, 19, the first defendant shall be at liberty to apply that the suit be dismissed or for sale of the mortgaged property, and in case he shall apply for sale of the mortgaged property such property or a sufficient part thereof shall be sold free from the encumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into court and applied, first in payment to the first defendant of the said sum of Sh. x and such subsequent interest and costs as may be allowed by the court; secondly, in payment to the plaintiff of the said sum of Sh. y and such subsequent interest and costs as aforesaid, and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Sh. x into court on or before the day of, 19, the second defendant shall be at liberty to pay into court the said sum and the sum of Sh. y on or before the day of, 19, and thereupon the plaintiff shall deliver, etc. (as in Form 4).

(4) That if the plaintiff shall pay the said sum as aforesaid, but the second defendant shall fail to pay the said sums as aforesaid, the mortgaged property, or a sufficient part thereof, shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Sh. x and Sh. y and such subsequent interest and costs as may be allowed by the court, and that the balance, if any, be paid to the second defendant.

FORM 9-DECREE FOR SALE-SUB-MORTGAGEE *V.* MORTGAGEE AND MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE EXCEEDING THAT OF THE SUB-MORTGAGE

(Title)

(Insert declarations of the amounts due to the plaintiff Sh. x and to the first defendant Sh. y as in Form 7.)

And it is decreed as follows:-

(1) The first defendant and the second defendant shall be at liberty to pay into court the said sums of Sh. x and Sh. y respectively on or before the day of, 19, and upon either of the said payments being made the plaintiff shall deliver up, etc. (as in Form 4), and thereupon the sum of Sh. x shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into court and applied, first, in payment to the plaintiff of the said sum of Sh. x and such subsequent interest and costs as may be allowed by the court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant); secondly, in payment to the first defendant of the excess of Sh. y over Sh. x and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold and the net

sale proceeds shall be applied in payment to the first defendant of the said sum of Sh. y and such further interest and costs as may be allowed by the court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs, the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

FORM 10-FINAL DECREE FOR FORECLOSURE

(Title)

Upon reading the decree passed in the above suit on the day of, 19, and the application of the plaintiff dated the day of, 19, and upon hearing for the plaintiff and for the defendant, and it appearing that the payment directed by the said decree has not been made:

It is hereby decreed as follows:-

That the defendant and all persons claiming through or under him be debarred from the right to redeem the mortgaged property set out and described in the Schedule hereto annexed. (Where the defendant is in possession add “and shall put the plaintiff in possession of the said property”.)

SCHEDULE

[Description of the mortgaged property]

FORM 11 - DECREE AGAINST MORTGAGOR PERSONALLY

(Title)

Whereas the net proceeds of the sale held under the preliminary decree for sale passed in this suit on the day of, 19...., lodged in court to the credit of this suit, amount to Sh. y, and there is now due to the plaintiff the sum of Sh. x mentioned in the said decree together with the further sum of Sh. interest thereon at the rate of 6 per cent per annum from the day of, 19., to this day, and also the sum of Sh. for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Sh. z. And whereas it appears to this court that the defendant is personally liable for the said balance:

It is hereby decreed as follows: -

(1) That the said sum of Sh. y be paid out of court to the

plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Sh. z with interest thereon at the rate of 6 per cent per annum from this day to the date of realization of the said sum.

FORM 12 - VESTING ORDER

(Title)

Whereas on the day of, 19....., a plaint was filed in this court by the above-named plaintiff claiming from the defendant the sum of Sh. with interest and costs as therein mentioned and in default of payment thereof that the premises therein referred to and hereinafter described should be sold and the proceeds thereof applied towards payment of the said sum and such further interest and costs as might become due under the charge therein mentioned and whereas on the day of, 19....., this court by a preliminary decree ordered (*inter alia*) that if the defendant did not pay into court the sum of Sh. being the amount of principal, interest and costs found to be owing by the defendant on the day of....., 19....., property hereinafter described should be sold in satisfaction of the claim of the plaintiff and whereas on the day of, 19....., the said property was sold by public auction to for the sum of Sh. and whereas the purchaser has applied to this court that the said property be declared vested in him by virtue of the provisions of section 48 of the Trustee Act, now therefore this court having heard counsel for the purchaser doth hereby declare that (*insert particulars of property*) is vested in the said (*insert name, address and description of purchaser*) his executors, administrators and assigns (*if the property is subject to any covenants, provisos or conditions, add "but subject to....." [specifying the same]*).

Given under my hand and the seal of this court at
this day of, 19.

.....
Judge.

FORM 13-CERTIFICATE OF SALE

(Title)

I, A.B., of.....
, Auctioneer, the person appointed to sell the estate comprised in
 the particulars hereinafter referred to, hereby certify as follows:-

1. I did at the time and place, in the lots, and subject to the conditions
 specified in the said particulars and conditions of sale hereto annexed and
 marked A put up for sale by auction the estates described in the said particulars.

The result of the sale is truly set forth in the bidding paper hereto
 annexed and marked B.

2. I have received the sums set forth in the fourth column of the
 Schedule hereto as deposits from the respective purchasers whose names
 are set forth in the second column of the said Schedule opposite the said
 sums in respect of their purchase money leaving the sums set forth in
 the fifth column of the said Schedule due in respect thereof.

THE SCHEDULE above referred to

No. of lot	Name of Purchaser	Amount Purchase money	Amount of Deposit received	Amount remaining due

(Signed) A.B.,
 Auctioneer or the party having the conduct of
 the above-mentioned sale.

Note.-In the case where the property is bought in at the sale by
 the plaintiff this should be made clear in the certificate.