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A TREATISE

ON THE

LAW OF MORTGAGE

AS ADMINISTERED IN THE COURTS

BENGAL AND THE NORTH WEST PROVINCES.

BY

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FOURTH EDITION.

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ABBREVIATIONS.

Sel. Rep. Report of Select Cases decided in the Calcutta Sudder Dewanny Adawlut from 1791 to 1848.

S. D. A. Decisions of the Calcutta Sudder Dewanny Adawlut recorded in conformity with Act XII of 1843.

N. W. P. Decisions of the Sudder Dewanny Adawlut North-Western Provinces, recorded in conformity with Act XII of 1843.

Rep. Sum. Cases. Reports of Summary Cases.

INTRODUCTORY CHAPTER.

A MORTGAGE may be defined as a pledge, for securing a debt, of lands of which the debtor and those claiming under him remain either the actual owners, or in a position to assert their rights as actual owners, until debarred by judicial sentence or by legislative enactment. Mortgages of land have long been in use all over India, and are well known in Hindu and Mahomedan law.

The Mahomedan law made no distinction between mortgage of land and pledge of other property (*a*). Possession or seisin of the thing pledged, was in all cases the essence of the security, and hypothecation, the giving a lien over a thing without actual possession of it, seems to have been originally unknown. But all that was required in order to give validity to the contract, was that possession should be once given so as to evidence the fact of the mortgage having been made. And a mortgage did not come to an end on the mortgagee's going out of possession, if he did not do so with the intention of relinquishing his security (*b*) : nor was the right of a mortgagee

(*a*) Macnaghten's Mahomedan Law, p. 74.

(*b*) *Ibid*, p. 354.

who had obtained possession, injured by his being subsequently ousted by the mortgagor. Although possession was necessary in order to complete the mortgagee's title, it seems that he was not entitled to the use, or to the actual enjoyment of the profits of the property pledged, except by special agreement(*a*). A mortgagee or pledgee in possession, had priority over other creditors with respect to the property pledged, and was entitled to satisfy his debt thereout, before it could be applied to the liquidation of other claims: the surplus only which remained after discharging the mortgage debt being divisible amongst other creditors (*b*).

The taking of interest was forbidden among Mahomedans, but the property pledged was always presumed to be in value equivalent to the debt due; and the mortgagee might in fact thus obtain, so long as he kept it in his own hands, what was of greater value than the sum lent (*c*).

The mortgagee could not, except by the consent of the mortgagor, at any time sell the property in pledge; at least if he sold it for more than the principal due upon the loan, he had to account to the mortgagor for what he received in excess of that sum (*d*).

The mortgagor could not dispose of the property mortgaged without the consent of the mortgagee. Such a sale was legally valid, but its operation depended entirely on the pleasure of

(*a*) Macnaghten's Mahomedan Law, p. 74.

(*b*) *Ibid*, pp. 75, 347.

(*c*) Macnaghten's Mahomedan Law, p. 74.

(*d*) *Ibid*.

the mortgagee, unless the purchaser paid off the mortgage debt, which he was entitled to do, or the mortgage was from some other source redeemed *(a)*. But the consent of the mortgagee confirmed any such disposition, so that if the mortgagor sold to two persons in succession, and the mortgagee recognised the second sale only, that sale took priority over the first *(b)*.

No partial payment of the mortgage debt affected the mortgagee's right over the whole property pledged, and the mortgage remained in force, not only until redemption, but until the mortgagee in consequence of the redemption actually gave possession of the property to the mortgagor (*c*).

The Hindu law likewise recognised no distinction between mortgages of land and pledges of other property (*d*), and the pledge might be for a limited or for an unlimited time, and either usufructuary or for custody only. Actual possession was probably originally (*e*) essential to their validity, although there is little doubt that hypothecation has existed in the country from a remote period *(f)*. When no date was specified for redemption, a mortgage might be redeemed at any distance of time, no title by prescription being acquired by the mortgagee in possession (*g*).

(*a*) Macnaghten's Mahomedan Law, p. 176.
(*b*) *Ibid*, p 355.
(*c*) *Ibid*, p. 356.
(*d*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," p. 140.
(*e*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," pp. 140—202.
(*f*) Strange's Hindu Law, v. 1, p. 288.
(*g*) Colebrooke's Digest, v. 1, p. 183 Strange's Hindu Law, v. 1, p. 290.

A mortgagee in possession had priority over all other mortgagees, if he obtained possession without force or fraud (*a*). The offence of one who, having mortgaged his property, afterwards fraudulently made a mortgage of it to another, was looked upon as a crime worthy of "whipping," "punishment for theft," "punishment as a robber," and even death (*b*).

Although such generally were the principles which regulated mortgages amongst Hindus and Mahomedans, many changes and modifications appear to have been from time to time introduced; and there is much inconsistency in the various doctrines laid down in the books. In Hindu law there are numerous written texts in which possession is declared to be absolutely necessary, in order to give validity to a contract of mortgage; as for example,—"By the acceptance or actual possession of a pledge, the validity of the contract is maintained" (*c*). "Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and not otherwise" (*d*). On the other hand there are texts, although they are fewer in number and perhaps of less authority, some of them partially, others of them absolutely in opposition to these:—"Of him who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased" (*e*). "But if there be no occupancy, but a writing exist duly attested and so forth, the writing

(*a*) Colebrooke's Digest, v. 1, p. 211.

(*b*) *Ibid*, pp. 209, 210: Gentor Sec. 2.

(*c*) Colebrooke's Digest, p. 161, Yajnyawalcya.

(*d*) *Ibid*, p. 205, Vayasa.

(*e*) *Ibid*, p. 205, Vrihaspati.

shall prevail, because it is the best evidence of a transaction: it shall establish the mortgage" (*a*). It is evident that the original doctrine had been considerably modified, and that whatever may have been the case at first, a valid mortgage unaccompanied by possession, was a thing in later times not unknown in Hindu law.

A strong argument in favor of the conclusion that possession is not demanded by either the Hindu or the Mahomedan law, as we found them existing in this country, may be drawn from the fact that all the legislation of the English Government on the subject, has proceeded on the basis that mortgages are alike valid, whether accompanied by possession or not. The earlier legislation of the East India Company, did not profess to introduce new principles of law into the country, but rather to express and provide a better mode of enforcing those which already prevailed. The Regulations then enacted may therefore, so far as regards general principles, be presumed to be an embodiment of the law which was found prevailing: and as they in no degree recognise any necessity for the mortgagee's being put in possession, it may reasonably be inferred that according to the law of the land no such necessity existed, either among Hindus or Mahomedans.

One learned writer on Hindu law, adopting apparently a suggestion made by Sir William Jones, goes even so far (*b*) as to think, that notwithstanding all that is said about the necessity

(*a*) Colebrooke's Digest, v. 1, p 215, Helayudha.

(*b*) Sir T. Strange, v. 1, p. 288.

of the delivery of possession in order to give validity to a mortgage, it is not unlikely that the mode of pledging without giving possession,—*i. e.* hypothecation,—originated among the Hindus.

The question as to the necessity for the delivery of possession (which the Regulations put beyond doubt in the Mofussil Courts) was on several occasions raised and discussed in the Supreme Court under the statute (*a*) which enacts that in hearing and determining actions or suits between Mahomedans or between Hindus, all matters of contract and dealing between party and party shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Hindus by the laws and usages of Hindus: and when only one of the parties shall be a Hindu or Mahomedan, by the laws and usages of the defendant. At one time it was held that a mortgage between Hindus was invalid, where there had been no possession (*b*). But these cases were overruled, and the Court always subsequently recognised the validity of, and gave full effect to, Hindu mortgages, whether accompanied by possession or not (*c*).

The forms in which mortgage securities were given, seem to have been the same as those now in use: and the earlier Regulations shew that the usufructuary mortgage, and that by conditional sale, were of common occurrence prior to their enactment.

(*a*) 21 Geo. 3, chap. 70, Sec. 17.

(*b*) Sibnarain Ghose, *v.* Russickchunder Neoghy, Morton's Rep. p. 105.

(*c*) Colly Doss Gungopadhya, *v.* Sibchunder Mullick, Morton's Rep. p, 111: Sibchunder Ghose, *v.* Russick Neoghy, Fulton's Rep. p. 36.

The law which now governs mortgages in the Mofussil Courts, is that which is to be found in the Regulations, and in the orders and reported decisions of the Courts and bare questions of Hindu or Mahomedan law rarely if ever arise *(a)*. The law on the subject all bears date since the year 1780, when the legislature seems first to have interfered in the matter indirectly by an Act then passed, limiting the amount of interest which the lender of money might legally receive. One form of mortgage, which before that time was much in vogue, and which since the usury laws have been repealed *(b)*, is likely again to come into common use, was of a very simple nature. The lender received from the borrower a piece of land, receiving the profits in lieu of interest, and retaining possession until the loan was paid off by the mortgagor; the risk of loss in bad years was set off against the profits of good years; no question arose as to the precise sum received by the mortgagee, who was not bound to render any account: and the mortgagor was personally liable for the payment of the principal, but not for any thing further. The Regulation above referred to, however, and subsequent enactments *(c)*, changed the character of such securities, and introduced a close system of accounting, which is applicable to all mortgages made before Act XXVIII. of

(a) S. D. A. 1848, p. 530: N. W. P. v. 7, p. 88.

(b) Act XXVIII. of 1855.

(c) Reg. XV. 1793, Sec. 10: Reg. XXXIV. 1803, Sec. 9.: Reg. XVII. 1806, Sec. 6.

1855, came into force. They declared that no more than 12 per cent. per annum should be allowed as interest on any mortgage; that all sums received by the mortgagee in excess of 12 per cent., should go to the account of principal; and that whenever he had received a sum amounting to the principal with legal interest, the mortgage should be considered as cancelled and redeemed. In legislating on the subject of mortgages, the Government has for the most part been guided by a desire to protect the debtor against his creditor, and, acting on this principle, does not sanction in any case the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer,—unless such transfer be by the direct and immediate act of the proprietor himself *(a)*.

(*a*) S. D. A. 1847, p. 354: N. W. P. v. 8, p. 447.

CHAPTER II.

OF THE VARIOUS KINDS OF MORTGAGES.

THERE are various kinds of mortgages now in common use throughout the districts subject to the jurisdiction of the High Court at Calcutta and the Sudder Court at Agra, each kind being attended with rights and liabilities peculiar to itself. In one, the regular payment of the interest of the money advanced is well secured to the mortgagee, while the principal is not recoverable at any fixed period, or in one sum, but is only gradually to be liquidated from what is received from the land by the mortgagee, in excess of the interest he is entitled to, the mortgagor not being personally liable for the re-payment of either principal or interest. In another, the lien which the mortgagee has over the property, gives him no security for the regular payment of interest, but the mortgagor is personally liable for that and for the principal, which are, after a certain time, recoverable in one sum, either from the mortgagor or from the mortgaged property, the latter being liable to be sold, and the proceeds of its sale being applicable in the first instance towards the liquidation of the mortgage debt. In a third, there is no security for the regular payment of interest, nor is the

mortgagor personally liable for that, or for the principal, but, on default being made, the whole property passes away from the mortgagor, and vests absolutely in the mortgagee.

Whatever may be the form adopted, the mortgage is subject to the incidents attached by law to that form: and this apparently, notwithstanding any stipulations to the contrary, which the parties may have made between themselves (*a*).

There are five different kinds of mortgages. Three of these are simple and pure forms, wholly distinct from each other in their nature and properties (*b*). The others are merely combinations of the simple forms, and are governed by the rules laid down as to these forms, according as the particular matter in question belongs rather to one form than to another.

The three pure forms are (*c*) :—

I. The usufructuary mortgage. II. The simple mortgage. III. The mortgage by conditional sale, kut-kubala, or bye-bil-wufa.

I. *The usufructuary mortgaye*:—Where a man borrows money and gives up his land to the lender, who (unless his debt is paid off by the mortgagor) may retain possession until he has, from the rents, and profits of the land, repaid himself the interest, or, according as the terms of the agreement in each case may be, the principal and interest of the sum advanced by

(*a*) *See* N. W. P. v. 8, p. 161.
(*b*) S. D. A. 1847, p. 354. *See* N. W. P. v. 8, p. 447.
(*c*) S. D. A. 1847, p. 354.

him. Where the whole debt is to be satisfied out of the rents and profits, the mortgage corresponds with the original *vivum vadium* of the English common law: where the interest alone is to be liquidated from them, the case resembles that of a Welch mortgage *(a)*.

Of usufructuary mortgages there are two kinds, namely, mortgages of the whole right and estate of the mortgagor, and mortgages of his right and estate for a term of years only.

Zur-i-peshgee leases,—leases granted on a sum of money being advanced,—have been decided to be on the same footing as pure usufructuary mortgages, and are dealt with as such *(b)*; but this is only when there is a power of redemption reserved to the lessor either expressly or inpliedly *(c)*.

When a mortgage is given by way of lease, the loan is generally made re-payable on the same day that the lease expires, and the deed usually contains a stipulation, that if default is made, the lender and lessee shall continue in possession on the terms of the lease, until the debt is repaid from the profits of land or otherwise.

If by the terms of the contract the mortgagee is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment

(a) Coote on Mortgages, p. 4.

(b) Sel. Rep. v. 4, p. 251: S. D. A. 1847, p. 167: 1852, pp. 280, 304: N. W. P. v. 8, p. 10 : v. 10. p. 355, and the cases referred to there.

(c) S. D. A. 1855, p. 481: N. W. P. v. 8, p. 356: v. 10, p. 355. *See* S. D. A. 1857, p. 1232.

of either, in the absence of a special agreement that he shall be so. And it would seem to have been held, that even where the application of the profits was expressly limited to the liquidation of interest, the mortgagor was not personally liable for the principal. There is little doubt, however, but that in this last case the mortgagor is liable for the principal, especially in a contract made subsequent to the passing of Act XXVIII. of 1855 *(a)*.

The mortgagor has the right of redemption at any time on liquidation of the debt, either from the usufruct, or by a cash payment or deposit in Court *(b)*.

The mortgagee never can become absolute owner of the mortgaged estate of which he has possession, and the right of redemption remains to the mortgagor and his representatives after any lapse of time, however great.

II. *The simple mortgage:*—Where the borrower binding himself personally for the re-payment of a loan with interest, pledges his land as a collateral security for such re-payment.

He does not give up possession of the property to the mortgagee, or permit him to enjoy the usufruct of it, nor does he covenant to make an absolute transfer of it in the event of non-payment. On default, the mortgaged estate does not at once pass into the hands of the mortgagee, nor does it of necessity do so at all. The mortgagee enforces his security

(*a*) N. W. P. v. 3, p. 211 : Sel. Rep. v. 1, p. 121.
(*b*) S. D. A. 1847, p. 354.

by suing the mortgagor for what is due on the loan for principal and interest: having obtained a decree, he proceeds in execution to sell the land, and out of the proceeds of the sale to satisfy his own claim, the mortgagor being entitled to any surplus which may remain. The mortgagee may himself be the purchaser if he chooses *(a)*. From the date on which the money advanced is in the agreement declared to be re-payable, up to the time of decree and sale, the mortgagor has the right of redeeming, on payment of the balance due in respect of principal and interest: that right however necessarily becomes extinct on a sale taking place.

The mortgagor in the case of simple mortgages, is liable to lose his land, but it does not thereupon vest in the morgagee.

III. *The mortgage by conditional sale, kut-kubala, or bye-bil-wufa,*—is that in which the borrower, not making himself personally liable for re-payment of the loan *(b)*, covenants that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee.

If the debt is not paid as stipulated, the mortgagee can have the property transferred absolutely to him. For this purpose he must proceed to foreclose, according to certain prescribed rules, converting the conditional sale into an absolute one, and obtaining possession. Until he takes such proceedings, the mortgagor remains in possession and enjoyment of

(a) N. W. P. v. 6, p. 218.
(b) *See* Cons. 898. Sel. Rep. v. 7, p. 92.

the property, and has the right of redemption on paying off what is due on the mortgage; but on forelosure, that right ceases, and the property passes wholly from the mortgagor and vests in the mortgagee.

In mortgages by conditional sale, the mortgagor is liable to lose his estate, and when he does so, it passes at once to the mortgagee.

Combinations of these three pure forms give rise to two other kinds of mortgage, the one being the simple mortgage usufructuary, and the other the conditional mortgage usufructuary.

IV. *The simple mortgage usufructuary*—is that in which though the property is only collaterally pledged, as in the case of a pure simple mortgage, the mortgagee is permitted to have the usufruct of it. This may be done either by simply allowing him to receive the rents and profits, or by giving him a lease for a limited period. In either case, the proceeds are credited to the mortgagor against interest, and, if they exceed what the mortgagee is entitled to for interest, against principal also. As in a pure simple mortgage, the mortgagor is personally liable, and his estate subject to be sold on default though redeemable until it is so sold.

V. *The bye-bil-wufa or kut-kubla usufructuary:*—Where the mortagagee by conditional sale has the usufruct of the property, either by being merely put in possession and allowed to receive the rents and profits, or by having a lease given to him by the mortgagor. The position of the parties up to the date on which the loan is re-payable, is in all respects

the same as in a pure usufructuary mortgage. From that date their position resembles what it would be in a pure conditional mortgage. But the mortgagee is in the receipt of the profits of the land. Until he has obtained a decree for foreclosure, he must account for such receipts unless his mortgage was made after the passing of Act XXVIII. of 1855, and the agreement is that the usufruct should be taken in lieu of interest. The mortgage is redeemed or cancelled whenever (prior to his obtaining a decree for foreclosure) the mortgagee has received a sum equal to the principal with interest at a rate not higher than 12 per cent. per annum, or if the contract was entered into subsequent to the passing of Act XXVIII. of 1855, whenever he has received the principal with interest at the stipulated rate, or at such rate as the Court shall think proper if there be no stipulation on the subject.

CHAPTER III.

OF PERSONS CAPABLE OF MORTGAGING.

THE right to mortgage is *primâ facie* incident to the right of property, and co-extensive with it; but to this rule there are exceptions in the cases of lunatics and minors. Persons whose rights are of a limited or qualified nature, cannot do any valid act in excess of these rights. Thus a Hindu widow, holding property belonging to her husband's estate which devolved to her in succession upon his death, cannot, except under certain circumstances, make a mortgage which will be valid against the heirs in reversion of the husband. And if the estate is ancestral property belonging to a Hindu family, where the doctrines of the Mithila school prevail, and has been mortgaged without the consent of all those interested in it, or if the land is mal-i-wuqf or dewutter, set apart and devoted to religious purposes, a mortgage of it may generally be set aside.

Minors are incapable of executing a mortgage of their property. But a mortgage by a minor's legal guardian is valid, and will be sustained, if made *bonâ fide*, and for the benefit of the minor or of his property (*a*).

(*a*) Sel. Rep. v. 4, p. 339: v. 5, p. 82; S. D. A. 1846, p. 371: 1856, p. 980: N. W. P. v. 6. p. 234. *See* S. D. A. 1856, p. 392.

It has been held that where money is borrowed on account of minors, this fact ought to be stated in any deed in which the transaction may be embodied; and that a guardian who mortgages his ward's property, ought to do so in his character of guardian, and not as if he were himself proprietor (*a*). So a sale of land made by certain persons, not as guardians on behalf of a minor (which was their real character), but as joint proprietors, was declared invalid. The Court said that all the parties who appeared as sellers were wrongly described, and that a deed vitiated by so serious a flaw could not be regarded as conveying a good and sufficient title (*b*).

But the leading case on this subject may be said to be that of Hunoomanpersaud Panday, *v.* Musst. Babooee Munraj Koonweree. A Ranee the guardian of, or rather the manager for, her minor son, mortgaged ancestral lands which had on his father's death descended to the son as heir. In the mortgage deed she was described not as guardian or manager, but as being herself absolute proprietor, and the deed was in consequence set aside by the Agra Court (*c*). But on appeal to the Privy Council this decision was reversed (*d*). Their Lordships remark, with reference to the point of the mother having described herself as proprietor instead of as guardian or manager, that the Lower Court "did not enter upon the

(*a*) S. D. A. 1848, p. 791: N. W. P. v. 8, p. 156.

(*b*) N. W. P. v. 3, p. 156. (*c*) N. W. P. v. 7, p. 21.

(*d*) Moore's Indian Appeal Cases, v. 6, p. 393. The whole of the Judgment in this case in so instructive and important that it has been printed in full in the Appendix.

question of the validity of the charge in whole or in part, as a charge effected by a *de facto* manager or proprietor whether by rightful or wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of such weight:" and after some further observations they continue, "it is not suggested that she ever claimed any beneficial interest in the estate as proprietor: had she done so it would have been *pro tanto* a claim adverse to her son: and it is conceded that she did not claim adversely to her son. The terms 'proprietor' and 'heir' when they occur, whether in deeds or pleadings or documentary proofs, may indeed by a mere adherence to the title be construed to raise the conclusion of an assumption of ownership in the sense of beneficial enjoyment derogatory to the rights of the heir: but they ought not to be so construed, unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her, and that she must be viewed as manager inaccurately and erroneously described as 'proprietor' or 'heir:' and it is to be observed, that the Collector takes this view, for whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as 'Surberakar.' If the whole context of all these documents and pleadings be taken into

consideration, and the construction proceed on every part, and not on portions of them, they are sufficient in their Lordship's judgment to show the real character of her proprietorship."

On the general question of the power of a guardian of, or a manager for a minor to mortgage the minor's estate, and of the degree to which the *onus* is thrown on the mortgagee of proving that the charge was created for the benefit of the minor and from necessity,—their Lordships thus lay down the law: "The power of the manager for an infant heir to charge an estate not his own, is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide*, will not be affected though it be shown that with better management the estate might have been kept free

from all debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

A mortgage made by a guardian is in all cases valid, if ratified by the minor after attaining his full age (*a*). But if

(*a*) S. D. A. 1853, pp. 494, 525.

the minor immediately upon his attaining his full age sells an estate previously mortgaged by his guardian, no subsequent ratification by the minor of the guardian's act will be of any avail *(a)*.

Without such ratification, money advanced to a guardian for what the Court does not consider to be for the minor's benefit, as, for example, money advanced to carry on excessive litigation, will be considered as having been obtained by the guardian on his own personal responsibility *(b)*.

According to the doctrines of the Mithila school, the alienation of joint undivided property is invalid, without the assent of all the sharers, and is not valid even for the seller's own share, without such assent. Therefore when a mortgage of such property was made by the three sharers, but one of them was a minor and his assent could not be legally given, the mortgagee's claim against the two major proprietors, as well as against the minor, was in the absence of such assent, held to be invalid, and he could not succeed in a foreclosure suit: the mortgage was bad even as to the shares of the two partners, who were of age *(c)*. Nor can the head of a Hindu family alienate such property during the minority of any brother, or without the consent of those brothers who are of age *(d)*. A father of a joint Hindu family *(e)* cannot

(*a*) S. D. A. 1858, p. 312. (*b*) S. D. A. 1853, p. 531.

(*c*) S. D. A. 1853, p. 344. *See* S. D. A. 1847, p. 557: Sel. Rep. v. 4, p. 158.

(*d*) Fulton's Rep. p. 368, Note *a*.

(*e*) The law of Mitakshara is in this the same as that of the Mithila school.

alienate ancestral property during the minority of his sons, or, if they are of full age, without their consent (*a*).

To these rules there is an exception, where the alienation is made from necessity or for the manifest benefit of all interested (*b*). Under the head of all alienations from necessity may be ranked those made for the support of the family, for the services of religion (*c*), for the payment of Government revenue or for any 'pressing need.' Where decrees obtained by creditors were in execution against the father of a family, and the ancestral property had been advertised for sale in satisfaction of these decrees, and the father had been fined and was in jail under a criminal prosecution: it was considered that the necessity of the case justified in alienation of part of the property, in order to arise money to pay the fine imposed on the father, and to save the remainder of the estate from sale (*d*). And the necessities which may arise for such transfer, need not be connected with the ancestral debt (*e*). But only so much of the property should be sold as is sufficient to meet the claim, and if a larger portion than is absolutely required is sold, it must be shewn by the purchaser that the money required to pay off the claim could not be raised otherwise (*f*).

(*a*) Sel. Rep. v. 6, p. 71. *See* S. D. A. 1853, p. 344.
(*b*) Fulton's Rep. p. 380.
(*c*) *See* Sel. Rep. v. 5, p. 24.
(*d*) N. W. P. v. 5, p. 327.
(*e*) N. W. P. v. 6, p. 474.
(*f*) S. D. A. 1861, v. 1, p. 193.

In a case in which the ostensible purpose of the loan was to pay off Government Revenue, the Court ruled that in order to render such a loan binding upon those who had reversionary interests in the property, it must be satisfactorily proved that the loan was at the time absolutely necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor (*a*). More recently the Court, acting upon the general principles laid down by the Privy Council in the case of Hunooman persaud Panday, to which reference has been made above (*b*), held that as the debt to the mortgagee was contracted under circumstances of great pressure and was for the benefit of the estate, the lender's title was a good one and could not be affected by the waste or mismanagement of the borrower (*c*).

Those who dispute a conveyance of this kind, can do so only by bringing a suit to have it declared illegal and void, on the ground of the property being ancestral: and a suit brought by sons for possession as proprietors, on account of illegal alienation by their father, will not be entertained;—a son's proprietary right in ancestral property, not arising until after the death of his father (*d*), unless the father shall have expressly relinquished his rights (*e*).

(*a*) S. D. A. 1858, p. 802.

(*b*) Moore's Indian Appeal Cases, v. 6. p. 393. *See* p. 17 *supra*: and *Appendix*.

(*c*) S. D. A. 1859, p. 1643: and *see* p. 376.

(*d*) N. W. P. v 7, pp. 311, 365: v. 6, p. 414: S. D. A. 1851, p. 352; 1850, p. 282.

(*e*) Sel. Rep. v. 6, p. 65.

In Bengal a Hindu widow who, having no son, has succeeded to the property of her deceased husband, cannot make a valid mortgage or sale of any portion of that property, nor even of her own life interest in it, except when the sale or mortgage is made on account of some *necessity*, as the providing for her own maintenance, or for any indispensable duty connected with her husband, such as acts designed for his spiritual benefit, or the payment of his debts. In the Calcutta Sudder Court a mortgage by a Hindu widow was at one time held to be invalid, if not proved by the mortgagee to have been incurred for the purposes of her necessary maintenance, or for some indispensable duty (*a*).

There has been much discussion and some variety of decision on the question of the exact nature of a Hindu widow's estate, and the extent of her powers to deal with it: and the widow's estate has even been sometimes treated as an absolute life interest in the husband's property, alienable at pleasure for the term of her life. Latterly, however, there has been more uniformity in the decisions of the Courts. The principles laid down in the case of Hunoomanpersaud Panday, (*b*), have been applied by the Sudder Court to Hindu widows, whose power of dealing with the property their deceased husbands is held in many respects to resemble

(*a*) S. D. A. 1849, pp. 64, 405, and the authorities there quoted: 1857, pp. 401, 460.

(*b*) *Supra*, pp. 17—20, and

much the power of the manager for a minor to deal with the property of the minor. The rule may be said now *(a)* to be that one who lends money to a Hindu widow on mortgage of property belonging to her deceased husband's estate, is bound to inquire into the necessity for the loan, and to satisfy himself as well as he can that the widow is acting in the particular instance for the benefit of the estate: if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his mortgage: and he is not bound to see to the application of the money. A *bona fide* mortgagee will not suffer when he has acted honestly and with due caution, even though he be himself deceived.

In the Supreme Court it has for many years been ruled that there is no presumption against alienations by a Hindu widow, and that such alienations are to be supported, unless proved to have been improper. In giving judgment in the case of Goluckmonee Dabee, *v.* Degumber Dey *(b)*, the Court said:—"No part of the entire interest when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life estate, but the whole interest is in the widow. When she takes as heir under the Hindu law, she is ranked in all treatises as heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore when they term it also a life

(*a*) *See* S. D. A. 1859, pp. 207, 210, 421, 567, 1164: 1860, v. 2, p. 174.
(*b*) Supreme Court, November 15, 1852; reported in the *Englishman*, Nov. 17.

estate, they mean that expression in a sense different from that of a pure and mere life estate. Such an estate as that last described, may exist as well under the Hindu, as under the English law. It exists when by donation, whether testamentary or *inter vivos*, property is given to one for life. In such a case, there would be no distinction in the nature of the interest, from that of a similar interest created by donation under the English law. The law upon the point has been settled by the decision of the Privy Council, (the decisions of which bind both the Courts of the Crown, and of the East India Comppny) in the case of Kosynath Bysakh, *v.* Wumoosoonderee Dossee *(a)*. On the first hearing of that case in this Court, the Court declared by its decree as to the estate of the widow, that she took an interest for her life in the immoveable estate, and an absolute interest in the moveable; on the latter point adopting a distinction between moveable and immoveable estate, which does not prevail in Bengal; and also failing to mark the limitation or the power of disposal as to moveables. The case was re-heard, and the Court by a subsequent decree, rectified its own decree, declaring as to both immoveable and moveable that 'she should be declared entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu law.' It therefore expressly corrected the

(*a*) Clarke's Reports, Appendix, p. 91. The correct title of the case is Cossinauth Bysack, *v.* Hurrosoondery Dossee.

declaration that she took an interest for life, and declared her entitled in unrestricted terms, limiting the restrictive terms to the possession, use, and enjoyment of the property. This decision was affirmed on appeal; since that decision the decrees of this Court in which it is necessary to declare what interest the Hindu widow takes, have been in conformity to it. It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law, that adverse possession which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life as known to the English law. Here the lessor of the plaintiff showed that the widow had made an alienation of the estate. Was the Court to assume it an unauthorized alienation? On what principle? We can discover none; there is neither authority nor principle to be found which would warrant the Court in saying, that under all circumstances, and whatever the nature of the suit or the position of the parties, or the rule which regulates the particular action, the presumption must ever be *primâ facie* against the validity of the alienation by a Hindu widow of the estate to which she succeeds as heir. Still less should that presumption be made, where possession has gone along with it for a long time, and a dormant title is asserted against a purchaser for value, after many years. We have looked carefully through the cases cited, and can find none that establishes any such position. In our opinion the law presumes neither against nor in favour of an alienation by a Hindu widow."

In another case (*a*), the Court held that the estate could not be considered as one given by way of maintenance, but as an absolute life interest, so long as it was not used in a manifestly improper manner: and that therefore, a Hindu widow was entitled to save as much as she pleased of the income received by her from her husband's estate, and by her will or otherwise, to dispose of such savings away from her husband's heirs. And in *Jadomoney Dabee, v. Sarodaprosono Mookerjee* (*b*) the late Chief Justice *Colvile* says: "but the estate of a Hindu widow is very different from a mere life estate. The case of *Cossinauth Bysack, v. Hurroosoondery Dossee* which has long given the law to this Court establishes that the estate of the widow is something higher than a life estate: that it entitles her to the possession of the property without restriction: and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible, to define further than by saying that the propriety of any particular exercise of that power mus depend on the circumstances under which it is made, and must be consistent with the general principles of the Hindu law regarding such dispositions. The cases of *Oojulmoney Dossee, v. Sagormoney Dossee,* and *Hurrydoss Dutt, v. Runjunmonee Dossee* which have established in this Court the right of the reversionary heirs, though their interest is only contin-

(*a*) In the goods of Hurrendernarain Ghose, Kaylasnath Ghose, *v.* Bissonath Biswas, Supreme Court, 30th June 1853.

(*b*) Boulnois' Reports, v. i. p. 129.

gent, to maintain a suit to restrain waste by the widow—particularly the latter case in which the late Chief Justice entered at large into the nature of the widow's estate,—are quite consistent with what I have stated. Sir Lawrence Peel there says 'the estate, though sometimes so expressed to be, is not an estate for life; when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had but a life estate.'"

But any alienation of her husband's property is valid if made by the widow with the consent of *all* (and not merely *the nearest*) heirs of the husband alive at the time of executing the deed by which the alienation is made *(a)*. If any reversioner signs the deed as witness, his consent to the act set forth in the deed will be presumed *(b)*.

A suit to set aside an improper alienation, should be brought by those parties whose interests are directly affected (as the next heirs), not by those whose rights are merely future and inchoate *(c)*. And the cause of action in a suit to set aside a sale by a widow arises on her death: during her life-time the rights of the reversioners are only contingent, and the law of limitation will run only from the date of the widow's death *(d)*.

(*a*) S. D. A. 1856, p. 596. *See* Jadomoney Dabee, *v.* Sarodaprosono Mookerjee, Boulnois' Rep. v. 1, p. 131.

(*b*) S. D. A. 1856, p. 596. And generally as to the presumption of consent arising from witnessing a deed, *see* S. D. A. 1857, p. 271: 1860, v. 1, p. 625.

(*c*) S. D. A. 1853, p. 641. 1859, p. 620: N. W. P. v. 9, p. 411.

(*d*) S. D. A. 1859, pp. 631, 681.

A Mahomedan widow cannot legally alienate property devolving upon her as dower, without the consent of the other heirs of her husband, and a mortgage made by her without such consent may be set aside by them *(a)*.

A mortgage of land devoted to religious purposes, whether by Hindus or Mahomedans, is invalid; as also is a mortgage of the produce of such lands *(b)*.

And the fact that the alienation is only temporary, or that it has been made for the repairs or other benefit of a mosque or temple, or of the property itself, dees not affect the case, according to the decisions of the Calcutta Court (*c*). But the Agra Court has held that it does not necessarily follow that because lands are wuqf, the temporary alienation of them by the mutuwallee is illegal:—and that the mutuwallee is in fact entitled to dispose of such portion of the property as may be required in order to raise money for necessary repairs, the preservation of buildings in all cases of endowment being a matter of indispensable necessity *(d)*.

Probably the principle which ought to rule all such cases is, that those alienations, and those alienations only, which fall within the scope and spirit of the endowment, are to be supported.

(*a*) N. W. P. v. 8, p. 45.

(*b*) N. W. P. v. 7. p. 118; Sel. Rep. v. 7. p. 268. *See* S. D. A. 1849, p. 65: 1855, p. 323: 1858, p. 586.

(*c*) Sel. Rep. v. 7, p. 268.

(*d*) N. W. P. v. 8, p. 433. *See* Macnaghten's Mahomedan Law, p. 328.

A mortgage by the mohunt of a Hindu temple, of land belonging to the temple, may be bad; but the faqueers attached to the temple, do not seem to be entitled to sue for the cancelling of the deed of mortgage, and erasure of the name of the mortgagee from the books of the Collector. Their remedy, if any, is by proceedings taken by them before the Revenue Authorities, under Regulation XIX. of 1810 (*a*).

(*a*) N. W. P. v. 7, p. 118.

CHAPTER IV.

OF MORTGAGE CONTRACTS.

PARTIES may enter into a contract of mortgage in the same manner as they may make any other contract,—that is to say, their agreement may be either verbal, or in writing. Proof of the existence of the contract is all that is necessary, and if satisfactorily established, a verbal agreement will have as full an effect as a written one; but if the contract be only a verbal one, the Courts will require indisputable proof of it (*a*).

At the same time, verbal contracts are so open to misconstruction and fraud, and the difficulty of proving them after the lapse of time, is so great, that they are to be especially distrusted in the case of mortgages of land, where disputes seldom arise until some considerable period has passed; and mortgages by merely verbal agreements, are consequently seldom or never met with in practice.

As the possession of property without the means of showing the right to such possession, is of comparatively little value, and the mere holding of those means by another, gives him a certain power over the land and those to whom it

(*a*) Sel. Rep. v. 4, p. 168. *See* also v. 2, p. 74, and N. W. P. v. 4, p. 219; and *post* p. 35.

belongs, a deposit of title deeds as security for a debt due, puts the creditor in a position to prevent the effective transfer of the estate without his debt being discharged. A deposit of this nature, in English law known as an "equitable mortgage," is treated as a valid simple mortgage of the whole property to which the deeds deposited refer, and is subject to the same rules as a regular mortgage *(a)*. Such a security is evidently much more safe than a mere agreement unaccompanied by any deposit *(b)*. But much risk and confusion are avoided, by having in all cases a short and accurate deed, attested by at least two credible witnesses, and duly registered, which may itself testify to, and aid in establishing, the real facts of the case and the intentions of the parties contracting.

A mortgage deed *(c)* should set forth shortly but distinctly, all the material points of the agreement which the parties really intend to enter into *(d)*. It should state with strict accuracy, the consideration given, and the mode of giving it *(e)*, the locality and description of the property pledged, the nature of the mortgage, the length of time it is to remain in force, and any other conditions which the parties may have agreed upon, together with the date of the execution of the deed.

(a) Sel. Rep. v. 6. p. 165. *See* also Reg. X. of 1829, Schedule A· Art. 35, (now repealed), and Act X. of 1862 (G. G.) Schedule A. Art. 46,—where any contract accompanied with the deposit of title deeds, when the same may be made as a security for money due or lent at the time, is declared liable to the same stamp duty as an ordinary mortgage deed.

(b) N. W. P. v. 7, p. 450.

(c) For precedents of mortgage deeds of different kinds, and also of a common English mortgage deed, *see* Appendix.

(d) *See* N. W. P. v. 9, p. 455. *(e)* *See post*, pp. 67, 68.

The stipulations as to the payment of interest should be especially clear. In a case where the mortgagee had not the usufruct of the property, the mortgage deed was silent on the subject of interest. The Court on account of this silence refused to allow any interest from the date of the deed up to the time when the money lent became re-payable (*a*.)

In one case, a mortgage deed was executed in the ordinary form. Two days afterwards the mortgagees executed an ikrarnama in which they undertook to pay Rupees 110 to the mortgagor as subsistence money. The latter instrument did not mention, and was not mentioned in, the former. The mortgagees subsequently transferred their rights under the first deed to third parties. It was held that these assignees were not liable to pay the subsistence money. "There is nothing whatever to connect the subsequent engagement with the mortgage deed, nor can any privity of contract between the mortgagor and the parties to whom the mortgage was afterwards transferred by deed, be inferred from the evidence or circumstances of the case" (*b*).

If more deeds than one are requisite in order to carry out the views of the parties, but all of them forming part of the mortgage contract, each of them should contain a reference to the others, so that it may appear on the face of them that they all are but one transaction, and must be taken in connection with each other. Thus in making a mortgage by

(*a*) S. D. A. 1855, p. 54, *See* also 1854, pp. 514, 518.

(*b*) N. W. P. v. 11, p. 6.

conditional sale, it is a common custom to make an absolute sale of the property, and at the same time to execute an ikrarnama declaring the sale to be only conditional, and made in fact by way of mortgage (*a*). A reference in each of these deeds to the existence and purport of the other, will be preventive of fraud and a protection to all parties (*b*).

It has been held that the terms of a written deed may be varied or modified by a verbal agreement, and that a deed which on the face of it is one of absolute sale, may by a verbal agreement be converted into one of mortgage (*c*). But very strict proof of any such verbal agreement is required, and the *onus* of proving that the actual engagements between the parties differ from those written, lies on the party who alleges that such difference exists (*d*). And in a late (*e*) case in which the Lower Court had held that a *mouroosee pottah*, absolute in its terms, was in consequence of a verbal agreement between the parties, to be treated as a mortgage, the Calcutta Court thus laid down the law: "As to whether parole evidence may be admitted to set aside the express terms of a deed, the rule is that parole testimony, though admitted to explain, cannot be received to contradict, vary, add to, or subtract from the terms of a valid written instrument, because such evidence while deserving far less credit than the writing itself,

(*a*) *See* an instance S. D. A. 1859, p. 127.
(*b*) N. W. P. v. 8, p. 564: v. 10. p. 223: Sel. Rep. v. 4, p. 174.
(*c*) S. D. A. 1858, p. 741. (*d*) N. W. P. v. 8, p. 473.
(*e*) S. D. A. 1859, p. 362.

would inevitably tend in many instances to substitute a new and different contract for the one really agreed upon."

Contracts are to be dealt with and deeds contrued according to the real intention of the contracting parties disclosed by the transaction *(a)*. It is therefore not necessary that a mortgage should be called a mortgage by name, or that the class to which it belongs should be expressly stated. An agreement that "until the amount of the bond shall be paid, the debtor will not transfer certain property, by sale, mortgage, or gift," is held to be a simple mortgage of the property mentioned. So, a money bond containing a stipulation that until the money was re-paid, the debtor would not alienate his rights as zemindar, in any other quarter, was held to be a bond in the nature of a simple mortgage *(b)*.

And so long as the nature of a transaction is materially such as to stamp it as belonging to a particular class of mortgages, the mere calling it by a different name will not transfer it to another class. In one case, where there was an absolute sale, but the purchaser gave an ikrarnama with a condition that, if the vendor re-paid the purchase money and interest by a fixed day, the purchaser would reconvey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held, that

(*a*) *See* the case of Hunoomanpersaud Panday, Moore's Indian Appeal Cases, v. 6, p. 393, *see* also *Appendix*.

(*b*) N. W. P. v. 125: v. 8, p. 669.

"redeemable sales," and "mortgages by conditional sale," were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed, only in the same manner as a mortgage by conditional sale could be (*a*).

So zur-i-peshgee leases, are treated in all respects as usufructuary mortgages (*b*), when they contain a proviso either express or manifestly implied, for redemption. But when the mortgage is by way of lease, it is desirable that the deed should declare expressly that the lease is in fact given as a mortgage security, and that there should be a condition that, if the advance is not re-paid when the lease expires, the mortgagee shall be entitled to hold on, until his claim is satisfied. In a case where there was no such condition, but on the contrary there was a condition, that if at the expiration of the term for which the lease was granted, the lessor failed to pay down at one time the whole amount of the advance made, the lessee should be at liberty to take such steps as might be deemed proper to recover the amount from the lessor, it was held that the absence of a proviso that the lease should continue until re-payment, more especially been the deed contained a condition that the amount might be recovered from the mortgagor, formed a distinctive feature removing the case from the ordinary category of leases held to

(*a*) N. W. P. v. 8, p. 564. *See* Sel. Rep. v. 4, p. 174.
(*b*) *Supra*, Chap. II. *See* S. D. A. 1857, p. 1232: 1859, p. 977.

be usufructuary mortgages (*a*). So the simple advance of 500 Rupees in consideration of receiving a lease for twelve years was held not to be a mortgage transaction, in the absence of any appearance of intention that it should be taken as such (*b*). In another case a lease for twenty years was granted. The terms of the lease provided that on the expiry of the twenty years the land should be made over to the lessor: and that the lessee alone should benefit by any improvement of the property or increase in the rents, but that he alone should bear any loss of rents or decrease in their amount. The Court said (*c*). "The deed before us is in fact an absolute sale of a lease for a fixed period, to which the rules common to mortgage transactions cannot be applied, as the extinction of the original debt is not solely dependant on the receipt of adequate profits, but on profits *whatever they may be* during the continuance of the lease. Should they fail, the debt is neither realisable from, nor secured by, any other resources: this is no device, but a substantial risk entitling the lender to any benefit from the bargain."

Lands were conditionally purchased by A, who paid down a certain sum of money and agreed to pay a further sum seven years afterwards: upon making the latter payment, A was to be put in possession, and the borrowers were within ten years from that date to pay off the whole loan and redeem their lands. A never advanced more than the first sum, and

(*a*) N. W. P. v. 8, p. 356. (*b*) S. D. A. 1855, p. 481.
(*c*) S. D. A. 1857, p. 1232.

he never got possession. It was held that this transaction never amounted to a mortgage, and that the money which A advanced was a simple debt for which there was no lien on the lands (*a*).

From badly drawn documents it is often difficult to discover what the exact nature of the transaction has been. This obscurity ought to be avoided, as the whole position of the parties depends upon the class to which the mortgage belongs (*b*) : and when a deed is so loosely worded as to admit of more than one interpretation, the Courts will always construe it in the sense most favourable to the mortgagor (*c*).

In mortgages of an usufructuary nature, it should be stated clearly whether the profits are to be taken in lieu of interest only, or whether both principal and interest are to be recovered from them, because in the latter case the pledger is not personally liable (except under particular circumstances), and the mortgagee must look to the land alone for payment of his debt and the interest thereon (*d*).

In a recent case the plaintiff objected to the allowance of interest at a rate in excess of the usufruct, and the Court held the objection to be good, saying: "when it is manifest that the usufruct does not amount to simple interest at a legal rate, and there is no rate of interest stipulated for, the presumption is that the usufruct was deemed by the mortgagee

(*a*) S. D. A. 1858, p. 1491. (*b*) N. W. P. v. 8, pp. 356, 370, 447
(*c*) N. W. P. v. 5, p. 113.
(*d*) N. W. P. v. 3, p. 211 : Sel. Rep. v. 1, p. 121. *See* S. D. A. 1857, p. 1232.

sufficient interest for his money debt, and that the mortgagor is not bound to pay a further sum to make up any particular rate; the law is satisfied if no more than legal interest is received, and the Court has nothing to do with the accounts if less than that amount has been taken. In the present case as no rate of interest was stipulated for, and the usufruct does not exceed a legal rate, the mortgagee must be considered as having agreed to take that and rest satisfied with the security the land afforded for regular payment. We therefore modify the judge's decree, by declaring plaintiff entitled to recover possession when able to pay up the amount of the principal of his debt, defendant retaining the land as security for interest till such debt is paid" (*a*).

The parties may make any conditions or covenants they please, so long as they are not in themselves illegal (*b*), as,—that the mortgagee in possession shall pay the mortgagor a certain allowance or rent (*c*): that the loan shall be repaid by instalments, and that in default of payment of any one instalment, the mortgagee shall be entitled to foreclose for the balance then due (*d*): that no payment made by the debtor shall be allowed, unless it is duly endorsed on the deed (although the Courts will, notwithstanding such a condition, admit proof of payment of a sum not so endorsed) (*e*): that after payment of Government revenue and village expenses,

(*a*) S. D. A. 1860, v. 2, p. 223. (*b*) N. W. P. v. 7, p. 307.
(*c*) S. D. A. 1852, p. 577. (*d*) N. W. P. v. 7. p. 322.
(*e*) S. D. A. 1853, p. 544.

the mortgagor shall pay to the mortgagee the entire surplus collections, and also all that may be derived from alluvion, and that if in the month of Jeyt in any year the whole surplus is not paid to the mortgagee, he shall be entitled to enter into possession (*a*) : that if any ground shall be lost from the encroachment of a river bordering on the estate, the mortgagor shall make good the loss, and if any thing is gained from the same river, the mortgagee shall make an allowance for it (*b*) : that a third party named, as well as the mortgagor, shall have the right of redeeming (*c*): that the mortgagor shall make good the balances of rent unpaid by cultivators (*d*): that the mortgagor will not alienate or mortgage his interest until the debt is paid off with interest (*e*): that the mortgagor, not retaining possession, shall pay the Government revenue,—and any other similar covenants.

The property intended to be mortgaged should be described, so that it may be readily recognised and identified. When there are villages or other places well defined, their names will suffice : in other cases the boundaries should be given.

It seems that future words, such as, "and whatever property I may hereafter acquire," or words which are general and do not refer to any specific property, will not give any lien to the mortgagee, as against an intermediate *bona fide* purchaser. Where there was a mortgage of certain

(*a*) N. W. P. v. 8, p. 70. (*b*) S. D. A. 1862, p. 928.

(*c*) N. W. P. v. 3, p. 187. (*d*) N. W. P. v. 7, p. 482 ; v. 8, p. 70.

(*e*) N. W. P. v. 6, p. 39 ; v. 7, p. 614 : *et passim.*

villages named, and in the concluding part of the deed authority was given to the mortgagee, on default of payment by mortgagor, to sell the villages pledged, as well as "any other existing property and whatever may hereafter be acquired," a village acquired by the mortgagor after the execution of the deed, was held not to be included in the mortgage, so as to defeat the claim of a purchaser at public auction in execution of a decree of Court. The Court said that independently of the fact, that the mortgagor was not possessed of the village at the date of the deed, the words were to be treated as mere surplusage, because without them all his property was equally liable to make good the mortgagee's claim should the pledged estate prove insufficient (*a*). In another case it was decided, that an agreement by a debtor to discharge a debt by instalments and "not to alienate any part of his property,"—the property not being specified,—"until the debt had been paid," did not operate as a mortgage, or vitiate the title of a *bona fide* purchaser from the debtor. But it was declared to be doubtful whether, after the debtor has committed a breach of his agreement, "the creditor is any longer bound to act on the forbearance stipulated for by the *kistbundee*, and may not *at once* demand payment in full of the debt due to him" (*b*).

According to a decision of the Calcutta Court, all conditions are null and void which are to the effect that the mortgagee shall, on default being made by the mortgagor, have power to

(*a*) N. W. P. v. 7, p. 265. (*b*) S. D. A. 1855, p. 353.

sell the mortgaged property, and so repay himself without applying to the Court or acting under its directions. A mortgage deed gave the mortgagee a power of sale over the estate, in case default should be made in payment of the mortgage money on a day named: the mortgagee sold under the power, and the purchaser brought a suit against the mortgagor to obtain possession of the land so sold to him. The Court refused to recognise the validity of such a power, or to give any assistance in carrying it into effect. The judgment of the Court,—which was based on the principle often brought forward, but not very consistently carried out, that the mortgagor is as much as possible to be protected against the mortgagee,—was delivered in a long and elaborate dissertation on the subject of mortgages (*a*). "Such a condition might be perfectly consistent with the laws of a great commercial country affording every facility to the capitalist lender, but, at the same time, be quite inconsistent with the laws of a country deriving the great bulk of its revenue from the land, and as a recompense for the stringency of the rules under which it is compelled to collect its revenue in order to carry on the Government (sale of the estate being the penalty of default,) affording every possible protection, in his private transactions, to the land-holding borrower. The Regulations will be searched in vain, for any express enactment prohibiting the sale of a mortgaged estate under power of sale. But such a power is repugnant to the principle of the Regulations enacted by Government for regulating the

(*a*) S. D. A. 1847, p. 354.

transfer of immoveable property in satisfaction of debt in general, and in satisfaction of debts on mortgage in particular. The regulations do not sanction, in any case, the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself."

Such a power is therefore of no effect, as the law at present stands. But it may be doubted whether the dread of injustice to the mortgagor, which led the judges to the opinion which they formed, is sufficient to outweigh the manifest convenience and advantage to both parties which arise from a sale unaccompanied by the expense and delay by which litigation is at all times attended. Moreover except where there are strong reasons for it, interference with arrangements fairly made between individuals is much to be deprecated. There is nothing *primâ facie* inequitable in such a power, and if in fact any great oppression is worked by the mortgagee or the land is sold for a manifestly unfair price, the mortgagor still has his remedy through the Courts.

In England also, it was once doubted whether such powers should be upheld and encouraged, and for a time the inclination and the decisions of the Courts were against them. But for a very long period, they have been uniformly supported and enforced. A power of sale on default is given to the mortgagee in almost every English mortgage deed: and it is constantly acted upon, without any general complaint being heard of the evil effects produced thereby. On the con-

trary, such powers are found in practice to be very useful, and to be the means of avoiding much expense and delays; while in the event of any abuse of the privilege they confer, the mortgagor has no difficulty in obtaining relief from the Courts. The observations of a well-known writer on the subject of English mortgages, are very much to the point (*a*): "Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of Equity, but they were groundless: a slight consideration will shew that they are not within any of the mischiefs intended to be guarded against by the Courts of Equity, for they give nothing to the creditor beyond his principal interest and costs: they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt."

There does not appear to have been any decision of this question in the Agra Court: so that there such a power may perhaps be held to be valid.

With respect to the amount of interest for which the mortgagee may stipulate, and which he may recover, a very great change in the law has been effected by the abolition of the usury laws. Since the passing of Act XXVIII of 1855, interest may be contracted for at any rate on which the parties choose to agree. But as to contracts made before the passing of that Act, it is otherwise: for no agreement to

(*a*) Coote, p. 124.

pay interest at a higher rate than 12 per cent. per annum can be enforced, if it was entered into prior to the passing of Act XXVIII of 1855 (*a*). By making such an agreement, the lender could not possibly gain any thing himself, but he might greatly benefit his debtor: for no decree for the payment of interest even at 12 per cent. or less, can ever be given on such contracts, while in certain cases, the whole transaction being null and void, the lender will be unable even to obtain a decree for the repayment of the principal monies advanced by him.

By Section 8, Regulation XV of 1793 (*b*), it is enacted, that "the Courts are not to decree any interest whatever, in any case where the bond or instrument given for the security and evidence of the debt, shall have been granted on or subsequent to the 28th of March 1780, and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date;" and by Section 9 of the same Regulation, "nor to decree any interest whatsoever in favor of the plaintiff, in any case when the

(*a*) A question may be raised as to whether a contract made between the 19th September 1856 and the 1st Jnnuary 1856, is subject to the Usury Laws or not. The doubt arises from the manner in which Act XXVIII. of 1855 is expressed. Sec. 7 of that Act says, that the rights of parties shall not be affected in respect of contracts entered into *previous to the passing of this Act.* Sec. 8 says, that the Act shall *commence and take effect* from the 1st of January 1856. The Act received the assent of the Governor-General, *i. e. was passed*, on the 19th September 1855. According to Sec. 7, contracts made after that date fall under the new Act: according to Sec. 8, they do not do so if made before 1st January 1856.

(*b*) XXIV. 1803, Secs. 7 and 8: Reg. XVII. 806, Sec. 2.

cause of action shall have arisen on or subsequent to the 28th of March 1780, when a greater interest than is authorized by this Regulation shall have been received or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever, nor to give any other judgment but for dismission of the suit, with costs to be paid by the plaintiff." So that conditions by which it has been attempted to secure more than the principal sum advanced with interest at the rate of 12 per cent. per annum, are under the old law void not only as to the interest stipulated for in excess of that which the law allows, but as to the legal interest also: and should the attempt to secure interest at an illegal rate, have been made in such a manner as to be considered by the Court to be "elusive" of the law, a suit brought on the contract will be dismissed with costs, and neither the principal nor the interest will be recovered.

In a case of bye-bil-wufa, the mortgagee having exacted illegal interest by deducting from the principal, his suit to have the sale made absolute was dismissed with costs, as the transaction was a device contemplated by Section 9 of the law against usury (*a*). And so, when the deduction was made in the shape of *dharat,* or discount (*b*).

There was a regular mortgage by conditional sale on an actual advance, and at the same time, the mortgagor transferred

(*a*) Sel. Rep. v. 5, p. 8. (*b*) Sel. Rep. v. 5, p. 79.

absolutely to the mortgagee certain other land, without any consideration, but under pretence of the transfer being in payment of charges for drawing conveyances, &c. This was held to be "elusive" of the usury law, and the suit of the mortgagee to render the conditional sale absolute, was dismissed with costs (*a*).

A deed in which sums which had not then been paid, were admitted as having been received, and an engagement entered into to pay interest on them from the date of the deed, that is, for a time before payment of them, was held to be usurious and "elusive," and a suit founded on it was dismissed with costs (*b*). From the report of another case it seems that the deduction from the principal sum lent, of five per cent. under the name of gomasta's fees, and four annas per cent. as interest, would, if proved, have been held by the Court to bring the case under Section 9, Regulation XV of 1793 (*c*).

And a transaction is equally liable to be set aside whether it consists of one, or of several sepate agreements, and even though the deed on which alone the suit is brought, is when taken by itself perfectly free from any appearance of usury.

In a suit to obtain possession of certain premises, under a deed of bye-bil-wufa, where the mortgage had been foreclosed and the sale become absolute,—it appearing that 12 per cent. per annum was the rate of interest stipulated in the deed to be paid, and that the mortgagor had granted a separate bond

(*a*) Sel. Rep. v. 5, p. 346. (*b*) S. D. A. 1852, p. 516.
(*c*) S. D. A. 1853, p. 268.

in which he undertook to pay one per cent. additional,—the transaction was held to be evasive of the law, and the suit was dismissed with costs. Here the mortgage deed, which was in itself quite good, was the agreement on which alone the mortgagee's suit was founded: but it was vitiated by the existence of the other instrument (*a*).

A *theeka* lease of land was granted, ostensibly to the agent of a banker, who had just advanced a sum of money to the lessor; the banker at the same time got a mortgage of the same property, and an assignment of the *theeka* rent, which of itself more than covered the stipulated interest on the loan (8 per cent). After paying the Government revenue and deducting the interest at 8 per cent. there remained such surplus receipts as gave the mortgagee, in the whole, interest at about 14 per cent. In the lease it was stipulated that no account of profits should be asked for by the lessor and mortgagor. The mortgagor sued to recover possession, alleging that the deeds were elusive of the usury laws, and that the principal, with the stipulated interest at 8 per cent. had been liquidated from the usufruct. The Court held that the two deeds were to be considered as one transaction, in the light of a simple usufructuary mortgage so contrived as to elude the usury laws. But, "as the mortgagor had not come into Court to ask that the principal should be declared forfeited in consequence of infraction of the law of usury," he obtained his decree for possession only on

(*a*) Sel. Rep. v. 4, p. 10.

shewing that the principal sum with the stipulated interest, had been realised from the usufruct (*a*).

A agreed to lend B rupees 8,000 for three years, at 18 per cent. interest. To provide for the payment of interest at this rate, without allowing it to appear that there had been any evasion of the usury laws, recourse was had to the following device. Two bonds, one for rupees 5,000, the other for rupees 3,000 were executed by B, who at the same time pledged a certain talooqua, as security for the re-payment of the loan. B's two sons gave kubooleuts to pay rupees 960 annually for three years, as the rent of the pledged talooqua. This covered legal interest at 12 per cent.; for the remaining 6 per cent. a third bond, for which no consideration passed, was given by B for a sum equal to three years' interest on rupees 8,000 at 6 per cent. The Court "entertained no doubt that the device shewn to have been resorted to, to secure a higher rate of interest than is authorised by law, brought the case within the scope of Section 8 of the Regulation of 1803 (being the same as Section 9 of Regulation XV of 1793), and the objection having been pleaded, that the lender was liable to the prescribed penalties, which the Court had no alternative but to enforce," the decision of the lower court was reversed, and the suit of the lender dismissed with cost (*b*).

A contract, the precise terms of which are not easily gathered, was held to be "elusive," and the plaintiff's claim was dismissed with costs. The contract is thus described

(*a*) S. D. A. 1842, p. 678. (*b*) N. W. P. v. 8, p. 411.

by the Court in giving judgment on an application for a review. "The contract in the present case is complicated. A sum of money is lent, and it is to be re-paid at a fixed time, or a quantity of grain equal to the value of the loan is to be provided, not at the market rate of *that day* when it was dearest and a comparatively small quantity would have sufficed, but at the market rate of the next month, when it would be at the lowest rate, the crop having been just reaped, and therefore a very large quantity only would have sufficed. A second condition was added, that failing to pay the loan, or to furnish the quantity of grain at the cheapest rate equal to it, a sum of money was to be paid which would purchase the quantity of grain valued at the dearest rate. In short a claim is thus made for rupees 3,975 upon a bond of a loan of rupees 2,000 after a lapse of only eight months" (*a*).

But this decision has since been expressly overruled in a case in which judgment was delivered in the following terms (*b*): "The contract on which this action is based is denominated *soudaputtro*, and by it the defendant bound himself in consideration of an advance of rupees 21 made to him on the 15th Sawun 1256, to supply to the plaintiffs 21 maunds of *tethoor* or hooley powder, in the following Pous, in default thereof to pay to plaintiffs the value of the above quantity at the current selling price of the article in Phalgoon. The

(*a*) S. D. A. 1855, p. 452. *See* p. 241; also 12th November 1845 p. 417.

(*b*) S. D. A. 1857, p. 118.

defendant having failed to deliver the powder stipulated, this action was brought for rupees 42, being the price current of 21 maunds, at which hooley powder was selling in Phalgoon. There is, in our opinion, nothing illegal in the stipulation of this contract, which is clearly a contract to supply a certain article of trade at a particular time to enable the plaintiffs to take advantage apparently of an expected rise in the price at a particular season. This cannot be construed into an attempt to evade the provisions of Section 9, Regulation XV of 1793." And the course pursued by the Court in this instance has been followed in many subsequent cases (*a*).

In one of these cases (*b*) the Court said that in construing Section 9 of Reg. XV of 1793, it would not be a fair interpretation of it, to bring within its terms every contract, the ultimate effect of which was to secure to the lender more than the legal interest of 12 per cent. for a loan of money. "A contract, it appears to us, is without the terms of that law, whatever its ultimate effect may be, provided it be on the face of it a fair and open transaction, and one in which the borrower takes *the chances* of the market price of an article at a particular period, when covenanting regarding the mode in which his debts may eventually be repaid."

If the condition of re-sale (*i. e.* the condition on which a mortgage by conditional sale is declared to be redeemable) is such that, if carried into effect, the mortgagee would receive

(*a*) S. D. A. 1857, pp. 183, 189: 1858, pp. 457, 913, 961.
(*b*) S. D. A. 1857, p. 183.

more than the principal and legal interest, this may be considered an evasion of the usury law.

Lands were sold on payment of rupees 4,401, the vendee covenanting by a separate deed not to take possession until the lapse of a year and four months, at the end of which time the vendor might re-purchase on paying rupees 5,801, otherwise the sale to be absolute. The vendor did not re-purchase, and the lender sued for possession as on an absolute purchase. But the transaction was held to be a bye-bil-wufa with a stipulation for the payment of illegal interest, and to be evasive of the regulations against usury. However, under the special circumstances of the case, the principal was not declared forfeited, but only the interest (*a*).

Forfeiture of principal as well as interest will be enforced, only where the contract is so covert as to be manifestly a device, implying disguise and trickery. There must be unexceptionable proof of a design to evade the law, before the penalty of dismissal with costs will be imposed (*b*). Therefore an open and avowed stipulation for securing illegal interest, the interest in excess of 12 per cent. being called "mercantile excess," was considered as coming under the less penal clause, involving the loss of the interest only (*c*).

So where the sum advanced being only rupees 600, the deed of mortgage shewed the annual produce of the land pledged to be rupees 142, of which the mortgagee was to be allowed

(*a*) Sel. Rep. v. 2, p. 146. (*b*) N. W. P. v. 10, p. 43.
(*c*) Sel. Rep. v. 5, p. 10.

rupees 127 as interest, paying the remaining rupees 15 to the mortgagor (which gave him about 20 per cent. interest), this was held to be no attempt to evade the usury laws. One Judge however dissented, as the deed did not mention the word interest at all, but spoke of it as "profit," *intifa*,—a device which he was of opinion rendered the deed evasive, and the lender's suit liable to dismissal with costs (*a*).

A bond in which it was stipulated that the borrower should pay the principal sum borrowed with interest at 81 per cent. per annum, was held to fall under the less penal clause, the principal being recoverable, but without any interest. "There was here no attempt to elude the law by any device, inasmuch as the bond openly stipulated payment of interest in excess of that allowed" (*b*). In another case, the Court said: "the petitioner only claims the right to recover the principal of his debt, on the ground that the contract in excess of that allowed by law is *clearly stipulated* in the bond, and therefore the cause should have been decided under Section 8, Regulation XV of 1793, and not under Section 9. The plea is a good one; we therefore reverse the Lower Court's judgment. There was no attempt to *elude* the rules prescribed, by deduction from the loan by any device" (*c*). And an open and avowed charge of 2 per cent. as commission for making up accounts, (in addition to interest at 12

(*a*) S. D. A. 1847, p. 459.
(*b*) S. D. A. 1852 p. 1132; 1153, p. 893; 1857, p. 849.
(*c*) S. D. A. 1855, p. 336.

per cent.), was held to be legal, *and not usurious*,—certainly not *elusive* (*a*).

In a case, where the bond contained a stipulation for only legal interest, but the defendant set up a case of usury attempting to prove a verbal agreement by which he was to pay 12 per cent. additional, the Court declared;—firstly, that this verbal agreement had not been proved, and secondly, that if it had, it would not have brought the bond within the terms of the usury law so as to cause the forfeiture of the bond. "Such a verbal agreement could not admit of being enforced, and if the illegal interest so stipulated were paid, it could only be at the option of the borrower. The inutility of such a stipulation, renders it extremely improbable" (*b*.) It may be remarked that in delivering the above judgment, it seems to have been forgotten by the Court that it matters not how fully the parties may at the time of contracting have given their consent, or with what solemnities the contract may have been entered into,—in no case whatever, can the payment of illegal interest be enforced: and if illegal interest is ever paid, it is so "only at the option of the borrower."

In one case, it was said that had the deed on which the suit was brought not been registered, Section 9, Regulation XV of 1793, would have been applicable:—but as it had been registered, Section 8 was held to apply, and the interest

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(*a*) N. D. P. v. 10, p 276, and cases there quoted.
(*b*) S. D. A. 1853, p. 259. *See* S. D. A. 1858, p. 643.

only was declared forfeited (*a*). This, however, is not a satisfactory decision, and cannot be looked on as establishing that registration will take a transaction out of the scope of the more penal section, if it would otherwise fall under it. Registration in no case gives any great additional weight to a deed, and its principal object is merely to afford satisfactory proof of the fact of the deed having been actually executed prior to the date on which it was registered. The authenticity and validity, and consequently of course the legality, of a registered deed, must be established just in the same way as that of an unregistered one which has never left the hands of the parties (*b*).

It will be seen from these decisions that, it frequently is not easy to say whether a case comes under the more or under the less stringent section of the usury laws. We can only gather, that the greater the pains taken to conceal the existence of an agreement for usurious interest, the greater is the risk of loss to the lender. What benefit can ever have arisen from drawing a distinction between cases "elusive," and those, not so, it is difficult to perceive: for to say that a man who openly stipulates for illegal interest shall run the risk of losing only that interest, while the man who makes the same agreement covertly shall risk not only the interest but the principal, seems without affording any substantial protection to the borrower, merely to give encouragement to the more open infraction of the law. Laws against usury, have at all

(*a*) Sel. Rep. v. 2, p. 146.

(*b*) S. D. A. 1853, p. 345; W. P. v. 6, p. 266: Act XIX of 1843.

times been found exceedingly difficult to enforce, especially in this country, where they have not in fact been steadily or rigidly carried out. The forfeiture of principal as well as interest is so severe a punishment that the Courts have always had a tendency to bring as many cases as possible under the more lenient provision of the law.

But no contract will be bad under the usury laws, unless there is an attempt to obtain, in the whole, more than the principal with legal interest. Therefore, when the mortgagee, who was a Mahomedan and wished to avoid the appearance of taking interest, actually advanced only rupees 1,300, but consolidating the legal interest of that sum for five years (rupees 781), the period during which the mortgage was made redeemable, took a mortgage bond for the aggregate sum of rupees 2,081;—it was held, that he was entitled to recover the sum actually advanced, with interest at the rate of 12 per cent. per annum, as there was no attempt or intention in fact to get more than legal interest (*a*).

It is a common practice in drawing up bonds, payable by instalments, to provide for the interest accruing during the currency of the bond, by adding a certain sum to the original debt, and taking a bond for the whole sum: and this may be done without any infraction of the usury laws, so long as the additional sum stipulated for as interest, does not exceed the limit prescribed by law (*b*).

(*a*) Sel. Rep. v. 2, p. 255. *See* S. D. A. 1852, p. 577.
(*b*) N. W. P. v 9, p. 487.

In an agreement mortgaging land the rents of which amounted to about rupees 2,500, it was stipulated that out of these rents, the mortgagee should pay himself interest at 10 per cent. with 10 per cent. as expenses of collection, and should discharge certain public burdens, devoting the surplus to the reduction of principal,—and that if the rents fell short of rupees 2,500 a year, the mortgagors should make them up to that sum. This was held to be a good agreement, and not usurious; and the rents falling short of rupees 2,500 a year, the mortgagee recovered the deficiency from the mortgagor (*a*).

In one case, where there was a condition in a mortgage deed (the mortgage being of an usufructuary nature), that the mortgagor should not demand a settlement of mesne profits when redeeming, the Court expressed an opinion that such a condition had a tendency to evade the laws against usury, but held that such a stipulation was to be disregarded, and the general rule as to redemption, applicable to mortgages of the nature of the one in suit, acted upon (*b*).

So in like manner, a condition that the mortgagor shall have no right to claim an account of the proceeds of the estate during the occupancy of the mortgagee, cannot (and no similar special condition between the parties can) bar the operation of the law, by which the lender "is to account to the borrower for the proceeds during his possession." It appears to have been the opinion of one judge, that if the point were raised by the mortgagor, such a condition would most likely

(*a*) S. D. A. 1848, p. 872. (*b*) N. W. P. v. 7, p. 307.

be held to render the whole bond void, as being illegal and evasive of the usury laws (*a*). And there can be no doubt that such conditions are in most instances usurious in their nature.

In the case of Hunoomanpersaud Panday (*b*) to which we have had occasion to refer so frequently, the mortgagee was put in possession under a lease at a fixed rent, and claimed not to be liable to account for the sums received by him; but the Privy Council ruled that the lease was merely part of the mortgage security and was intended to create not a distinct estate, but only a security for the mortgage money. "As it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and the decree of Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore proceeds on the right principle and is in accordance with the true nature of the security and the spirit of the Regulations:"—and their Lordships added that, under the Regulations, unless the principal is meant to be risked and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be received only as a security for the mortgage debt and must be restored when the debt, interest, and costs are satisfied by receipts.

In contracts made after Act XXVIII. of 1855 came into force, conditions that the mortgagee shall not be called on to account and the like may be legal; for in such contract

(*a*) S. D. A. 1851, p. 632: N. W. P. v. 5, p. 456. *See* Sel Rep. v. 1, p. 11
(*b*) Moore's Indian Appeal Cases, v. 6, p. 393. *See Appendix.*

interest is to be calculated at the rate stipulated therein (*a*), and an agreement that the usufruct of property mortgaged shall be allowed in lieu of interest will be enforced (*b*).

The rules against usury do not, however, apply to cases in which the principal money is meant to be risked, the regulations being held to refer only to common cases, where there is supposed to be fair security for the principal (*c*). If the lender risks his money, this is considered a sufficient ground for extraordinary interest being allowed him.

In one very remarkable case (which is referred to merely because it contains a recognition of the principle just stated), a surety who had advanced money to pay the Government revenue was allowed to recover from his debtor more than 12 per cent. interest, as a compensation for the risk run by him. "He who stands security for another for the payment of large sums to Government, who never remit an iota of their dues, would need to have the prospect of some profit to himself" (*d*).

There was a zur-i-peshgee lease: the farm was given out and out, the period for its continuance being fixed, and there was to be no claim by either party for profit or loss. The case was in fact one of absolute purchase of a lease, and it is difficult to see how any question of usury could have been raised. It was raised, however, and it was held that there was nothing usurious in the contract, however large the profits

(*a*) Sec. 6. (*b*) Sec. 4.

(*c*) *See* Hunoomanpersaud Panday's case, p. 59, *supra*.

(*d*) Sel. Rep. 3, p. 261.

realised might be. Whether the amount paid was realised or not, the farmer could not continue to hold the land after the period fixed, so that there was a risk, and no usurious attempt. As the farmer could not claim in case of loss, so neither could he be called upon to refund any profits obtained by him (*a*).

And the same principle is recognised in another case, reported as one of usury, though not in fact coming under that head at all. A bond for rupees 4,000, with interest at 12 per cent. was bought up for rupees 1,000, the seller covenanting for title. The purchaser sued the parties liable on the bond, and the Court held that the trtnsaction was not usurious, the purchaser having paid rupees 1,000, for the chance of getting rupees 4,000, but having risked the loss of the whole (*b*). It seems here to have been forgotten, that in one case only can a contract be usurious, namely, where there is an agreement that the borrower shall pay, in the whole, more than the sum received by him with legal interest. If the contract is not usurious from the first, no dealing between the lender and a third party can make it so. The price paid by the purchaser of the lender's rights, could not by any possibility affect the nature of the contract. The borrower, so long as his own position was not interfered with, had nothing to do with any arrangements between the lender and a purchaser from him, and ought not to have been allowed to go into the matter at all.

(*a*) S. D. A. 1849, p. 134: 1857, p. 1232.
(*b*) S. D. A. 1852, p. 542.

It has been held that when the suit in which the evasive nature of the transaction is shown, is one brought by the borrower, the provisions of the law by which neither principal nor interest are recoverable will not be put in force, unless the plaintiff expressly pleads that his case falls within those provisions. Thus, if a mortgagor sues to redeem on the ground of his debt having been paid off with legal interest, he will fail in his suit, if he does not make out his case, although the mortgage transaction turns out to be of a highly usurious and elusive kind *(a)*. And a person pleading a plea of usury, will be bound by the terms of his plea, and will obtain no relief but that which he seeks: the Court will not carry his defence further than his own allegations do. Thus, where the plea was that the transaction fell under Section 8, of Regulation XV. of 1793, and that therefore the defendant was not bound to pay interest, the Court decreed payment of the principal, although it expressed an opinion that Section 9 was applicable to the case, and that if it had been so pleaded, they would have declared the principal also to be forfeited *(b)*.

When the plea alleged a verbal agreement to pay double the legal interest, and the evidence went to prove a deduction made from the sum advanced,—the whole defence was rejected, as no defence not in accordance with the plea, could be admitted *(c)*. And when the due execution of a deed (which on

(*a*) S. D. A. 1852, p. 678. (*b*) S. D. A. 1852, p. 678.
(*c*) S. D. A. 1853, p. 259.

the face of it shews the receipt of legal consideration) is admitted, and the defendant sets up a plea of usury, the whole burden of proof will lie upon the defendant (*a*).

But it does not seem, that when a lender or mortgagee sues to enforce his claim, Sec. 9 of Reg. XV. of 1793 ought not to be applied, unless when expressly pleaded. It is true that an observation incidentally made by the Agra Court in deciding another point, seems to imply that such would be the case. The question however, was not before the Court: and the language of the Regulation appears imperatively to require the Court to dismiss with costs, any suit brought by the lender, to which the section applies, whether it is specially pleaded by the borrower or not (*b*).

It not unfrequently happens, that one who has lent money on mortgage, subsequently makes further advances to the mortgagor, it being agreed that the property mortgaged shall be charged with the re-payment of these further advances (*c*): "The practice of taking bonds of subsequent date to the original mortgage, which is thereby rendered liable for the discharge of the aggregate amount, is far from uncommon, and has been fully recognized by the Court" (*d*). In such cases, the land will be considered as mortgaged for the aggregate amount of the original and subsequent loans. It is, however, only when it is expressly agreed that the subsequent

(*a*) S. D. A. 1858, p. 1321. (*b*). N. W. P. v. 8. p. 411.
(*c*) N. W. P. v. 7, pp. 34, 248, and 607, v. 8, pp. 112, 692, and 726.
(*d*) N. W. P. v. 8, p. 726.

loan shall be a further charge upon the land, that it will be treated as such (*a*).

If loans are made by way of further charge and questions as to priority arise, the mortgage will, no doubt, as to each particular sum, be considered to bear date only from the time when that sum was charged on the mortgaged lands, and will not, as to the subsequent advances, take the date of the original mortgage contract. But there are no reported cases in which the question of priority has been satisfactorily discussed or decided: and it is scarcely possible to draw any distinct deduction from the few cases which exist, bearing on the point.

In a case (*b*) in which it was held that a subsequent mortgage deed was tacked to a prior one, an objection was raised to the mode in which the accounts had been taken in the Lower Court. The later deed contained a stipulation that the interest should be paid "when the mortgage was redeemed," while the original deed provided that it should be paid "before the principal." The Lower Court in taking the accounts upon the two mortgages together, allowed "intermediate" interest. It was contended that this was wrong, and that the principal should have been first credited. The Court thus disposes of the objection: "With respect to this plea, the Court are of opinion that as it has been ruled that the bond of the 3rd April 1846 was tacked to the original mortgage debt, it must be accounted for agreeably to the

(*a*) N. W. P. v. 9. p, 465 : 1860, p. 122.
(*b*) N. W. P. v. 9, p. 465

same rule as the original mortgage debt itself, *viz.* that which is fixed by the practice of this Court for the general adjustment of mortgage accounts and without advertence to the special stipulations of the bond. It cannot be regarded as the appellants would wish it to be, as a perfectly separate and independent loan transaction."

In another case *(a)* the Lower Court gave a judgment which contained the following passage: "The mortgagor Chujjoo Mull (defendant) urges, that the property was in his possession long before plaintiff's mortgage. But all former deeds by which he held, are annulled by the last one, under which he holds possession at present. If this were not the case, there was no use in writing a new deed, as this deed is clearly of a subsequent date to that of plaintiff's; it follows that plaintiff holds a prior lien on the property." On this the Agra Court remarks: "The Court are unanimous in recording their dissent from the doctrine propounded in the foregoing extract. They observe that the 'former deeds' held by the appellant Chujjoo Mull are by no means 'annulled by the last one, under which he holds possession at present.' They are, it is true, *superseded* by the latter deed; but up to the time of the latter instrument's execution, the previous deeds, if genuine, must be held to be in full force. The Judge's remark that 'if this were not the case, there was no use in writing a new deed,' is founded on an erroneous view of the case. There was an *obvious* use in the new deed, as it included fresh demands of

(*a*) N. W. P. v. 7, p. 34.

Chujjoo Mull against the subscribing parties for which the former deeds provided no security; and the amount specified in the new bond, represented the consolidated sum due to the bondholder up to that date, and *repledged* the property, which had been theretofore hypothecated for a smaller sum. Equally unsound is the Judge's declaration 'that as this deed is clearly of a subsequent date to the plaintiff's, it follows that the plaintiff holds a prior lien on the property.' If this doctrine were admitted, a wide door would be opened to fraud; a dishonest debtor, simply by antedating a bond, might invalidate a genuine deed of later date. The question for decision in the present case is, not the order of dates in the conflicting deeds, but whether the owners of the property in dispute were competent to execute the bond which constitutes the plaintiff's cause of action, which they clearly were *not* if the authenticity of Chujjoo Mull's deeds of the 8th October 1824, and 17th April 1833, be admitted,"—which deeds, or one of them, must apparently have contained a proviso against alienation by the mortgagor until the debt was paid off.

The further charge ought to be made by a new deed applicable only to the sum to be charged: and when the original mortgage deed is thrown aside, and a fresh deed executed, by which the property is mortgaged for the consolidated sum, there is danger of the original mortgage, as well as the further charge, being held to rank only from the date of the later deed.

This observation, however, is not supported by the case last referred to, (*a*) or by the following case, which in truth is not one of further charge at all.

A mortgagor having made some payments, the accounts between him and the mortgagee were made up, and a fresh mortgage deed executed which, after reciting the previous mortgage and the payments in respect of it, again mortgaged the same property on the same terms as those contained in the original mortgage deed, as a security for the unliquidated balance. The original mortgage deed was then given up and cancelled. The mortgagor had mortgaged the same property to a third party subsequent to the date of the original mortgage, but prior to the mortgage given as security for the unliquidated balance. The Court considered that the mortgage for the unliquidated balance was merely a *continuation* of the first mortgage, and that the substitution of the last deed for the first did not terminate the first mortgage, or give priority to the third party to whom the property had been intermediately mortgaged (*b*).

Regulations III. of 1793, Sec. 15, and VIII. of 1805, Sec. 6, prohibited the Courts from decreeing the payment of any sum due on a tumussook or bond, unless the bond were proved to have been executed in the presence of two credible witnesses, or the payment of the sum demanded on the bond, or some other valuable consideration for it having been received, were proved

(*a*) N. W. P. v. 7, p. 34.
(*b*) S. D. A. 1856, p. 942: 1857, p. 1184.

to the satisfaction of the Court. Much inconsistency is to be found in the decisions of the Courts upon the construction of these sections. It has sometimes been ruled that the consideration must in every case be proved by the plaintiff even though he holds a bond duly executed: on the other hand, it has almost equally often been ruled, when a bond duly executed is sued upon, that the defendant who denies receipt of the alleged consideration must prove he did not receive it, and that the burden of proof lies upon him and not on the plaintiff. But it is needless now to follow at length the discussion which have taken place, for the law referred to has recently been repealed so far as it relates to Bengal (*a*), and will be repealed very soon as to the North-West Provinces also. In the meanwhile it will suffice to observe that the Calcutta Court has in all its later cases held—much in conformity with the tendency of the decisions in the Agra Court—that when a party admits the execution of a deed by himself, but seeks to avoid liability under it, by pleading that full consideration according to the terms of the contract has not been received by him, the proof of such non-receipt rests upon *him*, and that in the absence of proof he must be held to the terms of the deed to which he has deliberately affixed his signature. The presumption is that the terms of the deed have

(*a*) Reg. III. 1793, Sec. 15, is repealed by Act X. of 1861: but Reg. VIII. 1805, Sec. 6, is not, and consequently is still in force in the N. W. P. Its speedy repeal however may be looked upon as certain.

been fully carried out: but this presumption may be rebutted, and if it is so, the whole contract is null and void *(a)*.

(a) S. D. A. 1857, p. 1114. *See* also 1857, p. 925: 1858, pp. 41, 55, 812, 1287, and 1321: 1859, pp. 113 and 1251: 1860, p. 419.

CHAPTER V.

OF THE REGISTRATION OF DEEDS.

No particular ceremony is required on the execution of a deed: but it should be executed in the presence of at least two credible witnesses. A deed is not void simply because some of those who are named as parties to it do not sign it, and are not present at its execution by the others. In such a case the deed will, so far as circumstance admit, be binding on those who execute it, but it will not affect those who do not *(a)*.

Delivery of the deed which evidences the transfer of property is not necessary condition to the perfectness of the conveyance; but, generally speaking, delivery evidences the completeness of the transaction, and non-delivery will necessarily operate very powerfully to bar the recognition of any claim founded upon the deed *(b)*.

In a case of the sale of land, it was held that the right of *property* had passed to the purchaser on the execution and delivery of the deed of conveyance and payment by him of

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(a) N. W. P. v. 11, p. 72. As to presumption of consent arising from signing a deed merely as a witness, *see supra*, p. 29, note *(b)*.

(b) N. W. P. v. 4, p. 219: *see* v. 5, p. 364.

part of the purchase money, but that the right of *possession* would remain in the vendor until the residue of the purchase money was paid *(a)*. "The contract of sale is, speaking generally, perfected by consent alone, and in the present case is evidenced by the execution and delivery of the deed of conveyance on the part of the seller and by the payment by the purchaser of a portion of the price agreed to."

A deed which was produced for the first time, long after the date on which it was alleged to have been executed, was rejected by the Court, who said:—"It is not sufficient in this country, that a deed which diverts real property from the channel in which it would naturally flow, should be executed and locked up in a box. There are means of giving unquestionable validity to documents, unexpensive and easy of access, and if parties interested refuse to use them, they cannot be surprised if the documents are rejected by the Civil Courts." *(b)*

It is generally to the advantage of all parties concerned, especially of mortgagees, to give as much publicity as possible to all contracts regarding land: and they ought to be registered and to be brought forward on any occasion on which the rights of parties in the pledged land are under discussion, —as for example when a settlement is going on *(c)*.

And any collateral or other deed favourable to himself

(a) S. D. A. 1860, p. 419.
(b) N. W. P. v. 5, p. 333. *See* S. D. A. 1855, p. 218.
(c) N. W. P. v. 5, p. 333: v. 8, p. 542.

which the mortgagee may have, should be on all occasions brought forward by him, along with the mortgage deed.

A mortgagee produced an ikrarnama alleged to have been executed three days after the mortgage deed, and containing terms much more favourable to him than were those of the deed. But the ikrarnama was rejected by the Court, because when application was made by the mortgagee for mutation of names in the malgoozaree register, the only deed mentioned or produced before the collector, was the mortgage deed. And the Court remarked, that if individuals will not avail themselves of the simple and obvious means afforded, of giving publicity to these transactions regarding land, they have only themselves to blame if the reality of those transactions is doubted when they are, after a lengthened interval, for the first time declared to have taken place *(a)*.

The fact of a deed not having been registered, creates a presumption against its genuineness, other things being suspicious *(b)*. On the other hand, a deed which has been registered and publicly made known at the time of execution, will not be set aside except on strong grounds *(c)*. And registration has been said to be "a publication of the deed to the world" *(d)*, and "a substantial issuing of the document" *(e)*, entitling one who says the deed is a forgery and who is likely to be injured by it, to sue to set it aside.

(a) N. W. P. v. 8, p. 601.
(b) S. D. A. 1854, p. 529 : 1855, p. 218 : N. W. P. v. 10, pp. 290. and 608.
(c) N. W. P. v. 9, p. 481. *(d)* S. D. A. 1856, p. 615.
(e) S. D. A. 1857, pp. 208. and 956.

An *intention* to register is of no avail: it must be followed by actual registration (*a*).

The registration should be made as soon as possible after execution, and in the district where the lands to which the deed refers are situated. Registration in a different district, creates a presumption against the deed (*b*).

A deed of mortgage which has been registered, will be entitled to satisfaction in preference to any other mortgage on the same property, whether of prior or subsequent date, which may not have been registered (*c*). Where there are two deeds of sale or of mortgage, one registered and the other not, that which is registered has the preference: and it has been said that it signifies nothing that at the date of the execution of the registered deed, the seller or mortgagor was not in possession of the premises sold or mortgaged, and had no rights remaining, having parted with all his interest in the property, under the prior but unregistered deed (*d*). On this point however, the law has recently been very differently laid down. The Court refused to recognise a registered deed as "authentic" (*e*) saying: "If the registered deed recites that the property conveyed by it is the property of the seller, while the proof on record shews that that party has already conveyed away and delivered possession of the same property to another party, the elements of authenticity are wanting, and the

(*a*) S. D. A. 1857, p. 840.
(*b*) N. W. P. v. 9, p. 149. *See* S. D. A. 1859, p. 1059.
(*c*) Act XIX. of 1843.
(*d*) N. W. P. v. 8, p. 297; S. D. A. 1853, p. 245.
(*e*) S. D. A. 1858, p. 1051. *See post*, p. 75.

proviso of the law forbids that preference should be given to such a document."

A simple mortgagee had had the mortgaged property sold under a decree: a second mortgagee who had subsequently obtained a decree attached the sale proceeds in satisfaction of his (the second mortgagee's) claim, on the ground that although his deed and decree were the later in date, his deed was registered, while that of the first mortgagee was not. The title of the first mortgagee was upheld, and the Court remarked that the time was past for inquiring into any preferential right the subsequent mortgagee might have considered himself entitled to set up (*a*).

The Act gives preference to registered, over unregistered deeds, only when the deeds are of the same character; and therefore, a registered deed of sale does not take priority over an unregistered mortgage deed of earlier date,—nor *vice versâ*. And a subsequent purchaser whose deed is registered, takes the property subject to a prior mortgage though it be not registered (*b*).

The fact of the person who obtains priority of registration of his deed, having at the time of registering, full notice, or being aware, of the existence of an earlier but unregistered deed, does not prevent his deed from having the preference (*c*)

(*a*) S. D. A. 1857, p. 147.

(*b*) S. D. A. 1852, p. 987: 1850, p. 77: 1857, p. 1667: N. W. P. v. 7, p. 124: 1860, p. 93.

(*c*) Act XIX. of 1843, Sec. 2: N. W. P. v. 6, p. 266: S. D. A. 1853, p. 335, *See contra*, S. D. A. 1847, p. 525.

But registration will not give precedence to a subsequent purchaser where a prior purchaser *bona fide* has actually been put in possession under his unregistered deed (*a*).

The authenticity of the registered deed which is relied on must be established to the satisfaction of the Court, and the Court must decide the question of authenticity, before deciding which deed is to have the preference. Where there were two sales, the first a *bona fide* one, but unregistered, the second a fictitious one, but registered, it was held that the deed recording a sale which never in fact took place, and for which no consideration was paid, could not be considered "authentic" under the terms of the Act, and that therefore, its being registered did not give it priority over the other. "There was no sale at all, but a mere pretence. A deed recording a fictitious sale cannot be considered authentic: an authentic document must be a record of a real or actual transaction, not of a fictitious one" (*b*).

It is difficult to say what the meaning of the ward "authenticity" really is, and there is some inconsistency in the decisions of the Courts on the question. It has been ruled that, under the Act, a deed is authentic, if it represents any real transaction, however fraudulent it may be; and one of the Judges of the Sudder Court in giving his decision in a case referred to above, (*c*) remarks:—"A person who, having sold

(*a*) S. D. A. 1857, p.

(*b*) S. D. A. 1853, p. 245: 1858, pp. 960, 1051: N. W. P. v. 9, p. 149: 1860, p. 267.

(*c*) S. D. A. 1853, p. 245.

his property, takes money for, and sells that property again, and the person with notice of previous sale who purchases the property, acts fraudulently, and the sale is a fraudulent one. The law however contemplates such sales, and from considerations of policy gives preference to the second deed provided it be registered. By providing further that the authenticity of the deed so preferred, must be proved, it cannot mean to bar its preference if fraudulent. But I am not prepared to say that a deed which is wholly fictitious, which records a sale which never took place, can be considered to be authentic."

The registrar must inquire into and ascertain the due execution of a deed presented to him, before admitting it to registration, but he has no right whatever to institute any inquiry as to the consideration which has passed. "The practice of making an inquiry into the payment and realisation of the consideration noted in deeds presented for registry, is quite irregular, and should be strictly prohibited. The registrars of deeds are required to ascertain the 'due execution' of the deeds preferred to them, but have no right or power to meddle with any other points, which it is the province of the civil courts to determine" (*a*). And an acknowledgment of payment of the consideration, if made before the registrar, has been held to be a mere form and no evidence (*b*). There can, however, be no sort of doubt that such an acknowledgment is

(*a*) The Agra Court (No. 803, 19th June 1850) to the Judge of Bareilly. Rep. Sel. Com. on Indian Territories, 1852, Ap. p. 614.

(*b*) N. W. P. v. 9, p. 183. But *see* S. D. A. 1856, p. 469.

just as little a mere form and is just as good evidence if made before a registrar, as it is if made before any other person. It may be no part of the business of a registrar to take such acknowledgments. But if, as a matter of fact, such an acknowledgment is made and can be satisfactorily proved, the Court is bound to receive it in evidence and to give the same weight to it as would be given to a similar acknowledgment if made to a person not a registrar.

CHAPTER VI.

OF STAMPS, AND THE VALUATION OF SUITS CONNECTED WITH MORTGAGES.

I. Of Stamps on Deeds.

All mortgage deeds must be written on stamped paper. It may be true that the Stamp law does not alter the operation of the law of property, and that an unstamped document passes the same rights as a stamped one (*a*). But until it has been properly stamped, no document can be used in enforcing the rights passed by it: practically, therefore, no deed is effective so long as it is not duly stamped. In many cases deeds may be stamped after execution (*b*); but this is not always so, and when it is, a heavy penalty has to be paid for the privilege.

The whole law as to stamps has recently undergone an entire change, in consequence of the enactment of Act XXXVI. of 1860, and more lately still of Act X. of 1862 G. G.,—each of which Acts repeals all previous laws on the subject. All deeds executed prior to the 1st day of October 1860, when

(*a*) *See* S. D. A. 1853, p. 191. This case, however, scarcely bears out the marginal note appended to the report of it.

(*b*) Reg. X. 1829, sec. 14: Act XXXVI. of 1860, sec. 13: Act X. of 1862, G. G. sec. 15.

Act XXXVI. of 1860 came into force, require to be stamped in accordance with Reg. X. 1829. Those executed on or after the 1st of October 1860, but before the 1st of June 1862, must be stamped as provided in Act XXXVI. of 1860. Those executed on or after the 1st of June 1862 must be stamped in the manner prescribed by Act X. of 1862 G. G. As cases belonging to each of those various periods will no doubt still frequently come before the Courts, it is necessary to consider what are the provisions of the law applicable to each period.

As to deeds executed before the 1st of October 1860.

All such deeds must be stamped as provided for by Reg. X, 1829 (*a*.) Under a General rule in schedule A annexed to

(*a*) Article 35 of Schedule A, Reg. X. 1829 declares that every deed of mortgage or conditional sale, kut-kubala bye-bill-wúfa, bhog-banduk, &c, with or without possession given, of or for any lands, estate, or property, real or personal, intended as a security for money due, or to be lent thereupon, also every deed or contract accompanied with a deposit of title deeds to any property, when the same may be made as the security for the payment of money due or lent at the time, is to be charged after the same manner, and at the same rates, as if in lieu of such deed of mortgage or the like, a bond had been taken for the sum due or lent at the time. And by Article 7, the following rates are declared to be payable on bonds :—

				Rs.	As.
If for any sum not exceeding		Rs.	25	0	2
Above Rs.		25 and not exceeding	50	0	4
,,	,,	50	,, 100	0	8
,,	,,	100	,, 200	1	0
,,	,,	200	,, 300	2	0
,,	,,	300	,, 500	4	0
,,	,,	500	,, 1,000	6	0
,,	,,	1,000	,, 2 000	10	0
,,	,,	2,000	,, 3,000	16	0
,,	,,	3,000	,, 5,000	20	0
,,	,,	5,000	,, 10,000	32	0
,,	,,	10,000	,, 20,000	40	0
,,	,,	20,000	,, 50,000	64	0
,,	,,	50,000	,, 75,000	70	0
,,	,,	75,000	,, 1,00.000	80	0
,,	,,	1,00,000	,, 1,50,000	100	0
,,	,,	1,50,000	,, 2,00,000	120	0
,,	,,	2,00,000	,, ...	150	0

this Regulation the Courts used to hold strictly that if the signature or seals of the parties and witnesses to a deed were not all written on the sheet bearing the stamp, the deed was illegally executed and could not be treated as duly stamped (*a*). But the law is now different, for the general rule referred to has been repealed by Act XLI. of 1858, sec. 2, (*b*) which has

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and a further duty of Rupees 100 for every sum of one lakh in excess of the said amount of two lakhs of Rupees.

Deeds of mortgage given as security for the transfer of Government Securities, or for the payment of an annuity for a fixed period, or for the delivery at a future date of any matter or thing capable of being valued, are charged at the above rates for the total amount assured, or for the *bona fide* value (1).

Deeds of mortgage given for the security of annuities for an indefinite period, are charged at the rate of ten times the annual value of the annuity (2).

When the total amount secured by a mortgage is unlimited, the deed may be executed on such stamp as the party may choose, but the deed is good only for the amount covered by the stamp (3).

Where it is stipulated that the amount secured shall not exceed a certain sum, the deed must bear a stamp corresponding to the sum limited (4).

When a bond has been already taken for the amount secured or when from any other cause, the mortgage shall act merely as a security collateral to some other transaction already charged with the *ad valorem* duty thereupon, the same being specified in the body of the deed of mortgage, the collateral deed shall be charged with a like stamp to the principal deed, if that stamp does not exceed eight rupees, which sum is the *maximum* duty on collateral instruments. And so, where more deeds than one are necessary in order to execute the mortgage in the manner desired by the parties (5).

But all such collateral deeds shall specify by their contents, which other is the principal deed, and that that other is executed and stamped in the manner required. And when of several deeds or writings a doubt shall arise as to which is the principal, the parties may determine for themselves which shall be so deemed and may engross the same on paper stamped with the proper *ad valorem* duty (6).

(*a*) S. D. A. 1853, p. 965: 1854, p. 464: 1856, p. 556: 1858, pp. 477, 504.

(*b*) Since repealed virtually by the repeal of Reg. X. 1829. But it still has operation in all cases coming under Reg. X. 1829.

(1) reg. X. of 1829, Sched. A. Art. 36.
(2) *Ibid*, Art. 37.
(3) *Ibid*, Art. 38.
(4) Reg. X. of 1829, Sched. A. Art. 39.
(5) *Ibid*, Art. 39, Note: and Art. 19.
(6) *Ibid*, Art. 18, *Note*.

a retrospective effect and applies to deeds executed prior, as well as to those executed subsequent, to its passing *(a)*. And even before the passing of Act XLI. of 1858, it had been decided that the objection was a technical one under Act IX. of 1854 *(b)*, and could not be entertained in appeal when raised there for the first time *(c)*.

When the mortgage deed contains any matter beyond that which is incidental to the mortgage, the same duties are payable as if the mortgage and other matter had been contained in separate instruments.

A suit was brought to recover money advanced on a lease being granted. The document was a *ticca zur-ipeshgee*, and apparently was a bond for the sum lent, with interest, accompanied by an agreement that the mortgagee should hold the lands at an annual rent of Rupees 500, to run on till the advance was paid off. The deed was stamped as a simple bond, and the mortgagee sued on it as such, seeking not to obtain possession, but only to recover the money lent by him. It was held, that this instrument required the stamp of a lease, and that it was not sufficient that it should be stamped as a bond, the stamp for a simple bond being of smaller value than that for a lease *(d)*.

The stamp to be imposed on a document is the largest applicable to its nature, not that required by the nature of the suit;

(*a*) *See* S. D. A. 1859, pp. 70, 1519 : 1860, v. 1, pp. 498, 700.

(*b*) Since repealed by Act X. of 1861. *See* Act VIII. of 1859.

(*c*) S. D. A. 1855, p. 335.

(*d*) S. D. A. 1853, p. 269. Cir. Ord. of the Board of Customs, 28th April 1852.

for example, in the case just quoted, though the instrument was sued on as a bond, it still required to bear the stamp of a lease. And from this it may be inferred, that the mere fact of the parties choosing to give up, or not to enforce, one part of the provisions of a deed, does not affect the general rule as to the stamp it must bear.

A mortgage, a zur-i-peshgee lease, contained a covenant for payment of the money advanced, on a certain date: it also contained a condition that the lessee and mortgagee should pay annually, according to the fixed *kists*, without fail or excuse a rent of Rupees 1,866 to the lessor and mortgagor, and should appropriate the remainder of the estimated assets, or Rupees 1,200 and as much more as he could collect,—the meha\ not being redeemable till, either on the expiry of the prescribed term or subsequently, the whole principal sum should be re-paid. The document was stamped as a conveyance, with a Rupees 50 stamp, which was less than the duties would have come to, had it been stamped both as a bond or mortgage, and as a lease. A suit was brought on it as a bond, for the recovery of the money advanced. The Court said, "they did not doubt that the engagement between the parties in this case, must be regarded as including two separate contracts,—the one of lease, for the annual payment to the lessor, under all circumstances, of Rupees 1,866,—the other of mortgage, as to the enjoyment by the mortgagee of the residue of the rents, after the payment of the reserved rent of Rupees 1,866, as a security for the profits or interest on the amount of his money advanced.

Upon fulfilling the conditions of the lease, the lessee or mortgagee would have his right to retain the property with its remaining profits, as a security for the money lent by him; but there was a distinct and certain stipulation of prior payment of rent to the lessor (not merely of Government revenue), before the mortgage lien could attach to the residue. The document was not one which, in the case before the Court, could be broken into parts, if such a division could in any case be made. Each of the two contracts must bear its own appropriate stamp,—or Rupees 40 for the mortgage, and Rupees 12 for the lease, calculated on the reserved rent of Rupees 1,866. The provisions of the law could not be dispensed with, merely because the two contracts were written on one paper" (*a*). And so, in a later case (*b*).

But if the double matter be immaterial, and can be treated as mere surplusage, there need be no stamp in respect of it.

A suit was brought for foreclosure, on a deed properly stamped as a mortgage deed: but it was dismissed by the lower Court on the ground that it ought to have had a second stamp, in respect of a receipt for the consideration money which was endorsed upon it. But on appeal it was held, that such a receipt was more surplusage, in no way affecting the mortgagee's right as he might prove payment of the consideration, by any other evidence he might have: and that the suit lay only on the contract of conditional sale, which bore the

(*a*) S. D. A. 1853, p. 569. (*b*) S. D. A. 1853, p. 942.

adequate stamp *(a)*. This case seems to shew, that when the further matter is wholly distinct from that which is the subject of the suit, a stamp suitable to the latter, is alone necessary.

The filing of an improperly stamped document has been held to be no ground of nonsuit: and it has been said that the only consequence of its not being properly stamped was, that if the Court refused to allow the plaintiff time to apply to the Revenue Authorities for the purpose of having the deed duly stamped, he would have to forego the advantage of making use of the deed as evidence in his cause *(b)*. And if a plaintiff set out in his plaint a deed collateral to the point at issue in the suit, but which was no part of the basis of his claim, the fact that such deed was insufficiently stamped was immaterial. The deed of course was inadmissible in evidence until properly stamped *(b)*.

Under Reg. X. 1829 it was ruled that not only was it necessary that documents should bear stamps of the proper value, before they could be received in evidence, but such stamps must have been imposed,—in the case of a plaintiff, previous to the institution of the suit,—in the case of a defendant, previous to the filing of the plea, in support of which it was proposed to make use of the document. Stamps imposed after bringing the suit *(c)*, or putting in the plea *(d)* were of no avail for the purposes of that suit or of that

(a) S. D. A. 1853, p. 828. *(b)* N. W. P. v. 10, p. 459.
(c) S. D. A. 1852, pp. 84, 497, 1032, 1068, *et passim*.
(d) S. D. A. 1852, pp. 41, 996, 1000, *et passim*.

defence. But the Courts in the North-West Provinces seem to have exercised a discretionary power of allowing the plaintiff time to apply to the Revenue Authorities for the purpose of having the proper stamp affixed *(a)*.

The value of the stamp required on a deed in which the money terms are expressed in Sicca Rupees, must be calculated on the conversion of the Sicca's into Company's Rupees *(b)*: this however was not so at one time *(c)*. Sicca Rupees may be converted into Company's Rupees, by allowing 106-10-8 Company's for 100 Siccas *(d)*.

The Calcutta Court held that Act IX. of 1854 *(e)* put an end to the right of special appeal on points arising under the stamp law, but not otherwise affecting the merits of the case as between the parties: and this, whether the objection was taken in the lower Court or not *(f)*. But this was in direct opposit on to the ruling of the Agra Court by which the error was not treated as a *technical* one, and Act IX. of 1854 was declared to be inapplicable *(g)*.

It was held that a deed declared by the Revenue Authorities to be properly stamped, must be received as such by the Civil Courts, without further question *(h)*: and it has been said

(a) N. W. P. v. 10, p. 459. *(b)* S. D. A. 1853, p. 658.
(c) Sevestre's Rep. v. 1, p. 95. *(d)* Cons. 1151, 27th April 1838.
(e) *See supra*, p. 81, *note (b)*
(f) S. D. A. 1855, pp. 222, 228, 229: 1856, pp. 523, 534: 1857, pp. 203, 1071: 1859, p. 652.
(g) N. W. P. v. 10, p. 30. *See* S. D. A. 1854, p. 529.
(h) S. D. A. 1852, p. 61; 1855, p. 46.

that the decisions of the Revenue Authorities were conclusive as to the amount of stamp required, but not so, as to whether a stamp is required at all or not (*a*). But a majority of three out of five Judges ruled that when the Sudder Court had once declared a document inadmissible for want of a stamp, it would not rescind its judgment, on the ground that subsequent to its being passed, the Revenue Authorities had decided that the deed required no stamp (*b*).

As to deeds executed on or after the 1*st of October* 1860, *but before the* 1*st of June* 1862.

Act XXXVI. of 1860 is so similar to Act X. of 1862 G. G. that it seems sufficient for the purposes of this treaties that the latter only (which is now the permanent law of the land) should be given in detail. But the two Acts do nevertheless differ in various points, and it will therefore be necessary to refer to Act XXXVI. of 1860 itself in all cases which come within its provisions.

As to deeds executed on or after the 1*st of June* 1862,—the whole law on the subject is to be found in Act X. of 1862 G. G.

Every deed of mortgage (*c*) or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgment in the nature of a mortgage, conditional sale, pledge, or hypothecation of or in respect of any immoveable property with or without possession given or of any personal property without

(*a*) S. D. A. 1854, pp. 109, 538.

(*b*) S. D. A 1854, p. 538. *See* S. D. A. 1854, p. 529 : 1855, p. 46.

(*c*) Act X. of 1862 G. G. Schedule A, Art. 46.

possession given intended as a security for money due or to be lent thereupon; and every deed or contract accompanied with a deposit of title deeds to any porperty where the same is made as security for payment of money due or lent at the time—must bear the same stamp as is required for a bond for the payment of the amount due or lent (*a*).

Every deed of mortgage or conditional sale, assignment, pledge, or hypothecation or of any acknowledgment in the nature of a mortgage, conditional sale, assignment, pledge, or hypothecation given for a loan or advance made on the

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(*a*) Art. 12 gives the following Table as containing the stamp duty payable in respect of a bond or other obligation for the payment either absolutely or conditionally of any definite or certain sum of money :—

		Rs.	As.
If for any sum not exceeding	25	0	2
Above 25 Rs. and not exceeding	50	0	4
„ 50 „ ditto	100	0	8
„ 100 „ ditto	200	1	0
„ 200 „ ditto	300	2	0
„ 300 „ ditto	500	4	0
„ 500 „ ditto	700	5	0
„ 700 „ ditto	1,000	6	0
„ 1,000 „ ditto	2,000	10	0
„ 2,000 „ ditto	3,000	15	0
„ 3,000 „ ditto	5,000	25	0
„ 5,000 „ ditto	10,000	35	0
„ 10,000 „ ditto	20,000	60	0
„ 20,000 „ ditto	40,000	100	0
„ 40,000 „ ditto	60,000	125	0
„ 60,000 „ ditto	80,004	150	0
„ 80,000 „ ditto	1,00,000	200	0
And for every further part of	1,00,000	100	0
And for every further	1,00,000	200	0

deposit of any personal property (*a*), must be stamped as a promissory note (*b*).

Every deed of mortgage or conditional sale, assignment, pledge, or hypothecation with or without possession given of any immoveable property or of any right, title, or interest therein intended as security, for the transfer of a Government security, or for the payment of an annuity for a fixed

(*a*) Art. 47.

(*b*) Promissory notes are to be stamped like Bills of Exchange, and Art. 10 lays down the rates for Bills of Exchange thous :—

If payable on demand and bearing the date on which it is made and if the sum payable exceed twenty Rupees, } 1 Anna.

If payable at sight or at any period not exceeding one year after date or sight,	If drawn singly	
	Rs.	As.
When not exceeding 100 Rs.	0	1
When exceeding 100 not exceeding 250 „	0	3
„ 250 „ 500 „	0	6
„ 500 „ 1,000 „	0	12
„ 1000 „ 2,500 „	1	8
„ 2,500 „ 5,000 „	3	0
„ 5,000 „ 10,000 „	6	0
„ 10,000 „ 20,000 „	12	0
„ 20,000 „ 30,000 „	18	0

And for every further 10,000 Rupees, or for any part of every further 10,000 Rupees, if drawn singly, 6 Rupees in addition.

If bearing no date, the same stamp as if payable at sight, unless any date or period of payment be specified, in which case the same stamp as prescribed by Article 12 for a bond of the same amount.

If payable at a period exceeding one year after date or sight, the same stamp as on a bond.

period, or for the delivery at a future date of any matter or thing capable of being valued, is to be stamped (*a*) as a bond for the total amount assured or the *bona fide* value.

Every deed of mortgage, or conditional sale, assignment, pledge, or hypothecation with or without possession given of any immoveable property, or of any right, title, or interest therein, given for the security of an annuity for an indefinite period, such as a life annuity, is to bear the same stamp as for ten times the annual payment (*b*). If it is stipulated that the amount secured by such mortgage shall not exceed a certain sum, it must have the same stamp as for a deed of mortgage of such limited sum: but when the total amount secured by the mortgage is unlimited, an *optional* stamp (*b*).

For every deed of mortgage where a bond shall have been already taken for the amount secured, or where, from any other cause the mortgage shall act merely as a collateral security to some other transaction in which an instrument requiring a stamp has been executed, the stamp (*c*) must be the same as for

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(*a*) Art. 48.

(*b*) Art. 49. *See* Sec. 27, which enacts that "No larger sum shall be recoverable in any Court of Justice by reason of any deed, instrument, or writing, for which an optional stamp is indicated to be proper by the Schedule A annexed to this Act, than the largest sum for which, if specially stated in a deed, instrument, or writing of the same denomination, the stamp actually used under the option so given would be of sufficient value. And no such deed, instrument, or writing shall be held by any Court of Justice to be valid in respect to any sum of money larger than that for which the stamp on the said deed, instrument, or writing would be sufficient."

(*c*) Art. 50.

the bond or other instrument if of value not exceeding eight Rupees,—otherwise a stamp of eight Rupees must be imposed.

Where there are more deeds than one required to execute a mortgage in the manner desired by the parties, then for every other deed than the principal deed (provided the original deed has been duly stamped) the same stamp is required as for the principal deed if of value not exceeding eight Rupees,—otherwise a stamp of eight Rupees (*a*).

Letters of hypothecation accompanying a Bill of Exchange require no stamp (*b*).

A re-conveyance of mortgaged property must be stamped as an assignment (*c*) : and a release of an equity of redemption as a conveyance (*d*).

(*a*) Art. 50, *note*. (*b*) Art. 50, *Exemption*.

(*c*) Art. 51 : *i. e.* it must have the same stamp as the original deed if the original deed be on a stamp of less than 8 rupees, and in any other case a stamps of 8 rupees. Art. 9.

(*d*) Art. 52. Art. 23 declares the following stamps to be leviable on conveyances :—

When the purchase or consideration money therein expressed or denoted shall not exceed One Hundred Rupees,						1 Rupee.	
Above	100	Rupees, and not exceeding	200	Rupees,		Rupees.	Annas.
„	200	„ ditto	400	„		2	„
„	400	„ ditto	800	„		4	„
„	800	„ ditto	1,200	„		8	„
„	1,200	„ ditto	2,000	„		12	„
„	2,000	„ ditto	3,000	„		20	„
„	3,000	„ ditto	4,000	„		30	„
„	4,000	„ ditto	5,000	„		40	„
„	5,000	„ ditto	7,500	„		50	„
„	7,500	„ ditto	10,000	„		75	„
„	10,000	„ ditto	20,000	„		100	„
„	20,000	„ ditto	40,000	„		150	„
„	40,000	„ ditto	60,000	„		200	„
„	60,000	„ ditto	80,000	„		300	„
„	80,000	„ ditto	100,000	„		400	„
And for every further,			50,000	„		500	„
Or part thereof,						200	„
						100	„

A deed may be written on one or more stamps, if the aggregate value of the stamps used amount to the value required by the law (*a*).

And when of several deeds or writings a doubt shall arise as to which is the principal, the parties may determine for themselves which shall be so deemed: but if there are more deeds than one, every other deed than the principal requires the same stamp as the principal deed, if of value not exceeding eight rupees (which is the maximum stamp for collateral deeds), and every such collateral deed shall specify which other is the principal deed and certify that it is executed on the proper stamp (*b*).

An agreement or memorandum in the nature of a mortgage must be stamped as a mortgage (*c*).

As a rule, it will lie upon the Courts in each case to decide whether deeds which are produced in evidence are properly stamped. But if before execution the parties, having doubts as to the amount of stamp required, apply to the Revenue authorities, and pay a fee of ten rupees, those authorities will decide what stamp is required, and will stamp the deed accordingly: and a deed so stamped will be received in every Court as properly stamped (*d*). And when a deed has on payment of penalties been stamped subsequent to execution, the stamp impressed shall be taken in all Courts to be the proper stamp (*e*).

(*a*) Act X. of 1862, G. G. *Note* (*a*) to general exemptions at the end of Schedule A.

(*b*) *Ibid, note* (*b*).

(*c*) Schedule A. Art. 1.

(*d*) Sec. 19.

(*e*) Secs. 15 and 16.

II. OF THE VALUATION OF SUITS, AND THE STAMP DUTY ON PLAINTS.

Every petition of plaint or appeal filed on or after the 1st of June 1862, with a view to the recovery of any sum of money, or to obtain possession of any interest, matter, or thing, must be written upon stamped paper as provided for by Act X. of 1862, G. G. It will be unnecessary to go into the details of the former stamp laws on this subject;—for questions under Reg. X. 1829 can scarcely arise now, and the terms of Act XXXVI. of 1860 are almost the same as those of Act X. of 1862.

Plaints must be stamped according to the following table (*a*).

If the amount or value of the property claimed does not exceed				Rs.	As.
		16	Rs.	1	0
Above	16 Rs. and not exceeding	32	„	2	0
„	32 „ „	64	„	4	0
„	64 „ „	150	„	8	0
„	150 „ „	300	„	16	0
„	300 „ „	800	„	32	0
„	800 „ „	1,600	„	50	0
„	1,600 „ „	3,000	„	100	0
„	3,000 „ „	5,000	„	150	0
„	5,000 „ „	10,000	„	250	0
„	10,000 „ „	15,000	„	350	0
„	15,000 „ „	25,000	„	500	0
„	25,000 „ „	50,000	„	700	0
„	50,000 „ „	1,00,000	„	1,000	0
„	1,00,000 „			2,000	0

The amount or value of the property claimed is to be ascertained according to certain prescribed rules.

In suits for lands paying Revenue to Government if forming one entire mehal, or a specific portion thereof with a

(*a*) Act X. of 1862, G. G. Schedule B. Art. 11.

defined jumma subject to revision, the value shall be assumed at the amount of the annual jumma payable to Government on account of the mehal or portion thereof as aforesaid; and when the land has been assessed in perpetuity, at three times the amount of the annual jumma (*a*).

In suits for lands exempt for the payment of Revenue the value shall be calculated at eighteen times the aggregate annual rent payable by the ryots or other under-tenants of the land (*b*).

In suits instituted for houses, gardens, and other things of value, real or personal, not of the descriptions above specified; as well as for any interest in land paying Revenue to Government or for any other right or thing not capable of valuation under the above rules, the amount shall be computed according to the estimated selling price, or when no such estimate can be made, at the sum at which the plaintiff shall estimate the value of his suit; and suits for damages or compensation for injury sustained, and the like, shall be valued at the amout claimed by the plaintiff (*c*).

All questions relating to the valuation of claims are to be decided by the Court in which the claim is filed, subject to any appeal to which the orders of such Court are open (*d*).

The following decisions on questions which arose under Reg. X. 1829, may still be found of use as they seem applicable to cases which may arise under the existing law.

(*a*) *Ibid, Note* (*a*)
(*b*) *Ibid, Note* (*d*).
(*c*) *Ibid, Note* (*e*)
(*d*) Sec. 32.

The value of the principal, includes that of any subordinate right (*a*).

A mortgagor or mortgagee using for possession on redemption or foreclosure, must lay the value of the suit, not at the sum for which the property was mortgaged, but at the value of the land, estimating it according to the rule given above. An auction purchaser at an execution sale, sued to obtain possession, by setting aside as fraudulent, a mortgage set up by a third party whom he found in possession as mortgagee. The suit was valued by the plaintiff at the annual jumma, with the addition of the money advanced on the mortgage. The Court held, that the suit was over-valued, and that it should have been estimated at the annual jumma only (*b*).

When the suit is not for possession absolutely, as on redemption or foreclosure, but is for a possession of a limited or temporary nature (as where an usufructuary mortgagee is kept out by the mortgagor, and sues for possession, the right of redemption being still subsisting), the suit is to be valued, not according to the jumma of the lands, but according to the estimated valued of what the plaintiff sues for. The jumma valuation seems to be applicable to those cases only where the rights used for are of an absolute, or of a proprietary nature.

A kutkinadar or farmer, was ousted by his zemindar. He afterwards brought a suit to have himself re-established in his

(*a*) Rep. Sum. Cases, 16th March 1846.
(*b*) N. W. P. v. p. 420.

rights as kutkinadar. The Sudder Court at Agra, after a reference to that of Calcutta, decided that the plaintiff's claim being only for an interest in land during a limited period, the value must be laid at the estimated value of the injury sustained from dispossession, and that it was not to be assessed according to the jumma of the land (*a*). In a later case, the Court expressed their opinion, that suits for the possession of mortgaged lands, are analogous to suits for possession of farms. And in conformity with this ruling, it has been held, that suits brought to obtain possession of mortgaged lands must be estimated at the value of the thing sued for, and that it is incorrect to lay the value according to the jumma (*b*). The decision in these cases, however, must be taken as applying to suits in which the possession sued for was limited in its extent—possession as farmer or mortgagee: for suits for absolute and final possession, clearly required to be valued according to the jumma.

There was a simple usufructuary mortgage of a ten-annas share in the offerings made by the worshippers at a temple, the agreement being that the receipts should be taken in lieu of interest. The mortgagees sued to obtain possession as mortgagees of the share pledged to them. They valued their claim at 18 times the annual proceeds, viewing the *birt* or right to a share in the offerings as a rent-free property. This valuation

(*a*) N. W. P. v. 2, p. 217. Cons. No. 702, C. July 27, 1832, and 1101, C. Aug. 24, 1837.

(*b*) N. W. P. v. 4, p. 286: v. 6, p. 227.

was wrong: the mortgagees should have taken as their standard of valuation, the selling price of what they considered to be their interest in the property (*a*).

When a mortgagee sues to recover the money lent by him, from the mortgagor personally, and also to set aside subsequent alienations, and to have the mortgaged property brought to sale in satisfaction of his claim, the amount in which he considers himself to be damaged by the acts of the defendants, and which it is the sole object of the suit to recover, is the sum which should regulate the valuation of the suit. The pecuniary consideration paid by any subsequent incumbrancer against whom the suit is brought, does not affect the question. Thus, where land was mortgaged for Rupees 19,000 and was afterwards, contrary to the conditions of the mortgage deed, leased to third parties for Rupees 10,000, it was held that the mortgagee suing to recover his debt, from the mortgagor personally and by sale of the property pledged, and to set aside the lease, ought to have valued his suit at Rs. 19,000, not at Rs. 29,000 (*b*).

A mortgagee sued to recover money lent by him on a simple mortgage of certain property. By a supplemental plaint, he joined as a defendant in the suit, a person who professed to hold a conditional mortgage of prior date of the same property,—the validity of the conditional sale being thus put in issue. It was held, that the adverse right of the third party in respect of the alleged conditional mortgage, might be considered,

(*a*) N. W. P. v. 10, p. 341, *See* last Clause of Note on Art. 8, Schedule B. Reg. X. of 1829. (*b*) N. W. P. v. 8, p. 341.

so far as it affected the plaintiff's claim, without altering the original valuation of the suit, and that it was unnecessary to include the conditional mortgage, in computing the value to be put on the suit (*a*).

When a suit was brought in the Moonsiff's Court by a mortgagee to obtain possession of certain lands on a mortgage bond, the amount of the bond being Company's Rupees 2,000, but the suit was valued at one year's jumma of the land, which was Rupees 202,—it was held, that the fact of the amount of the bond being in excess of Rupees 300, was not of itself sufficient to place the suit byond the Moonsiff's jurisdiction, and that it was necessary for the defendant who objected to the valuation, to show that the present value of the mortgage exceeded Rupees 300 (*b*).

So in a suit brought in the Moonsiff's Court for an instalment due on a money bond. The instalments which had not yet fallen due amounted to a sum beyond the limits of the jurisdiction of a Moonsiff, but the instalment sued for was within those limits. It was decided that, as the validity of the bond was not disputed, the suit was rightly valued at the amount of the instalment sued for, and that the Moonsiff had jurisdiction to try the cause (*c*).

The Calcutta Court held (*d*) that in a Court of which the original jurisdiction was unlimited, over-valuation was not

(*a*) S. D. A. 1855, p. 277. *See* 1852, p. 8.
(*b*) N. W. P. v. 4, p. 297. (*c*) N. W. P. v. 9, p. 539.
(*d*) S. D. A. 1855, p. 232. *See* N. W. P. v. 10, p. 341: and contra S. D. A. 1854, p. 55.

under the old law a valid ground for nonsuit, though if the objection were taken by the answer, it must be disposed of.

Under Act IX. of 1854, the judgment of the lower Court on a plea of under-valuation could not be reversed on appeal. The defect was considered a technical one, and not productive of injury to either party (*a*).

A plaintiff might under the old law abandon a portion of his claim, so as to bring his case within the jurisdiction of an inferior Court. But the portion so relinquished was relinquished for ever (*b*). And the rule is now the same, under the Code of Civil Procedure (*c*).

(*a*) S. D. A. 1854, p. 491: 1855, p. 120: 1858, pp 205, 300, 308, 1027, 1225, 1649, *et passim*. N. W. P. v. 9; p. 585: v. 10, p. 355.

(*b*) N. W. P. v. 10, p. 545.

(*c*) Act VIII. of 1859, sec. 7.

CHAPTER VII.

OF THE RELATIVE ESTATES AND DUTIES OF THE MORTGAGOR AND THE MORTGAGEE.

On the execution of the mortgage, the proprietary right still remains in the mortgagor, even although the possessory right may have passed to the mortgagee.

Whichever party has possession, whether he be the mortgagor, or the mortgagee, is in the position of a trustee: he is not the absolute owner of the land, but holds it subject to the rights of the other. The mortgagor must use it as liable to become the property of the mortgagee, and must not do any thing that tends to injure or diminish the security, on the strength of which he has received the money of the latter. The mortgagee in possession must, as a mere trustee for the mortgagor, manage the land according to the best of his ability, regulating the expenses carefully, and applying all the profits to the satisfaction of his claim: and he must take the same care of the estate as he would of his own, and must admit no claim upon it until assured of the title of the claimant (*a*). The mortgagee is in most cases liable to account for his management, the mortgagor never is so.

(*a*) S. D. A. 1859, p. 1273.

The mortgagee's rights are of course always subject to any lien or incumbrance, as a lease or a mortgage, existing prior to the date of his security. And he cannot repudiate engagements binding the land, previously entered into by the mortgagee, (*a*).

A mortgagee who is entitled to possession, has generally a right to have his name registered in the Collector's books as mortgagee, in the place of that of the mortgagor: and he has a right to appear at a revenue settlement as an objector to the settlement then made, or sometimes as a claimant of the settlement.

A person admitted to settlement as a shareholder, and who continues recorded as lumberdar, may sue to recover his share of the produce of the estate, without first bringing a suit to establish his right to possession. His being so admitted and recorded, gives him a *primâ facie* title to be heard on the merits of his claim *(b)*.

In a pure usufructuary mortgage, the mortgagee has from the first a possessory right: but he never has any thing more, as the proprietary right remains always in the mortgagor. In simple mortgages, no proprietary or possessory right vests in the mortgagee at all, and he is not even in a position which entitles him to appear at a revenue settlement, either as a claimant, or in any other capacity *(c)*. In mortgages by conditional sale, the proprietary right, and also the

(*a*) S. D. A. 1849, p. 341 : N. W. P. v. 8, p. 515 : v. 9, pp. 366, 585 : v. 10, p. 408.
(*b*) N. W. P. v. 10, p. 494. (*c*) N. W. P. v 8, p. 489.

possessory vest in the mortgagee, when the term fixed for the re-payment of the loan has elapsed, and the process of foreclosure been completed,—but not till then (*a*).

An estate was sold for arrears of revenue in 1840 under Reg. XI. of 1822 which was then in force, and a mortgagee in possession sued under Sec. 25 of that Regulation to set aside the sale. It was held that his suit would not lie, as a mere mortgagee in possession has no right of ownership, and the Regulation gave the right of action to *proprietors* only (*b*). "The right of ownership in the mortgaged property does not pass to the mortgagee leaving *only* the equity of redemption to the mortgagor. The right of ownership, together with the right of redemption, remain with the mortgagor, and until the property be actually foreclosed and the sale become absolute the right of ownership does not pass. The doctrine is equally applicable to conditional sales or usufructuary mortgages: it follows that the mortgagees in the present case who, whatever the nature of the mortgage, were in possession, were simply usufructuaries, and as such enjoyed no right of ownership. Such being the case, the registration of their names incorrectly as proprietors, or the entrance of their names in the sale advertisements as such, when in fact and admittedly they were no such thing, cannot alter the nature of their rights or convert a lower into a higher title. Being as they are usufructuaries, they should with a view of saving their right, have paid in the revenue

(*a*) S. D. A. 1849, p. 392. *See* N. W. P. v. 10, p. 453.
(*b*) S. D. A. 1858, p. 840.

and stayed the sale, and they would thus have had an action against the actual proprietors for money paid on their account to protect an interest of the payer in the property."

There was an usufructuary mortgage: and the mortgagee having been ousted, sued to recover possession on the ground of proprietary right; but the Court held, that his suit would not lie, as he had no proprietary right, and ought to have sued for possession merely as mortgagee (*a*). So in a similar case, it was said that "the appellant having failed to establish his title as absolute purchaser of the property, his suit should have been dismissed, and the entire costs of the suit should, agreeably to the established practice, have been charged to him" (*b*).

It is the duty of a mortgagor to take all legal means to protect his rights in the property mortgaged by him: and the mortgagee will be entitled to recover from him, damages for any loss he may sustain through neglect of that duty (*c*).

A mortgage was made by conditional sale, the terms being, that, if the money was not repaid by a certain date the land should pass to the mortgagee. Soon after the execution of the deed, the mortgaged estate was sold under decree, as belonging to a third party. The mortgagor put forward his claim of right in the execution sale proceeding, but it was overruled, and he never took any further steps to protect the interests of the mortgagee. The Court

(*a*) N. W. P. v. 7, p. 5. (*b*) N. W. P. v. 11, p. 75.
(*c*) *See* S. D. A. 1857, p. 1195.

held, that it was the duty of the mortgagor to have brought a suit to establish his right to the land, and that as he had not done so, he was personally liable for the mortgage debt, while otherwise the mortgagee would have had no remedy but against the estate (*a*).

The Government revenue is a charge upon the land out of which it is payable, which takes precedence of all other claims, and consequently a mortgage does not in fact pledge any thing more than the receipts in excess of the revenue due in respect of the lands mortgaged. It is therefore, *primâ facie*, the duty of the person who is in actual possession and registered as proprietor, to pay the Government revenue (*b*) : and any loss consequent on the neglect of this duty, must be borne by him. Hence, if the property mortgaged by conditional sale remains in the possession of the mortgagor, and is sold for arrears of revenue (which has the effect of entirely defeating the mortgagee's security), the mortgagee may sue for, and recover from the mortgagor, the balance due to him, with interest,—instead of being left to his remedy against the land alone, as he otherwise would be (*c*). So, on the other hand, an usufructuary mortgagee, who, being in possession of the mortgaged estate, allowed the Government revenue to fall into arrears during his management, in consequence of which the Collector farmed the property for some time, was held responsible for the profits of the term during

(*a*) S. D. A. 1853, p. 575. (*b*) S. D. A. 1852, p. 678.
(*c*) S. D. A. 1848, p. 368.

which the Collector was in possession (*a*). And a usufructuary mortgagee has no claim against the mortgagor personally, for Government revenue paid by him while in possession, although such payments will be credited to him on adjusting the accounts between them. "The mortgagee has no right of separate action for the amount so paid, while he remains in possession" (*b*).

But it is only the revenue which accrues during the time of his possession, that the mortgagee is bound to pay: all arrears fallen due before the date of his entry, remain payable by the mortgagor.

A mortgagee being in possession, the Collector came in and farmed the property, not on account of any fault or mismanagement on the part of the mortgagee, but for an old balance of revenue fallen due before the commencement of his interest as mortgagee. The mortgagee, after a time, came forward and paid up the arrears, whereupon a farming settlement of ten years was granted to him by the Collector. It was held, that the mortgagee was entitled to all the profits during these ten years, without rendering any account to the mortgagor: that he was in no way bound to pay the arrears, and having done so, must be treated as an entire stranger would have been under similar circumstances (*c*). However, the Court expressed a

(*a*) N. W. P. v. 3, p. 417; *see* v. 7, p. 7, and Sheodut Singh, *v*,—28th May 1845.

(*b*) S. D. A. 1852, p. 1063; *see* 1848, p. 346, and N. W. P. v. 9, p. 378.

(*c*) N. W P. v. 7, p. 7.

doubt whether the Collector acted rightly in admitting the mortgagee in possession of the defaulting mehal, to engagements as farmer by the process of transfer.

If an estate is about to be sold for arrears of Government revenue which the mortgagor has failed to pay, the mortgagee may deposit the amount due, to be credited in payment of the arrear if the mortgagor does not ultimately pay the amount before the expiry of the prescribed time. And the mortgagee may recover what he has paid from the mortgagor with interest (*a*).

There was a mortgage of a *dur-putnee* tenure, the mortgagee not having possession. The *putneedars* fell into arrears, and the mortgagee paid the sum due and saved the tenure from sale. It was held that he could not recover the sum so paid from the *putneedars*, but that he had a good right of action for it as against the *dur-putneedar*, his own immediate mortgagor (*b*). "The plaintiff might no doubt have brought an action against the dur-putneedar for the money he had been compelled to pay to save his own interest: for in consequence of the peculiar connection between them the law would have implied a request to pay on the part of the dur-putneedar: but this obligation on the part of the dur-putneedar cannot extend to third parties who, although they may be under obligations themselves to the dur-putneedar, have no privity with the mortgagee. Payments made by the mortgagee

(*a*) Act XI. of 1859, Sec. 9. *See* Act I. of 1845, Sec. 9.
(*b*) S. D. A. 1857, p. 1195.

on their behalf are voluntary and officious, and give him no cause of action against them."

If one joint tenant pays the amount of Government revenue due for all, he can recover from the other joint tenants the proportions which it was their duty to have paid. And a mortgagee, being responsible for and having paid the revenue for a whole Talookah, part of which was in possession of another party, by whom the revenue for that part should have been paid, can recover the amount he has paid in excess of his own share, from the person who has made default (*a*).

But where a sharer had paid the Government revenue for the whole, and the persons in possession as co-sharers when the revenue accrued due, were afterwards found to have been wrongfully in possession, and the right as joint tenants declared by a decree of Court to be in certain other persons, it was held that the latter, who were put in possession under the decree, were not liable in respect of the revenue which had been paid for their shares, because they were not in possession when it accrued due (*b*).

The question has been raised, but does not appear to have been actually decided, whether, if a mortgagee in possession allows the Government revenue to fall into arrear, with a view to the land being put up to sale and his becoming himself the purchaser of it, and he dees in fact so become the

(*a*) N. W. P. v. 10, p. 1, *semble*; but the case is reported almost unintelligibly.

(*b*) S. D. A. 1855. p. 44.

purchaser of it, such a purchase is a good and valid one. From the observations made by the judges in one case (*a*), it rather seems that they did not consider that there would be any fraud in such a proceeding. There is, however, but little doubt that such a purchase cannot be supported. The encouragement of fraud in any shape, can never be justified on the ground of public policy: and one who, being in possession as mortgagee or trustee, fraudulently obtains the proprietary right, is to be treated as still in the position of trustee, as regards the person defrauded.

By the Supreme Court such a purchase has been treated as highly fraudulent, and the purchaser declared a trustee for the mortgagor. In one case (*b*), the judges expressed their opinion on the subject in the following terms:—"We continue to hold the opinion we expressed at the hearing, that the revenue laws cannot protect such a transaction as this last: that a mortgagee in possession of an estate and registered as its owner, who properly or improperly suffers that estate to fall into arrear, cannot be allowed to purchase it at a Government sale, to the prejudice of his mortgagor, and so as to acquire an irredeemable interest in it. Upon such a purchase a Court of Equity on general principles will fasten a trust, and hold that the mortgagee, subject to the re-payment of

(*a*) S. D. A. 1852, p. 392.

(*b*) Raja Oojooderam Khan, *v.* Aushootosh Dey and others, Supreme Court, 6th July 1852.—*Englishman*, 8th July 1852. *See* also Kelsall, *v.* Freeman.—*Englishman*, 4th February 1854.

the amount due on the mortgage, and of his expenses properly incurred, is a trustee for the mortgagor."

Where the agreement is, that the mortgagee shall remain in possession of the land until the principal and interest are paid from the profits, the mortgagee is bound to continue in possession so long as there is any thing due to him on the mortgage: at least, if he cannot shew good cause for not doing so, he will have no personal claim on the mortgagor for any part of his debt (*a*).

The mortgagee in possession must see to the proper management of the estate, and will be held responsible for any waste or actual damage committed or done by him, and for any deficiency in receipts arising from negligence or misconduct on his part. And a mortgagor is entitled to recover damages from his mortgagee (and also from a sub-mortgagee or any other person who has joined in the act complained of), for injury caused to the property by the acts of the mortgagee and others during the time of their being in possession (*b*). So, he may recover damages for waste committed,—as by the improper cutting down of trees (*c*). But those only are liable in damages, who have been guilty of the grievance for which redress is sought: and therefore a sub-mortgagee is not liable for damage caused before his entry (*d*).

It is the duty of the mortgagee in possession to realise balances due from the cultivators on the estate; and if these

(*a*) S. D. A. 1850, p. 44.
(*b*) N. W. P. v. 7, p. 436.
(*c*) N. W. P. v. 9, p. 1.
(*d*) N. W. P. v. 7, p. 436.

balances are lost through his negligence, they will be charged against him in taking the accounts (*a*). He must pay the wages of village chowkeedars and putwarees, and all other regular village expenses; these are altogether independent of the will of the mortgagee, and payments which he, as representative of the owner, is compelled by the orders of Government to make (*b*).

Every mortgagee in possession is bound to keep regular and accurate accounts of all sums received and expended by him in the management and preservation of the property, and if he fails to do so, the Courts make it a rule to lean against him, and to resolve all doubtful points in favor of the mortgagor (*c*).

A mortgagee "of proprietary rights," may bring a suit against one who occupies the lands as cultivator, for rent at *pergunnah* rates assumed from those paid for similar lands in the neighbourhood (*d*).

Tenants sued for arrears of rent will not be made to pay interest on those arrears, unless interest on them is stipulated for in the lease, or a written demand for interest is made before suit. If it has been so demanded, it will be allowed from the date of demand (*e*).

A mortgagee of a share in a joint estate has no such right as entitles him to sue for a partition, even although the mortgagor acquiesces in his doing so. "The plaintiff has

(*a*) N. W. P. v. 9, pp. 159, 371.
(*b*) N. W. P. v. 7, pp. 248, 477 : v. 9, p. 371.
(*c*) N. W. P. v. 10, p. 684. (*d*) N. W. P. v. 9, p 537.
(*e*) S. D. A. 1854, p. 518.

founded his claim on the fact that he stands in the same position as the mortgagor, and therefore that he is at liberty to sue for a division of the estate. The Court agree that in a measure he does stand in the position of the mortgagor, *i. e.*, so far as he is entitled to hold the property in the same manner as he received it from the latter: but they consider that as he has no proprietary right in the estate, he cannot sue for a division of it, the proprietors being alone the persons comtemplated by the law, Regulation XIX. of 1814, who are competent to make such an application." And in such a case, the mortgagee seems to be entitled only to possession as against the mortgagor of the portion of the property mortgaged to him, but without disturbance of the title of the *lumberdar* and his position thereunder, and without interruption of the existing fiscal arrangements for the collection of the revenue and general management of the estate (*a*).

The proprietor of a talook mortgaged a two annas' share to B. Subsequently he sold a five annas' share of the same talook to C.' with whom he made a *butwarra*, under which a certain village was registered by the Revenue authorities in C.'s name, and as representing his five annas' share. The Court held that on the completion of the *butwarra*, B lost all lien over the two annas share of the village made over to C., and that thenceforth his lien was limited to such a share of the remainder of the talook as corresponded to a two annas'

(*a*) N. W. P. v. 10, p. 453, and case there referred to.

share of the *whole* talook as it originally stood. As there was no allegation of fraud on the part of the proprietor and C., and as the partition was executed under a *butwarra* by the Revenue authorities, the Court was of opinion that the partition must be taken as final and conclusive (*a*).

A creditor may transfer to any third party a sum of money due to him, without previous reference to the person indebted, and without his consent. The transferee may resort to the same measures for the recovery of the amount of the debt, as the original creditor himself might have adopted had the transfer not taken place (*b*).

So there is no legal impediment whatever to the transfer by a mortgagee of his rights and interests as mortgagee, and his assignee will have in all respects the same rights and liabilities as the mortgagee himself had (*c*). But such a transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another person in his own position, but he cannot create a title in a third party, distinct from his own (*d*).

This last rule was given by the Calcutta Court as one of the grounds on which it decided that the mortgagee cannot, even in exercise of a power expressly conferred on him by the mortgage deed, sell the mortgaged property to a third person absolutely, on default being made by the mortgagor. As such a power would not enable the mortgagee himself to become absolute proprietor of the land, it was held, that for the

(*a*) S. D. A. 1857, p. 358.
(*b*) N. W. P. v. 10, p. 464.
(*c*) S. D. A. 1848, p. 530.
(*d*) S. D. A. 1847, p. 354.

mortgagee to exercise such a power in favor of a third party, was to create a title distinct from his own, and therefore invalid: and that, as the mortgagee's own title was one which might be made absolute with the aid of the Courts, but not otherwise, no higher right than this could be passed by him. The title passed by the mortgagee, however, when he exercises such a power, is not in fact his own right, or any part of it. A conveyance made by him under the power, is as it were the direct act of the mortgagor, the mortgagee being only the hand by which it is made (*a*).

And the mortgagor may either transfer absolutely, or mortgage his remaining interest in lands which he has already mortgaged, without first redeeming them. The purchaser or mortgagee acquires the rights and interests of the mortgagor and stands in his place: he takes the property subject to the lien of the prior mortgagee, the liabilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor,—nothing, in fact, but a revenue sale,—can injure the mortgagee's lien on the land, or on that which represents the land (*b*).

A mortgagor, after having hypothecated or pledged certain lands by way of simple mortgage, had a settlement made which divested him, as proprietor, of all his rights, and

(*a*) Supra, p. 43.

(*b*) S. D. A. 1848, p. 305: 1850, p. 77: 1857, p. 953. N. W. P. v. 6, p. 32: v. 7, p. 138: v. 9, pp. 371, 421: v. 11, p. 8. *See* S. D. A. 1858, p. 382.

assigned him a malikana allowance in lieu of his claims. It was contended that not only had the mortgagee no longer any claim on the land, but that the malikana allowance was not subject to his lien. But the Court held, that—"the thing pledged was not changed by the proceedings of settlements, so as to affect the mortgagee's lien, and that the pledge must be regarded as extending to any interest essentially involved in, and arising from, the interests possessed in the property by the debtor at the time of the original transactions; and that the malikana right assigned to the mortgagor at the settlement, strictly fell within that category (*a*)."

If a first mortgagee obtains a decree against the mortgagor, and the lands are sold in execution of that decree, but do not realise more than enough to pay off the first mortgage, the auction purchaser has a title to the lands free from all incumbrances subsequent in date to the first mortgage *(b)*.

The mere purchase of mortgaged property by a third party, does not render him personally liable for the debt, to secure which the land was pledged. The lien on the property under mortgage continues, and the only effect which the purchase has on the mortgagee's position, is that it gives the purchaser, as the mortgagor's "representative," the option of redemption (*c*).

It has been held that a mortgagor canot transfer his

(*a*) N. W. P. v. 8, p. 669. (*b*) N. W. P. v. 10, p. 227.
(*c*) N. W. P. v. 8, p. 316. *See* S. D. A. 1857, p. 953: 1858, p. 358: 1859, p. 1181.

interests, in opposition to an express stipulation to the contrary, and that a transfer made under such circumstances is *ipso facto* void, or at least voidable (*a*).

An agreement, however, in *general* terms, as "not to alienate any of my property until the debt has bee paid,"—no property in particular being mentioned,—does not constitute a mortgage; and a *bonâ fide* purchase made from the debtor is good and cannot be set aside (*b*).

But a sale within the forbidden time by a mortgagor, of property which he had pledged stipulating that during a certain period he would not sell his interest in it, was declared void and cancelled (*c*). And where there was a condition, that any alienation of the property by the mortgagor, until liquidation of the debt secured on it, should be illegal, a mortgage previous to such liquidation, was held to be null and void (*d*). And so, when property was pledged as a security for the honesty of the pledgor, and there was a written engagement by him not to alienate it, by gift, sale, or otherwise, till his accounts were settled, a sale made previous to such settlement was held void as against the original pledgee (*e*).

The Agra Court laid it down distinctly in one case, that where there is an express stipulation in a mortgage deed not to alienate the property pledged, a subsequent conveyance of it by lease or otherwise, involves a violation of its terms, by

(*a*) N. W. P. v. 8, pp. 316, 341, 369. (*b*) S. D. A. 1855, p. 353.
(*c*) N. W. P. v. 6, p. 39,
(*d*) N. W. P. v. 7, p. 614. (*e*) S. D. A. 1848, p. 682. *See* 1851, p. 482.

creating a lien which it was the express object of the stipulation to prevent; and that the mortgagee has a good cause of action against any one, who is a party to such violation, and is entitled to a distinct declaration of the invalidity of the subsequent conveyance, without reference to its consequences on the property, or to its effect upon the prior mortgage (*a*). And the same Court has also ruled that a suit may be instituted to set aside, as fraudulent, a deed of sale by which the plaintiff's title is put in jeopardy, although he has not actually been dispossessed under it (*b*).

But in many cases alienations contrary to express contract were more leniently, and perhaps more equitably, dealt with, and considered to be bad only in so far as they interfered with the rights of those with whom the condition not to alienate was made.

An appeal was admitted, the judge being of opinion, that "the condition of the mortgage (*viz.*, that the mortgagor should not alienate during its continuance), could never be intended to preclude the mortgagors transferring their own proprietary right to a third party, subject to the original mortgage. Of course, possession could not be decreed on such a transfer, until the full amount due to the mortgagee was paid or liquidated from the usufruct." And this view of the law was afterwards taken by the full Court and the transfer was declared to be valid, subject to the mortgagee's prior lien (*c*).

(*a*) N. W. P. v. 8, p. 341 : v. 10, p. 227.
(*b*) N. W. P. v. 9, p. 517 : v. 10, p. 240.
(*c*). S. D. A. 1848, p. 305. *See* 1854, p. 96.

And when there was an agreement "not to give a *kut* or *permanent* pottah," and that "if any sale, &c., should be made it should be invalid," it was held, that the mere giving a mortgage by conditional sale of the land referred to, was no infringement of the contract, although if the sale were made absolute so as wholly to alienate the property, there would then be a violation of the agreement (*a*). So, when in a soolenamah there was a stipulation in general terms not to alienate the property, a mortgage made in order to save the estate from permanent alienation was upheld. The debt for which it was motgaged, had been incurred to save it from being sold for arrears of revenue (*b*).

The later decisions of the Calcutta Court distinctly lay it down that an express stipulation not to alienate property which is mortgaged, until the debt with the interest and costs are paid off, does not, according to the true construction of the law, preclude the mortgagor from transferring his own proprietary right, or making a second mortgage, provided such transfer or mortgage be made subject to the first mortgage (*c*).

An alienation contrary to express agreement cannot be pleaded by the alienor, for the purpose of avoiding his own act. The person whose interests are prejudiced by the alienation, can alone put in such a plea or have the transaction set aside (*d*.)

(*a*) S. D. A. 1851, p. 477. (*b*) N. W. P. v. 6, p. 227.
(*c*) S. D. A. 1856, p. 942 : 1857, p. 825. (*d*) N. W. P. v. 10, p. 510.

The plaintiffs in a suit, sought to charge certain lands with monies due to them. The lands in question had been mortgaged in 1846 to the defendants, and the equity of redemption was sold to them by the mortgagor in 1850. Prior to the sale in 1850, a prohibition against the alienation of the lands in question, was under Section 5, Regulation II. of 1806, issued at the instance of the plaintiffs. It was held, that the rights and interests of the mortgagor in the property attached, as they stood on the date of the issue of the prohibition against alienation, were liable to be sold by the plaintiffs in execution of the decree they had obtained for payment of the debt due to them by the mortgagor (*a*).

A mortgage executed subsequent to attachment by proclamation regularly issued from a Court is invalid (*b*).

The fact of there being an existing mortgage over lands, in no way prevents the rights and interests of the mortgagor in them, from being sold by auction in execution of a decree against him (*c*). And an execution creditor should attach those rights and interests, notwithstanding their being incumbered. If he does not do so, but remains content with a temporary arrangement, such as an assignment of the rents of the estate, the mortgagor's rights may be sold and applied in satisfaction of the debt of any other decreeholder, who may afterwards come and attach them.

(*a*) S. D. A. 1856, p. 67. *See* N. W. P. v. 11, p. 11.
(*b*) S. D. A. 1857, pp. 407, 777: 1859, p. 102.
(*c*) *See* S. D. A. 1857, p. 959: 1858, p. 498: 1860, v. 2, p. 35.

A judgment creditor, instead of attaching the rights of his debtor as mortgagor of certain property, merely applied to the Court for an assignment of the rent payable to the debtor by the lessees of that property: and these rents were accordingly paid to him, so long as the lease lasted. Another judgment creditor had his debtor's rights as mortgagor put for sale, in satisfaction of his decree. It was held, that the first creditor having chosen to rest satisfied with another arrangement, and by his own laches allowed the rights of the mortgagor to get into the hands of another, had lost his remedy as against those rights, and that he had no claim, at law or in equity, against the second judgment creditor, or against the estate which had so passed into his hands under a legal title (*a*).

But only those rights and interests which remain to the mortgagor can be sold, and the sale of them in no way affects the mortgagee or his lien. A purchaser at a sale in execution of a decree, is in exactly the same position as a purchaser by private contract. He takes only what the previous possessor has to give; and his acquisition is subject to all the conditions and incidents under which it was held at the date of the sale to him (*b*). A purchaser at a sale in execution of a decree is entitled to all the rents due on the date of sale, or falling due afterwards. But he cannot recover from the former proprietor arrears of revenue fallen due before the

(*a*) N. W. P. v. 8, p. 372.

(*b*) N. W. P. v. 9, pp. 399, 559: v. 10, p. 562: v. 11, p. 8. S. D. A. 1857, pp. 486, 953: 1858, p. 498: 1860, v. 2, p. 25.

sale, which the purchaser has been obliged to pay in order to prevent the estate from being sold by Government (*a*).

An usufructuary mortgage was granted, by way of lease, two years being the term given for repayment, and there being also a stipulation that, after the lapse of that time, the mortgagee might hold on, until his claim was satisfied. It was held, that until the mortgage debt was paid, the mortgagee was entitled to possession, both before and after the expiry of the two years, even against a decreeholder (*b*).

When there was a stipulation, that the mortgage debt should be paid off on a day named, a sale of the property in execution of a decree against the mortgagor, in no degree diminished or affected the lien of the mortgagee, who was consequently held not to be entitled to sue the mortgagor personally for the recovery of the debt, before the day fixed by the contract (*c*).

A mortgagee ought not, however, to remain quiet at the time of a sale of the mortgagor's rights and interests, but should give notice of his lien (*d*).

When a mortgagee comes forward, objecting to an auction sale, on account of his prior lien on the land, the existence of his claim should, time permitting it, be made known by the auctioneer to the bidders. But, as nothing is guaranteed to the purchasers at such sales beyond the right and interest of the mortgagor, whatsoever that may be, no summary investigation is to be made into the claim of the mortgagee (*e*).

(*a*) N. W. P. v. 9, p. 344. (*b*) Sel. Rep. v. 6, p. 175.
(*c*) N. W. P. v. 3, p. 209. (*d*) N. W. P. v. 5, p. 3.
(*e*) Cir. Or. 106, 4th Sept. 1840 : 205, 10th June 1842.

It is the duty of a mortgagor who has covenanted to put the mortgagee into possession, to do so at once, and to secure his quiet enjoyment of possession during the term agreed upon. And a mortgagor who refuses, or is unable to give and to secure possession to an usufructuary mortgagee, renders himself liable to an immediate action for recovery of the money advanced, with interest. This has been ruled by the Privy Council, confirming a decree of the Calcutta Court.

There was an usufructuary conditional sale: the mortgage money was not repayable until the lapse of twenty years, but the mortgagee was to have possession from the date of the mortgage. Possession was withheld, and the mortgagee sued to recover the money lent by him. It was held that the mortgagee was entitled to recover at once, and without waiting till the end of the twenty years (*a*).

A mortgage by way of lease was granted, the condition being, that the farm should continue in force until the money was repaid. Previous to payment, the mortgagor ejected the mortgagee: and the Court held that the latter might sue the mortgagor for the money, and was not restricted to a suit for possession. The mortgagor having committed a breach of contract, could not enforce fulfilment from the mortgagee of what was to be performed on his part (*b*).

(*a*) Sel. Rep. v. 7, p. 47, and Moore's Indian Ap. Cases, v. 4, p. 849: S. D. A. 1856, p. 849. N. W. P. 1860, p. 280.

(*b*) S. D. A. 1852, p. 193: 1853, p. 59: 1858, p. 306. *See* S. D. A. 1859, pp. 58, 322.

In a case, which has been already referred to, of mortgage by conditional sale, the mortgaged lands were, prior to the date at which the loan was repayable, sold under decree as belonging to a third party. The mortgagor, unsuccessfully asserted his rights in the summary sale proceedings, but took no further steps to protect the mortgagee. It was decided that as the mortgagor had neglected the duty which lay upon him of preserving his rights for the mortgagee, the latter was entitled to sue to recover the money he had advanced, and was not bound to enforce his claim against the land (*a*).

When the agreement was, that the mortgagee should be put in possession, and repay himself from the usufruct, and the mortgagor prevented his getting possession, and evaded having his name registered in the Collector's books, this was held to entitle the mortgagee to sue for his money instead of for possession (*b*).

In another case the Court delivered the following judgment: —"The deed of mortgage is of the nature of mortgage with possession, being redeemable at any time, and the original mortgagee's possession having been disturbed by the act of the mortgagors which introduced the auction purchaser in their place, such act amounted to a wrongful dispossession and fully justified the mortgagee in bringing his suit for the amount of mortgage debt, it having been repeatedly held that when the mortgagor has committed a breach of contract, he

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(*a*) S. D. A. 1853, p. 575. (*b*) N. W. P. v. 8, p. 286.

cannot claim fulfilment by the mortgagee of what was to be performed on his part." What the terms of the mortgage contract in this case were, does not exactly appear from the report. But it seems to have been a simple usufructuary mortgage, for in another part of the judgment of the Court, it is said that the decree passed in favor of the mortgagee (for repayment of the mortgage debt) "does not carry a title to possession of the mortgaged property, but only a title to bring to sale the mortgagor's rights and interests in the estate whatever they may be. A declaration will suffice, that in execution the decreeholder will have liberty of bringing to sale those interests only which are mortgaged to him" (*a*).

In one case the mortgagee had possession, by deed of *burna*, in security for a loan. The terms of the deed were such that so long as the estate remained bound by the mortgage, the mortgagee could look no further than the estate and the convenience of the mortgagor for the discharge of the debt. The property was sold for arrears of Government revenue, and the mortgagee consequently lost possession. The sale for arrears left surplus proceeds which were claimed by and paid to a third party who held a decree against the mortgagor. The mortgagee then sued this third party for the surplus proceeds paid over to him, on the ground that those proceeds represented the mortgaged estate and were bound by the mortgage. But it was held that until the mortgagee secured a

(*a*) N. W. P. v. 11, p. 115, *See.* S. D. A: 1859, p. 1181.

decree against the mortgagor, he had no more right to the surplus proceeds or other assets belonging to the mortgagor than any other ordinary creditor had *(a)*. If in execution a decree of Court, mortgaged lands are sold subject to a mortgage, the mortgagee is not entitled to share to any surplus *(b)*.

If it is the expressed intention of the parties, that the land, and the land only, shall be the source from which the mortgagee is in any event to be paid, he must bring his suit for possession, in the first instance. The terms of a mortgage deed were, that the surplus proceeds of a certain talookah should be applied to the extinguishment of the mortgage debt, "and that in the event of the non-fulfilment of this condition, the mortgagee *might sue to obtain possession of the estate.*" It was held that the mortgagee could only avail himself of the remedy expressly provided for him in his deed, and must sue for possession *(c)*. In another case the mortgagee, who was put in possession, was to keep a certain portion of the yearly usufruct in lieu of interest, and this he was to continue to do, until the mortgagors came forward and paid off the principal in one sum. The mortgagee, after being in possession some years, voluntarily gave it up, and brought a suit on his mortgage deed, for principal and interest. It was decided, that so long as he received the specified sum from the usufruct, he had no right to complain, or to ask for his principal, until such time as the mortgagor chose to pay it

(*a*) S. D. A. 1860, v. 2, p. 38. (*b*) Act VIII. of 1859, Sec. 271.
(*c*) N. W. P. v. 3, p. 18.

off. It was, however, also held that if he had been dispossessed while any thing was yet due to him on the mortgage, he would have had a right to claim to be restored to the estate, or to sue without further delay for a cash payment, whichever he preferred (*a*).

There was apparently a pure usufructuary mortgage, the agreement being that the mortgagee should have possession until payment: but the money was not paid, nor did the mortgagee get possession. He therefore brought a suit for possession, and for the interest of his money during the time he had been kept out. The Court ruled that the conditions of the deed shewed that the mode of payment selected by the parties, and stipulated for, was payment from the usufruct, and that the mortgagee's claim for interest was not in accordance with the terms of the deed, and must be rejected (*b*).

The question was raised whether a mortgagee by usufructuary conditional sale, who had never got possession of the property, could foreclose the mortgage, he having refused to accept a tender of the principal sum due, on the ground that he was also entitled to interest, for the time during which the usufruct was withheld from him. The Court expressed an opinion, " that if he did not obtain the possession stipulated for, it was open to him to bring a suit to enforce fulfilment of the contract, but he was not at liberty to forego this right

(*a*) N. W. P. v. 3, p. 331. (*b*) N. W. P. v. 3, p. 211.

and to demand interest in lieu thereof, contrary to the express terms of the contract" (*a*).

In like manner any deviation by the mortgagee from the terms of his contract, entitles the mortgagor at any time to have it cancelled and to pay off his debt.

A mortgage agreement, an usufructuary conditional sale, provided that certain arable and orchard lands, portion of the mortgaged property, should continue in the possession of the mortgagor. The mortgagee, during the continuance of the mortgage term, took possession of some of the reserved orchard lands. It was held that this was such a breach as entitled the mortgagor at once, and without waiting for the day of payment originally agreed on, to cancel the mortgage contract and recover possession of whole mortgaged property, on paying into Court the full amount of the loan. And his right to do so, was not affected by the fact that it was not expressly given to him by the mortgage deed (*b*).

There are several cases which are remarkable as showing that a mortgage may be in abeyance for a time, without its validity being affected. Thus, where the mortgage is of an usufructuary nature, and the Collector comes in and farms the land, not on account of any fault or mismanagement on the part of the mortgagee, the mortgage is as respects the land, in abeyance during the Collector's possession, but will revive in full force, when he gives it up again (*c*). So if a mortgagee

(*a*) N. W. P. v. 8, p. 441. (*b*) N. W. P. v. 10, p. 223.
(*c*) N. W. P. v. 7, p. 7: v. 8, p. 59: v. 10, p. 553.

purchases the remaining rights of the mortgagor, and his purchase is set aside on the ground of the mortgagor having previously disposed of those rights, the mortgagee's title *as mortgagee* will revive in full force (*a*).

It has been ruled that as the holder of a zur-i-peshgee lease has rights equivalent to a mortgageee, he has such "an interest" in the lands leased, that if execution be issued against that "interest," it must be sold according to the rules prescribed for the sale of realty, not according to those laid down for the sale of personalty (*b*).

(*a*) N. W. P. v. 9, p. 183. (*b*) S. D. A. 1861, v. 1, p. 97.

CHAPTER VIII.

OF REDEMPTION.

THE mortgagor, his heirs, and assignees to whom he has transferred his *whole* interest, are entitled to redeem a mortgage. But the right to do so, exists only up to the time of the lands being sold under decree of Court in satisfaction of the mortgagee's claim, or, where the mortgage is by way of conditional sale, until the lapse of one year from the date of issue of a notice from the mortgagee, calling on the mortgagor or his representative to pay off the debt, or to be foreclosed. And redemption can never take place, until a sum equal to the amount of the principal monies advanced with interest at 12 per cent., or at any other rate that may have been stipulated for, has been received by, or tendered to the mortgagee. If the contract was entered into before Act XXVIII. of 1855, came into force, it is not in any case necessary to pay or tender interest at a higher rate than 12 per cent. per annum.

The payment to the mortgagee of what is due to him, must come either from the usufruct of the property pledged, or from some of those persons in whom the right of redemption

is vested: for the interest of the mortgagee in the land, is inferior only to that of the mortgagor and his representatives, and if they do not redeem, the mortgagee need not allow any one else to do so. A mortgagee, therefore, is not bound to receive payment of the sum due to him, or to relinquish his lien, without having proof that the party offering to redeem is entitled to insist upon his right to do so. And he may put any one who claims the right, to proof of his title, not being obliged to give up his mortgage tenure to a stranger. Thus, a person claiming to redeem on the ground of inheritance from the mortgagor, must prove that he really is the heir of the mortgagor, before he can succeed in his suit (*a*). "The mortgagee is not bound to *any* person who may start up with the allegation that he has succeeded to the rights of the original mortgagor. On the contrary, it is his duty as trustee for the mortgagor, to take the same care of the estate as he would of his own, and to admit no claims upon it until assured of the title of the claimant" (*b*).

And if the mortgagee rejects the tender of one not entitled to redeem the mortgagor cannot afterwards claim any benefit from such tender, unless it was expressly made on his account.

A creditor having obtained a decree against his debtor, wished to put it in force by attaching and selling certain lands belonging to the latter. But the lands were in the possession of a mortgagee by conditional sale, and could not be attached.

(*a*) N. W. P. v. 7, p. 45: 1860, p. 120. (*b*) S. D. A. 1859, p. 1273.

The decreeholder then deposited in Court, what was due on the mortgage, and brought a suit for redemption, in which he was unsuccessful as it was held that he had no title to redeem. The mortgagor himself afterwards brought a suit for redemption, on the ground that the right to redeem (which would otherwise have been barred), had been kept alive by the money having been tendered by the decreeholder. The Court was of opinion, that the money so deposited, could not be considered to be the money of the mortgagor, it not having been deposited on his account, or for his benefit in any way. It was not deposited with a view to save his estate from the conditional sale, but with the view of bringing it to an absolute sale by public auction, in satisfaction of the claims of the depositing party (*a*).

In this case however, the deposit, if it had been made in the mortgagor's name, or with his consent, would have been good, both as entitling the creditor to redeem, and as keeping alive the right of the mortgagor himself to do so. It would then have been the act of the mortgagor himself.

Persons to whom the mortgagor has transferred his whole interest, that is to say, purchasers *out and out* of his equity of redemption, are entitled to redeem (*b*). It was, however, apparently not so held formerly (*c*); and in some cases it is

(*a*) Sel. Rep. v. 3, p. 54.

(*b*) S. D. A. 1853, p. 859. N. W. P. v. 9, pp. 371, 421. In N. W. P. v. 8, pp. 181, 316: v. 9, p. 1: v. 10, p. 51, the right of the purchaser of the equity of redemption is tacitly admitted. So in S. D. A. 1854, p. 1: 1859, p. 127.

(*c*) S. D. A. 1847, p. 499. N. W. P. v. 6, p. 210.

still a matter of uncertainty whether a subsequent mortgagee has a right to redeem.

As regards simple mortgages, it has been decided that a mortgagee by conditional sale can redeem one who has a prior simple mortgage of the same property (*a*). And this decision does not violate any principle or supposed principle. For in a simple mortgage, the mortgagee never has any right in the land pledged, further than that he may have it sold in order to realize what is due to him; the only thing that he contracts for when he lends his money, is that it shall be paid back with interest; if it is so, he gets all that he ever contracted for, and he is not perjudiced by the fact that the money he receives, comes from the hand of a subsequent mortgagee, and not from the mortgagor himself direct.

Where there was a simple mortgage and a subsequent mortgage by conditional sale, the first mortgagee got a decree and sold the property in execution. The Court held that the second mortgagee could have redeemed the first, and that not having done so, but having allowed the estate to be sold to satisfy the first mortgage, he had no claim as against the purchasers at the sale, and could not follow the lands in their hands (*b*).

But the opinion of the Courts seems to be that no subsequent mortgagee has any right of redemption enabling him to redeem a prior mortgagee by conditional sale. It has been expressly

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(*a*) S. D. A. 1848, p. 305: 1859, p. 1567. (*b*) S. D. A. 1859, p. 1567.

so decided by the Agra Court in one case, where in giving judgment it was said that "the parties to a mortgage contract are mutually bound by their engagements to each other; and as the first mortgagee's contract was with his mortgagor, and with him only, or with his legal representatives, in which light the second mortgagee cannot be viewed, it is not competent to any third party to claim, or to the Courts to compel, a surrender of the tenure in whole or part, for which the first mortgagee is only answerable to the persons from whom he received it by payment of the amount of the mortgage loan. It equally follows, that the mortgagor is not at liberty to devolve the right of redemption to a third person, not a legal representative" (*a*).

The Calcutta Court appears to have come indirectly to the same conclusion, in a case in which the question was, who was "legal representative" of the mortgagor so as to entitle him to be served with notice of foreclosure. The Regulations generally mention only "the borrower" as having the right to redeem. But Regulation XVII. of 1806, Section 7, lays down what will, in cases of conditional sale, "entitle the mortgagor and owner of the pledged property or *his legal representative* to the redemption of the property;" and Section 8 requires a year's notice to be given to "the mortgagor or *his legal representative*" before foreclosure can take place. The Court declared that no one was entitled to notice except

(*a*) N. W. P. v. 8, p. 304.

"the mortgagor or *his legal representative*, that is, the mortgagor and the successor to and representative of, his legal estate. The notice is of long date and gives ample opportunity to all parties interested in barring a foreclosure to pay up the claim, with its due interest, of the mortgagee taking out the process: and the construction contended for, namely, that a second mortgagee is to be comprehended within the term *legal representative* for the purpose of the notice, is forced and inconsistent with the ordinary and plain meaning of the words," and long established practice (*a*). It will be observed, that this case goes no further than to decide that a second mortgagee is not the mortgagor's legal representative for the purposes of the notice, that is to say, under Section 8. But if he is not his legal representative under Section 8, there is no ground on which it can be said that he is his legal representative under Section 7. The two sections stand together; the words "legal representative" occur in both; there is no appearance of any intention to use them in two different senses; and in the absence of such intention, the words must be interpreted alike in both sections.

That a subsequent mortgagee should not have the right of redeeming a prior mortgagee by conditional sale, if such is really the case, is a most peculiar feature in the law of mortgages. It is in direct opposition to the principle which is the basis of the rule, that a purchaser of the mortgagor's

(*a*) S. D. A. 1853, p. 859.

whole interest, has the same right of redemption that his vendor had. The estates of a mortgagee and of an absolute purchaser are alike, only that of the former is subject to be divested on the happening of certain events. A mortgagee is, in fact, the purchaser of the rights of the mortgagor: he buys them, but gives the mortgagor the chance of re-purchasing within a cetain period. In England and in America, it has always been held, that every person being a subsequent incumbrancer, or having a legal or equitable lien on premises already subject to a mortgage, may insist on a right to redeem, on payment of the principal, interest, and costs due to the party redeemed, he who redeems, being himself liable to be redeemed by those below him (*a*).

The refusal in the Courts here to recognise the right of a subsequent incumbrancer to redeem a prior mortgagee by conditional sale, has probably arisen from the principle being lost sight of, that the mortgage is merely a security for the debt, and collateral to it, and that if the debt is paid by one who has an equity over the land, the mortgagee has got all that he had a right to, or that it was ever intended he should have (*b*). The transaction is treated by the Courts as one of absolute purchase to take effect on a certain day, but liable to become void in the event of payment by the mortgagor before that day. It is in fact dealt with as it was in olden times by the English

(*a*) Spence's Equity Jurisprudence, v. 2, p. 665: Story's Equity Pleading, ss. 185, 186, pp. 231, 2.

(*b*) *See* Hunoomanpersaud Panday's case, *post Appendix.*

Courts, before the present system of equity sprung up. The terms of the contract are followed literally, and as they contain no agreement for the re-payment to the mortgagee of the money advanced by him, it is considered that he looks to be repaid by getting possession of the property pledged, and by that alone, and that he is entitled to that possession, except in the one event of the mortgagor paying him off strictly in the mode agreed upon.

A third party to whom the right has been expressly reserved in the mortgage deed, is entitled to redeem, as the mortgagor himself might have done (*a*) And it appears doubtful whether or not, on the right so reserved being exercised, the property will pass absolutely from the mortgagor to the person so redeeming, or whether the latter will be treated merely as a trustee for the mortgagor (*b*).

But a person may by his own acts deprive himself of his right to redeem. A mortgagor presented a petition in Court, stating his inability to pay off his debt, and that he had put the mortgagee in possession as on foreclosure. The Court seems to have been of opinion, that he was stopped by this proceeding, from afterwards redeeming; but that unless delivery of possession to the mortgagee were proved, there was nothing in what had passed, to bar the right of one claiming under an alsolute purchase from the mortgagor (*c*).

(*a*) N. W. P. v. 3, p. 187.
(*b*) *See* Spence's Equity Jurisprudence, v. 2, p. 664.
(*c*) S. D. A. 1849, p. 311.

A mortgagor is not entitled to redeem any portion of the property pledged without the whole debt being paid off. A mortgage transaction is one and indivisible, and the mortgagee has a lien over the whole estate, until the whole sum advanced, with interest, has been re-paid.

Four villages were together mortgaged for a certain sum: the interest of the mortgagor in two of them was afterwards sold, and the purchaser sued to redeem these two, on payment of what he considered to be the proportion of the advance secured upon them. It was held, that the charge on the four villages could not be broken up, and that the mortgagee had a lien on the two, as on the four, for the whole mortgage debt *(a)*.

A single deed of mortgage, in security for an advance of rupees 2,000, was executed for two mouzahs, each bearing a separate jumma. The mortgagor then applied to the revenue office for change of registry on behalf of the mortgagee, representing each mouza to have been pledged for Company's rupees 1,000. Separate applications were necessary for each mouzah, by reason of their bearing separate jummas in the books. A few days afterwards, the mortgagee applied for registration in the usual form, making no mention of there being any separate advance or lien on *each* mouzah. The Collector, however, issued the usual notification in conformity with the specification of the mortgagor. But the Court, nevertheless, held that as the deed conveyed a lien on both mouzahs

(*a*) S. D. A. 1851, p. 288: 1859, p. 823.

for the entire loan, neither of them could be redeemed without payment of the whole of that debt (*a*).

These seem to be the latest decisions to be found on this point, and are apparently sound and good (*b*). There is, however, a case reported, which is directly opposed to them. A mortgagor having left two heirs, each entitled to succeed to one-half of his ancestor's rights, one of these heirs was declared to have the power to redeem half of the property pledged, on paying half of the balance due in respect of the mortgage debt (*c*). There can be no doubt, that this decision is quite wrong. According to the principle on which it is based, if the right of the mortgagor became split up, and vested in twenty different persons, each of them would be entitled to come forward and sue to redeem the twentieth part of the property, on paying the twentieth part of the debt due; a system which would expose mortgagees to endless annoyance and litigation, and is quite opposed to the principles on which mortgage agreements are founded.

A mortgagor may redeem part of the property pledged, if the debt for which the whole was mortgaged has been satisfied. Two mouzahs were mortgaged as security for one sum, and the equity of redemption in one of these mouzahs was afterwards sold. The purchaser was held to be entitled to sue to redeem the mouzah he had bought, on the ground

(*a*) N. W. P. v. 8, p. 473.
(*b*) *See* Spence's Equity Jurisprudence, v. 2, p. 666. (*c*) Sel. Rep. v. 4, p. 32.

that the whole mortgage debt had been paid off from the usufruct of the two : and this, although the other mouzah had several years before been sold by the mortgagor to the mortgagee (*a*).

Where the mortgage deed had been executed by a minor and by his mother, who joined as guardian, although the fact of her joining in that capacity did not appear on the deed, it was held that the son, on coming of age, could sue alone to redeem, without making his mother a defendant (*b*).

When two or more persons, being co-sharers, join in making a common mortgage, any one of them may redeem the property mortgaged, on payment of the whole sum due. And so may the purchaser of the rights of one of several such mortgagors (*c*).

But on the principle already observed, as to the indivisibility of a mortgage debt, no one or more of several common mortgagors, nor the purchaser from any of them, is entitled to redeem until the whole mortgage debt is paid (*d*). The mortgagor who comes forward and redeems, obtains possession of the whole property, leaving it to the co-mortgagors who do not join in redeeming, to recover their shares from him, on paying their proportion of the mortgage debt, and of the expenses incurred in redeeming (*e*). The joint mortgagors

(*a*) N. W. P. v. 10, p. 51. (*b*) N. W. P. v. 9, p. 525.
(*c*) N. W. P. v. 6, p. 328 : v. 1, p. 81 ; and the cases in note (*e*) *infra*.
(*d*) S. D. A. 1858, p. 1460 : 1860, v. 1, p. 482. N. W. P. 1860, p. 84.
(*e*) Sel. Rep. v. 3, p. 159 : v. 7, p. 53. N. W. P. v. 8, pp. 481, 518 ; v. 9, pp. 525, 543 ; v. 10, p. 378 ; v. 11, p. 77.

who redeem, have a line on the property for the costs they have incurred in redeeming and getting possession. And there is no need for them to institute a suit to establish that lien (*a*).

When a sharer in a property mortgages not only his own share, but that of his co-sharer without his consent, the latter should sue to have the mortgage set aside, so far as it regards his share. He ought not to sue to *redeem*, for by so doing he admits that there is a valid mortgage of his share (*b*).

But although when a mortgage of an entire estate has been executed by several proprietors in one and the same transaction, an action by one proprietor to redeem his own peculiar share on paying his proportion of the loan, will generally not lie, yet it has been said that this rule is not without exception, and cases may occur, in which for special reasons its enforcement may not be considered proper. And in one case, it was held that this objection must be specially pleaded by the mortgagee in the first instance, and would not be entertained if not advanced until the case was in appeal, as the Courts would not take up an objection *suo motu*, except when it appeared on the face of the proceedings that some positive law had been infringed, in which case, and in which alone, it was their duty to interfere (*c*).

The rule that one of several common mortgagors may redeem the whole estate, and that he cannot redeem his own

(*a*) N. W. P. v. 11, p. 77. (*b*) N. W. P. v. 9, p. 543.
(*c*) N. W. P. v. 8, p. 591, *See* Cir Ord. 13th September 1843.

share *only*, does not apply, when it appears clearly on the face of the mortgage deed, that the mortgagors have each of them separate and distinct shares in the mortgage (*a*). In such a case, they have no claim on the mortgagee, beyond the interests which they have themselves recorded, and it would seem, that each mortgagor must redeem his own share, and that there can be no success in a suit to redeem the whole property, unless all the parties to the contract join in it. A mortgage contract was entered into by certain persons in their own names, but in reality on behalf of, and as representing, the proprietary community of which they were the headmen. The names and shares of the real proprietors in the mortgage, were afterwards, with the consent of the headmen whose names appeared in the deed, and of the mortgagee, recorded in the administration paper of the settlement. The Court held, that any one of those so recorded as the real mortgagors, would have been entitled to redeem the whole, had it not been that the shares and rights of each were so distinctly defined as to limit the title of each, to the share registered as belonging to him *(b)*.

From the judgment of the Court in this case, it may be inferred, that one who, though not the nominal, is the real mortgagor, and has been once recognised as such by the mortgagee, is entitled to redeem, without the co-operation of the

(a) N. W. P. v. 5, p. 220; v. 9, p. 543; v. 10, p. 378.
(*b*) N. W. P. v. 5, p. 220. *See.* Sel. Rep. v. 7, p. 53.

nominal mortgagor,—that the cestuique trust can redeem without the assistance of his trustee.

There can be no redemption after foreclosure has taken place, for on foreclosure all the rights which the mortgagor had in the property pledged cease. And a suit for redemption instituted after foreclosure has been completed, must fail, except when the foreclosure successfully impeached and set aside.

A mortgagee executed an agreement, to the effect that if the mortgagor would consent to his obtaining a decree for foreclosure, he would afterwards restore the estate to him on certain conditions. He then brought a foreclosure suit, and the mortgagor allowed a decree to pass in his favor. But the mortgagor afterwards instituted a suit to redeem, as the mortgagee refused to fulfil his contract. The Court held that his suit must be dismissed. "If the mortgagor were minded to enforce any agreement whatever with respect to his property, it was indispensably necessary that he should have done so, before suffering the property to pass absolutely away from him. Having suppressed his agreement during the suit for foreclosure, he is not in a position to prefer any legal or equitable claim to benefit therefrom"*(a)*.

It may happen, that a mortgagee in possession is entitled to possession in more characters than one,—that he has some other title, as well as that of mortgagee. In such a case a suit for redemption will not lie.

(*a*) N. W. P. v. 5, p. 294.

A sum of money having been advanced for the payment of arrears of Government revenue due on a certain puttee, the lender was put in possession for five years as mortgagee. At the end of that period, a further sum was due for arrears, which the mortgagee paid up, obtaining a further mortgage for ten years. About the time when this second lease was granted, the Revenue officers were making a new settlement of the district, and they made it in respect of the mortgaged puttee, with the mortgagee, and not with the mortgagor, the settlement being renewed with the mortgagee as farmer of the puttee for twenty years. A suit for redemption and recovery of possession, was brought by the mortgagor, at the date named as the end of the second lease, but it was held that as the mortgagee then claimed, not as mortgagee but as farmer under the settlement, a suit for redemption would not lie until the termination of his farm: the settlement, if bad, must first be set aside (*a*).

So, A holding at the time a farming lease from the Government of B's lands, advanced a sum of money to him, and received in security for the debt, a mortgage of the same property. By the terms of the mortgage contract, A was to have immediate possession and registry, and B was declared entitled to redeem after the expiration of ten years. At the close of that period, B sued for possession by redemption; but he failed, on the ground that A was in, not as mortgagee, but as Government lessee (*b*).

Under the old law of limitation which still has operation in all suits instituted before the 1st of January 1862, a mortgagor is never barred by mere lapse of time, from recovering his property, whether real or personal, as the rule that suits are cognizable only within twelve years from the time when the cause of action arose, is applicable only when the possession of the occupant has been under a title *bona fide* believed to have conveyed a right of property to the possessor,—which the possession of a mortgagee never can be. The words of the Regulation, which is applicable to deposits or pledges of money or other personal property, as well as to land (*a*), are: "Provided, that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit, wherein the occupant of the land or other property may have acquired, or held, possession thereof as mortgagee or depository only, without any proprietary right nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, shall not have been under a title *bona fide* believed to have conveyed a right of property to the possessor" (*b*). So that mere efflux of time, will not, under the old law, of itself bar the right to redeem a mortgage (*c*).

And therefore, when, after a lapse of many years, the representative of the mortgagor sued to redeem, the fact that

(*a*) Cons. 965, W. C. 7th July 1835. (*b*) Reg. II. 1805, Sec. 3, Cl. 4.
(*c*) Sel. Rep. v. 1, p. 185: S. D. A. 1853, p. 975: 1854, p. 400: 1859. pp. 1135, 1273. N. W. P. v. 6, p. 203.

neither he, nor his father, nor his grandfather, all of whom in turn represented the original mortgagor, were ever in possession of the property, was held to be no ground of objection to his succeeding in his claim *(a)*. But this rule, of course, applies only to the right to redeem the land, not to the right to recover mesne profits, or profits come to the mortgagee's hands, after the mortgage debt had been liquidated in full, and when the mortgagor might have had himself put in possession if he had chosen. And if, after the mortgage debt has been in fact paid off from the usufruct of the land, the mortgagor is contented to wait more than twelve years before he advances his claim to possession, he is at liberty to do so, but he will not be allowed wasilat, or mesne profits, except for the twelve years immediately preceding the institution of his suit,—in like manner as under similar circumstances, he could not claim the amount due on a bond, or the rent accrued on land (*b*).

It is only in a *mere* redemption suit that the mortgagor has the benefit of this exception to the ordinary rule of limitation. Therefore, when a suit was brought to set aside an alleged mortgage deed, it being denied by the supposed mortgagor that he ever gave a mortgage at all, the case was held not to come within the exception (*c*). And when a party had been admitted by the Revenue Authorities to a settlement as proprietor under a

(*a*) N. W. P. v. 3, p. 187.
(*b*) N. W. P. v. 4, p. 298. Sel. Rep. v. 6, p. 231: v. 7, p. 182.
(*c*) S. D. A. 1859, p. 304: and *see* p. 1273.

birt title, it was held, that a suit to redeem the land, on the ground that the title of the person so admitted to the settlement was really only that of mortgagee, must be brought within twelve years from the date of the order of the Revenue officer. The Court was unanimously of opinion, that the plaintiff's (the alleged mortgagor's) cause of action, arose with the order of the settlement officers, which rejected the claim then put forward by the plaintiff as proprietor and mortgagor, and admitted his opponent to settlement as proprietor: and that, as the intermediate occupancy of the latter, which had extended over a period of more than twelve years, had been under a *bona fide* title (*i. e.* under the order of the Revenue officers), which conveyed a right of property to the possessor, the case could not be considered as falling within the cases which are excepted by Clause 4 of Section 3, from the operation of the ordinary rule of limitation; and the claim of the plaintiff having consequently become extinguished by lapse of time, under the general rule, he has no longer in a position to contest the title of the defendant, or to put him to the proof as to whether the possession held prior to the date of settlement, was of the nature of a mortgage otherwise *(a)*.

So where the original possession was admitted to have been as mortgagees, but the mortgagees had at the settlement been entered on the register as zemindars, without any assertion of title whatever on the part of the mortgagors, it was

(*a*) N. W. P. v. 8, p. 136.

held that a redemption suit brought more than twelve years after such settlement, was barred: that it was in fact not a redemption suit, but a suit to reverse the settlement, which could not be reversed after such a lapse of time. And the Court expressed an opinion that the defendant's title was a *bona-fide* one. "Whatever inferior interest may have been vested in them as mortgagees, previously to such settlement, became virtually superseded and extinguished, not indeed by the lapse of time, but by the new and superior right conferred on the defendants by the settlement concluded with them as zemindars, and the character of their tenure having been thus altered by a specific act, the plaintiff's cause of action is rightly held to arise from the date of such act" (*a*).

The soundness of the principles enunciated in these last two cases, may however, perhaps be open to doubt.

All suits instituted on or after the 1st of January 1862 come under the new law of limitation (*b*).

Act XIV. of 1859 enacts (*c*) that suits against a mortgagee for the recovery of any property moveable or immoveable, must be brought,—if the property moveable, within thirty years from the time of the mortgage,—and if the property be immoveable, within sixty years. If in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing signed by the mortgagee or some person claiming under him, the period of

(*a*) N. W. P. v. 10, p. 443. (*b*) Acts XIV. of 1859 and XI. of 1861.
(*c*) Sec. 1, Cl. 15.

limitation will count from the date of such acknowledgment in writing (*a*). But except in the one case of a *written acknowledgment* of the mortgagor's title or right of redemption it will always count from the date of the mortgage.

In suits for the recovery from the purchaser, or any person claiming under him, of any property purchased *bona fide* and for valuable consideration from a trustee, or mortgagee, the cause of action arises at the date of the purchase, and the suit must be instituted within twelve years from that date (*b*) : but in the case of a purchaser from a mortgagee the suit must be brought within the time limited for the bringing of a suit against the mortgagee himself for the recovery of the property as well as within twelve years from the date of the purchase (*c*).

The manner in which redemption is carried out, varies according to the nature of the mortgage. But in all cases, the redemption is complete, on the payment or tender to the mortgagee, or the deposit in Court, so long as the right of redemption is in existence, of the sum on payment of which the mortgage is by the contract declared to be redeemable.

A mortgage deed, and a separate deed relating to the same transaction, contained stipulations for the annual payment to the mortgagor by the mortgagee, who was to have possession, of a certain sum for *nanker* and *seer*. The mortgagor sued to redeem, and stated in his plaint that he meant to bring a separate suit for arrears of the *nanker* and *seer*. It was ruled, that he was not obliged to include his claim for these arrears in the

(*a*) Act XIV. of 1859, Sec. 1, Cl. 15. (*b*) *Ibid*, Sec. 1, Cl. 12. (*c*) *Ibid*, Sec. 5.

redemption suit, and that there would be no such splitting of demands, as rendered him liable to a nonsuit (*a*). In another case it was held that the mortgagor was right in including a claim for arrears of *nanker* in a redemption suit, in which a general account was demanded. But it would seem that if the agreement for the *nanker* had been by a separate deed, a separate suit would have been necessary (*b*).

A mortgagee got possession of certain lands not included in his mortgage. The mortgagor afterwards sued to redeem, not mentioning these lands. He then brought another suit for possession of them: and it was held that this was no splitting of claims, and that the cause of action was not *one* (*c*).

A mortgagee having fraudulently excluded part of the mortgaged property from the rent roll, and entered it as rent-free, the mortgagor rightly included in his redemption suit, a prayer that this might be corrected, and that the mortgagee might be charged with the rent which ought not to have been relinquished (*d*).

In a redemption suit, the mortgagee kept back the original mortgage deed, and produced one which turned out to be a forgery. It was held, that the Court should have gone on with the case, and decided it upon secondary evidence produced by the mortgagor of what the terms of the contract were (*e*).

(*a*) N. W. P. v. 9, p. 465. (*b*) N. W. P. v. 9, p. 522.
(*c*) N. W. P. v. 9, p. 425. (*d*) N. W. P. v. 9, p. 525.
(*e*) N. W. P. v. 10, p. 69.

The tender or deposit must be of money, and the lender is not bound to accept of a teep, bond, or bill, instead of cash. However, if he does accept such a mode of payment, he cannot afterwards repudiate his acceptance.

But a strict compliance with the terms of his agreement, is all that is required of the mortgagor (*a*). Therefore, a tender or deposit not made in cash, is good, if it was the intention of the parties, at the time of contracting, that a payment or tender so made should be sufficient. Where it appeared to be in accordance with the original intention of the parties, certain sums due from the mortgagee were allowed to be deducted by the mortgagor from his debt, and further a tender of Company's Paper the nominal value of which amounted to the debts reduced, was held a sufficient tender, without reference to the selling price of the paper. "The mortgagors have shown to the satisfaction of the Court, that they offered to pay all that was justly due at the date of making the tender, and in the mode contemplated by the lender, and they are therefore entitled" to a decree (*b*).

So, when the mortgage deed stipulates that the mortgagor shall be entitled to redeem on paying the principal, a tender of the principal alone is sufficient: and any claim which the mortgagee may have for interest, or for other matters arising out of the mortgage transaction, must be enforced by him in a separate suit against the mortgagor. He cannot, on the

(*a*) *See* N. W. P. v. 11, p. 147. (*b*) N. W. P. v. 8, p. 447.

ground of any such claim, oppose the mortgagor's right of redemption *(a)*.

And if a good and sufficient tender is made, but is rejected by the mortgagee, he is not entitled to any interest, after the date of the tender,—while if he is in possession of the land, he is accountable for the proceeds from that date, such proceeds being estimated according to the gross *jumma bundee*. All his rights under the mortgage contract are in fact at an end, on a proper tender being made: and interest from that date will be disallowed, even though the mortgagor does not plead his non-liability to pay it *(b)*.

Regulation III. 1793 (*c*), Sec. 8, required that all suits regarding the right to real property, should be decided in the district or zillah in which the land was situated: and this rule could not be dispensed with, except on permission previously obtained from the Sudder Court. A redemption suit had therefore to be brought in a Court of the district in which the lands to be redeemed were situated: and if the property came within the limits of more than one zillah, leave had to be obtained from the Sudder Court, to include the whole matter in one suit, in some one of the Courts which had jurisdiction (*d*). And an error in jurisdiction was not a technicality which could be cured by Act IX. of 1854 (*e*).

(a) N. W. P. v. 8, p. 441. *See* S. D. A. 1859, p. 144. *(b)* N. W. P. v. 9, p. 1.

(c) And Reg. II. 1803, s. 5, both repealed by Act X. of 1861.

(d) S. D. A. 1853, p. 305: 1856, p. 579. *See* Ras Muni Dabee, *v.* Prankishen Das, v. 4, Moore's Ind. Ap. Cases, p. 392.

(*e*) S. D. A. 1857, p. 1442. Act IX. of 1854 is repealed by Act X. of 1861. *See* Act VIII. of 1859.

Under the Civil Procedure Code if the suit be for land situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be brought in a Court within whose jurisdiction any part of the land lies, if the claim, in respect of the value of the land, be cognizable by the Court: but in Court which the suit is brought must apply to the District Court for authority to proceed with the same (*a*). If the property lie in different districts the suit may be brought in any Court otherwise competent to try it, within the jurisdiction of which any portion of the land is situate, but in such case the Court in which the suit is brought must apply to the Hight Court or Sudder Court for authority to proceed with the same; and if the application is made by a Court subordinate to a District Court, it must be submitted through that District Court (*b*). If the property lie in Districts subject to different High Courts or Sudder Courts, the application is to be made to the High or Sudder Courts to which the District in which the suit is brought is subject, and such High or Sudder Court with the concurrence of the High or Sudder Court to which the other District is subject, may give authority to proceed with the same (*c*).

I. As to the redemption of pure usufructuary mortgages.

I. *When the mortgage contract was entered into previous to the passing of Act XXVIII. of* 1855.

(*a*) Act VIII. of 1859, Sec. 11. (*b*) *Ibid*, Sec. 12.
(*c*) *Ibid*, Sec. 13, *See* Sec. 14.

The general custom in former times seems to have been that the usufruct of the mortgaged property, however lucrative it might be, should be taken in lieu of interest, and that there should be no redemption, until a payment or tender of the principal was made in full (*a*). Since the 28th of march 1780 however, the usufructuary mortgagee is confined to interest at 12 per cent. per annum, or at any lower rate which may have been agreed upon, and whatever sums are received from the land in excess of such interest, are applied to the reduction of the principal.

The regulations by which this new system was introduced, have ever since their enactment, been a very constant and fruitful source of litigation, from the difficulty of ascertaining the real amount of the mortgagee's receipts. The judge of Mooradabad, in a report of the 5th September 1850, to the Agra Court, wrote on this subject (*b*): "These suits are probably the most complex that come before our Courts, and to say nothing of the intricacy of the law relating to them, lead to perjuries without end on the part of the mortgagee on his swearing to the accounts produced by him according to law, to subornation of perjury on his part to support his perjury, and to all kinds of falsification of accounts. Surely it would be a very simple remedy, to revert to the old native system, *i. e.*, to let the parties abide by their contract in all its integrity, or, in other words, to place

(*a*) *See* Reg. XV. 1793, s. 10.

(*b*) Rep. Sel. Com. of the House of Commons on Ind. Territ. 1852, Ap. p. 608.

the chance of profit, more or less than 12 per cent., as it may be, against the interest." And the Court in its reply observes (*a*) : "The Court entirely concur in the view taken by you of the baneful tendency and effects of the law relating to the redemption of mortgages, as stated in your eighth paragraph. In their judgment, usury laws are worse than useless, as they cannot be enforçed, and only lead to fraud and perjury. It is to be hoped, that the Government may be induced to take the subject into consideration, and to provide by legislative proceedings, a remedy for an evil which has been the result of legislation."

By Regulation XV. of 1793, Section 10, it is enacted :— "In cases of mortgages or real property, executed prior to the twenty-eighth day of March, one thousand seven hundred and eighty, in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession, or not, the usufruct is to be allowed to the mortgagee, in lieu of interest, agreeably to the former custom of the country (provided it shall have been so stipulated between the parties), until the abovementioned date, subsequent to which the same interest is to be allowed on such mortgage bonds, and also on all bonds for the mortgage of real property, which have been entered into on or since that date, or that may be hereafter executed, as is allowed on other bonds, which have been or may be granted on, or posterior to, such date, and no more; and all such mortgages are

(*a*) Para. 4.

to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum, with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, subsequent to the twenty-eighth day of March, one thousand seven hundred and eighty, or otherwise liquidated by the mortgagor" (*a*).

All such mortgages are, therefore, to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it, shall have been realised, from the usufruct of the property or otherwise. They are redeemable after any length of time, until the lapse of sixty years from the date of the mortgage, or of the mortgagee's last acknowledgment in writing of the mortgagor's title or of his right of redemption (*b*).

The same rule applies to zur-i-peshgee leases, which we have seen have been decided to be of the nature of pure usufructuary mortgages, and are therefore subject to the rules which govern them (*c*). In one case, when the mortgagee held on after the end of his lease, his debt not being fully paid off, the Court said that it had no ground for acting summarily between the parties: and that in order to entitle him to possession, the mortgagor must proceed regularly after the whole amount of the debt had been realised from the property,—

(*a*) Reg. XV. 1793, Sec. 10; Reg. XVII. 1806, Sec. 5; Reg. XXXIV. 1803, Sec. 9. All of these are repealed by Act XXVIII. of 1855, *as to contracts entered into since the passing of that Act.*

(*b*) Act XIV. of 1859, Sec. 1, Cl. 15.

(*c*) *Supra*, p. 11. *See* S. D. A. 1859, p. 1566; 1860, v. 2, p. 174; 1862, p. 57.

and this whether the original term of the lease had expired or not. And the Court added that if a party holds over after the expiry of his lease, the terms of the lease not having been fully satisfied, he does so on exactly the same conditions as those on which he held during the period for which the lease ran (*a*).

All proceedings under Regulation XV. of 1793, Section 10, must be taken by way of regular suit, and there is no provision for disposing of cases which fall within its scope, by a summary suit (*b*). But nothing can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that some thing *may possibly* still be due on the mortgage (*c*). And the *onus probandi* does not lie upon the mortgagor: that is to say he is not bound to prove, independently of the accounts filed by the mortgagee, that the mortgage debt has been paid off (*d*). But if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs (*e*).

And a condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law by which the lender is to account to the borrower for the proceeds during his possession (*f*). As a general rule, the

(*a*) S. D. A. 1860, v. 1, p. 364.

(*b*) Cons. 277, 9th July 1817; Cons. 830, W. C., 20th Sept. Cal. C., 18th Oct. 1833. *See* S. D. A. 1860, v. 1, pp. 383, 390.

(*c*) N. W. P. v. 9, p. 371. S. D. A. 1858, p. 1691 : 1859, p. 1076.

(*d*) S. D. A. 1855, p. 432 : 1859, p. 5. (*e*) N. W. P. v. 11, p. 3.

(*f*) S. D. A. 1851, p. 632; 1859, p. 1076. N. W. P. v. 10, pp. 51, 198. *Supra*, pp. 58, 59.

mortgagee may be called on by the mortgagor to account at any time, on the mortgagor's allegation that the whole sum due, with interest has been received by him. And it has been held, that the mere fact that the term mentioned as that during which a zur-i-peshgee lease is to continue in force, has not yet elapsed,—or even a special agreement that the mortgagee shall remain in possession until payment of the debt is made in one sum, does not prevent the mortgage from being at an end, whenever the mortgagee has received both principal and interest (*a*).

But although the law appears to enact in the most distinct and comprehensive terms, that all usufructuary mortgages are to be considered cancelled and redeemed *whenever* the principal sum with interest shall have been liquidated by the mortgagor, or shall have been realized from the usufruct of the mortgaged property,—and although zur-i-peshgee leases are held to be in their nature usufructuary mortgages, and governed by the rules applicable to such transactions, yet doubts have been raised as to whether or not in the case of a zur-i-peshgee lease, the lessor and mortgagor can sue for possession and an account, until the expiry of the term for which the lease has been given.

The Calcutta Court on the 15th April 1852, in a case from the report of which it does not appear whether the term of the lease had expired or not when the suit was brought, held

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(*a*) S. D. A. 1852, pp. 280, 304: 1862, p. 57. N. W. P. v. 5, p. 266.

that the lease in question must be declared cancelled, in pursuance of the Regulation which enacts that whenever the principal and interest have been re-paid from the usufruct, the mortgage is to be considered virtually and in effect cancelled and redeemed (*a*). And on the authority of this case, the Court, less than a fortnight afterwards, decided expressly that a zur-i-peshgee lease might be declared cancelled, prior to the expiry of the term of the lease: and it was remarked in giving a judgment, "the lease is liable to cancelment, *whenever* the principal sum with interest," has been realised by the mortgagee (*b*).

The same question, however, again arose two months later, when a different view of it seems to have been taken. The Court said that the precedent of the 15th April was inapplicable, as *there*, the term of the lease had expired before suit brought; and it was held that the mortgagee need not come to an account or give up possession, until the end of his lease. But although the point was raised and discussed, the judgment given by the Court, appears, after all, to have been based not on any general principle of this kind, but on the special circumstances of the particular case before them. "We find a condition that the lessee and mortgagee shall pay annually a considerable sum certain, to the mortgagor as rent, irrespective of what he may each year realise from the property. This makes the transaction one of a peculiar nature, in which the lessee incurred a heavy risk, in consideration of which he

(*a*) S. D. A. 1852, p. 280. (*b*) S. D. A. 1852, p. 304: 1862, p. 57.

is entitled, upon the contract of lease, to hold possession of the farm, until the expiration of the period stipulated. This transaction, as it stands before us, is of an action brought before the period when the special lease had expired, which takes the case out of the provisions of Sections 9 and 10, Regulation XV. of 1793, whatever the effect of these may be" (*a*).

The terms of the mortgage deed were:—" that the property should remain in the possession of the mortgagee from the year 1249 to the year 1262, that all profit or loss should be his, and that no account shall be rendered, nor demand made of restitution of the property, until the end of the stipulated period, and then only on paying back the principal money lent, and at the end of the year." The Agra Court decided that the mortgagee was entitled to retain possession until the expiration of the term agreed upon, and that, until then, the mortgagor's suit for an account would not lie. " It was held by a full bench in a former case, which was precisely similar to the one now before us, that the mortgagor could not dispossess the mortgagee from the mortgaged property until the expiration of the term agreed upon: and that the mortgagor was bound to abide by the condition in the contract which he entered into, in the absence of any proof that such contract was made with a view to evade the usury laws. And so, in the present case" (*b*).

(*a*) S. D. A. 1852, p. 577.
(*b*) N. W. P. v. 3, p. 252. *See* S. D. A. 1858, p. 1840.

There was a simple usufructuary mortgage from the profits of which the interest was to be discharged, and it was provided that if *at the end* of any year the mortgagor should refund the principal, he might redeem the property, but that he should not be at liberty to redeem during the course of the year. The Court held that if the principal was paid during the year the mortgagor was entitled to possession at the end of the year, but not sooner *(a)*.

But the mortgagor must be careful not to oust the mortgagee within the period during which he is entitled to remain in possession, unless he is prepared to show beyond doubt, that the debt has been fully paid off. If he does oust the mortgagee too soon, he renders himself personally liable to an action for the balance then due, the mortgagee being no longer restricted to his claim for possession *(b)*.

The purchaser of a mortgagor's interest, with full notice of the mortgage, ousted the mortgagee in possession, denying that there ever was a mortgage. It was held that being a wrong-doer in ousting the mortgagee, he could not insist on the mortgagee rendering his accounts under Sec. 2 of Reg. XV. 1793: that the purchaser would be personally liable in a suit to recover damages for ousting the mortgagee, but that he was not *personally* liable for the mortgage debt merely as representing the mortgagor in the lands pledged *(c)*.

(a) S. D. A. 1860, v. 2, p. 208. *(b)* S. D. A. 1853, p. 69.
(c) S. D. A. 1859, p. 1181.

2. *When the mortgage contract has been entered into subsequent to the passing of Act XXVIII. of* 1855.

The repeal of the usury laws has created a great change in the position of usufructuary mortgages; and agreements made since it took place, will be strictly enforced even although such as to give the mortgagee interest at a higher rate than 12 per cent. per annum.

Section 4 of Act XXVIII. of 1855, enacts that a mortgage or other contract for the loan of money, whereby it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties.

By Section 5, whenever, under the Regulations of the Bengal Code, a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of land thereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract, or if no rate has been stipulated, and interest be payable under the terms of the contract, at the rate of 12 per cent. per annum; provided, that in the latter case the amount deposited shall be subject to the decision of the Court, as to the rate at which interest shall be calculated.

By Section 6, in any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage or conditional sale of landed property, or other contract whatsoever, entered into after the passing of the Act, *interest is to be calculated at the rate*

stipulated therein. If no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, it shall be calculated at such rate as the Court shall deem reasonable.

So far as they affect contracts entered into since the passing of Act XXVIII. of 1855, the following sections are repealed. Sections 4, 6, 7, 8, 9, 10, 11, Regulation XV. of 1793: Sections 3, 5, 6, 7, 8, 9, 10, Regulation XXXIV. of 1803: Clause 1, Section 23, Regulation VIII. of 1805, so far as it extends the application of the above mentioned sections of Regulation XXXIV. of 1803: Clauses 3, 4, 5, 6, Section 9, Regulation XIV. of 1805, and so much of Section 11 as bears on the subject of usury: Section 2, Regulation VII. of 1806, so far as bears on the subject: and Sections 4 and 6 of the same Regulation.

The effect of the change is simply to bind parties strictly by the terms of the contract they have made. When the agreement is that the usufruct is to be taken in lieu of interest, the mortgagee will not be liable to account, however large his receipts may be: he will be entitled to continue in possession, until the principal is paid to him. If there is no mention of interest at all, it will be for the Court to say whether any is to be allowed, and at what rate. If any rate is mentioned, it will be calculated at that rate whatever it may be. In the two latter cases the mortgagee will be liable to account, but will have to account only on the strict terms of his agreement.

II. As to the redemption of simple mortgages. The regulations lay down no particular rule as to the redemption of simple mortgages. In such cases, the mortgagor has merely to tender the whole balance due to the mortgagee for principal and interest, and may then require the mortgage deed to be delivered up. He must take care to provide himself with the means proving his having made the tender as, in the event of its not being accepted, he may bring a suit to have the mortgage deed cancelled, he offering to pay what is due from himself. A deed of mortgage is in fact of no effect after a legal tender has beem made, and all its conditions and stipulations cease from that date: and therefore, when a proper tender has been made and rejected, the mortgagee ought not to be allowed any interest after the date on which it was made, and the costs of the redemption suit consequent on such rejection, should be thrown on him (*a*).

Simple mortgages, where the mortgagee has been in possession, are redeemable in like manner as are pure usufructuary mortgages; and the mortgagor is not entitled to the summary procedure provided by Sec. 2, Reg. I. 1798, which refers to mortgages by conditional sale only (*b*). As in pure usufructuary mortgages, the liabilities and position of the parties will depend very much on whether the contract was entered into before, or after the passing of Act XXVIII. of 1855.

(*a*) N. W. P. v. 9, p. 1.

(*b*) S. D. A. 1860, v. 1, p. 383. *See* S. D. A. 1860 v. 1, p. 390.

But a simple mortgage, whether usufructuary or not, can be redeemed, only previous to the mortgagee's bringing a suit for his money, and having the property sold under decree, in satisfaction of his claim. On the land being so sold, the mortgage is of course at an end, and there can no longer be any redemption.

III. As to the redemption of mortgages by conditional sale, bye-bil-wufa, or kut-kubala. When the mortgagee has not had possession of the land, the mortgagor may redeem by tendering to the mortgagee or depositing in Court, the principal sum lent with the stipulated interest thereon, (not exceeding the rate of 12 per cent. per annum, if the contract was entered into before Act XXVIII. of 1855 came into force) or, if interest be payable, and no rate has been stipulated for, with interest at the rate of 12 per cent.: or by tendering or depositing any less sum which is the total amount due for principal and interest. But if such smaller sum only is deposited, the mortgage will not be considered as redeemed, until it is admitted or established, that that sum covers the full amount due to the mortgagee (*a*).

The deposit must be made in the Dewanny Adawlut of the city or zillah in which the land is situated: and the judge receiving the same, will furnish the party who pays it in, with a written receipt for the amount, specifying the date on which, and the purpose for which, the deposit is made.

(*a*) Reg. I. 1798, Sec. 2: Reg. XXXIV. 1803, Sec. 12: Act XXVIII. of 1855, Sec. 5.

The judge will, at the same time, cause a written notice of the deposit having been made, to be served on the mortgagee, and will pay to him the amount deposited, on his surrendering the bill of sale or mortgage deed, or showing sufficient cause why it cannot be surrendered (*a*).

The judge's notice generally calls on the mortgagee to take the money out of court, and to deliver up the mortgage deed, and such other title deeds as he may have in his possession, within a certain time,—the period named being any reasonable period, according to the distance of the mortgagee's residence from the station from which the notice is issued (*b*).

In all cases of mortgage by conditional sale, the mortgagor may redeem at any time either before or after the day of payment named in the contract, until the end of one year from the issue of notice of foreclosure by the mortgagee. The right of the mortgagor to redeem prior to the day fixed for payment, rests on express enactment (*c*).

In mortgages, however, entered into previous to the promulgation of Regulation XVII. of 1806, there can be no redemption after the date on which it was originally stipulated that the sale should become absolute if the debt was not paid. But as that Regulation has been now in force for more than fifty years, it is not likely that any cases will occur, which do not fall under its provisions (*d*).

(*a*) Reg. I. 1798, Sec. 2: Reg. XXXIV. 1803, Sec. 12.
(*b*) Cons. No. 974, 7th August 1835.
(*c*) Reg. I. 1798, Sec. 2. See post pp. 167—170.
(*d*) Reg. XVII. 1806, Sec. 7. Cons. No. 672, 20th Jan. 1832.

The steps to be taken in redeeming a mortgage by conditional sale when the mortgagee has had possession, are the same as in cases in which there has been no such possession. There is this difference, however, between the two kinds of mortgage, that when the mortgagee has had the usufruct, the mortgagor need never deposit more than the principal sum borrowed by him, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. And if the mortgagor deposits a sum less than that required by law, that is to say less than the principle, alleging that the sum so deposited is the total amount due to the lender for principal and interest after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and the usual notice given to the mortgagee: and if on investigation, it appears that the amount so deposited is the total amount due, the right of redemption will have been preserved to the mortgagor, and he will be entitled to recover his lands (*a*).

The mortgagor is entitled to receive possession summarily on depositing the principal sum borrowed, leaving the interest to be settled on an adjustment of the mortgagee's receipts and disbursements during the period he has been in possession (*b*). This adjustment must be carried out by a regular suit, one of the results of which may be the mortgagor's recovering his deposit or a part of it, if it exceeded what was really due. If

(*a*) Reg. I. 1798, Secs. 2 and 3. Reg. XVII. 1806, Sec. 7.
(*b*) Cons. No. 339, 25th May 1821.

the mortgagor is unwilling to deposit the whole principal sum, alleging that the whole, or part of it, has been paid, he can obtain possession of his lands only by regular suit.

In all instances in which the lender on a bye-bil-wufa, kut-kubala, or mortgage by conditional sale has been in possession, he must account to the mortgagor for the proceeds of the estate while in his possession, in the same manner as in cases of pure usufructuary mortgage (*a*). "But such part of the Regulation, as directs that the mortgages therein referred to, are to be considered as cancelled and redeemed whenever the principal sum, with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagor, being inapplicable to conditional sales, where the mortgagee has enjoyed the usufruct, it is hereby declared not to apply thereto" *(b)*.

The object of making the declaration contained in this clause, apparently was to show that in the case of an usufructuary mortgage by conditional sale, foreclosure may take place, which it cannot in the case of a pure usufructuary mortgage; and that it is only when the principal with simple interest, has been realised from the usufruct or otherwise, *prior to the expiry of one year from the date of the mortgagee's issuing notice of foreclosure*, that such a mortgage will be considered virtually and in effect cancelled and redeemed. It was, in fact, intended to limit the application of the word "whenever,"

(*a*) S. D. A. 1855, p. 432. N. W. P. v. 9, p. 371. *See Supra*, pp. 150—160.
(*b*) Reg. I. 1798, latter Clause of Sec. 3.

and its application is necessarily limited in the manner pointed out: for in all cases, if foreclosure has once taken place, the mortgagor's interest in the land is at an end, and he has no further claim of any sort on it.

If it were not that Reg. I. of 1798, Sec. 2 enables the mortgagor to redeem as early as he pleases, the object of the declaration might be taken to be to recognise the right of the mortgagee to resist being redeemed prior to the day of payment named in the mortgage deed. Under the English law the mortgagee has that right (*a*), and it is difficult to see on what principle of equity he is deprived of it.

With whatever view it was enacted, there has been a good deal of discussion and misunderstanding as to this clause and its meaning (*b*). In one case it was argued, that its effect was to prevent a mortgagee by conditional sale, from being accountable at all. The Court said, "this exception does not mean that the lender on a bye-bil-wufa, can be entitled to more than the return of his principal and legal interest, but only that his mortgage lien is not virtually and in effect cancelled upon such return, and that the borrower must proceed according to Sec. 2, Reg. I. of 1798" (*c*). There is nothing however, to prevent a mortgagor, whether by conditional sale or otherwise, so long as he is entitled to redeem, from doing so under Sec. 10, Reg. XV. of 1793 (*d*), if he pleases.

(*a*) Coote on Mortgages, p. 528. (*b*) S. D. A. 1851, p. 632: 1852, p. 831.
(*c*) S. D. A. 1851, p. 632. (*d*) Reg. XXXIV. 1803, Sec. 9.

On one rather important point the Court of Calcutta is at variance with that of Agra:—the former having laid down that a mortgagor suing to redeem *before* the time limited in the deed of mortgage, on the ground that the mortgagee has realised his debt from the usufruct of the property, must deposit in Court the entire principal sum advanced:—the latter having ruled that there need be no deposit, when there is a denial that any balance is due.

It is very difficult to perceive any grounds for making a distinction between the two cases; and none appear in the following judgment, in which it is asserted, though not absolutely decided. "The question for consideration is, whether the plaintiff, the mortgagor, having omitted to make previous tender of any sum in repayment of the loan received (a question which was not mooted till after the appeal was referred to a full bench,) can maintain his right of action, without such tender, on the general ground, that he is entitled to call for accounts of collections made by the mortgagee in usufructuary possession, according to the rule laid down in the first part of Sec. 3, Reg. I. of 1798, and Sec. 11, Reg. XV. of 1793. We are of opinion that the plaintiff is entitled to judgment. The whole spirit and intent of Reg. I. of 1798, and of Reg. XVII. of 1806, are for the relief and security of borrowers upon conditional sales. *The requisition of a previous absolute deposit of the entire principal sum advanced, must be complied with under Reg. I. of* 1798 *where application is made for re-entry into possession before the period*

limited in the deed shall have expired. When the suit is brought *after* such period, and there is a denial of any balance due, we hold that, under Sec. 7, Reg. XVII. of 1806, the mortgagor is empowered to sue for restoration of possession, without any deposit, and also under Sec. 11, Reg. XV. of 1793, to demand a rendering of accounts by the mortgagee in possession, at any time previous to final foreclosure of mortgage being carried out by the latter. The mortgagor suing without a deposit, would of course be liable to lose his suit, if on examination of accounts a *deficit* appeared, and the smallest amount might be established to be due" (*a*).

The judgment of the Agra Court, in which it was decided that the process was the same in either case, contains a clear and excellent analysis of the whole law as to the redemption of usufructuary conditional sales. The mortgagor sued for redemption before the time stipulated, alleging that the debt had been paid off from the usufruct, but making no deposit. "The enactment which most clearly lays down the principles upon which a conditional seller should proceed, if he desires to redeem his estate, is Reg. I. of 1798. Sec. 2 (*b*) commences by declaring that the borrower is 'at liberty to pay the amount due, on or before the date stipulated.' This sentence provides both for the time at which he may pay, and also for the *amount* to be paid, that is to say, the 'amount due.' But to avoid doubts, the law goes on to declare how

(*a*) S. D. A. 1849, p. 392: 1857, p. 503. (*b*) Reg. XXXIV. 1803, Sec. 12.

this 'amount due' is to be ascertained. It is at first supposed by the law to be the principal sum, with or without interest, according to circumstances. Such a deposit will secure redemption : but it by no means follows, that the deposit of even a less sum will not have the same effect, for the law goes on to say, 'provided, however, that if the borrower deposit a less sum, alleging that the sum so deposited is the total *amount due* to the lender for principal and interest, after deducting the proceeds of the lands in his possession, such deposit shall be received, and if the amount so deposited be the total amount due, the right of redemption shall be considered to have been preserved.' Now, if the borrower has not the power of demanding an adjustment of accounts in a regular suit for redemption, the Court do not see how the provisions of this law are to be enforced. The *amount due* can be ascertained, only after deducting the proceeds of the land. There is no limit to the smallness,—it might be one rupee,—it might be nothing. Sec. 3 confirms the foregoing Section, and more particularly declares that the account is to be made up 'on the principles prescribed with regard to mortgages, as far as the same may be applicable to the nature of the case.' But there is one rule in regard to mortgages, which is not applicable to conditional sales, and the remaining part of Sec. 3 makes the exception accordingly. Were it not for this special exception, no sale could ever become absolute, the words of the mortgage law being, that 'mortgages are cancelled and redeemed *whenever* the

principal with interest shall have been realised from the usufruct.' For, although a bye-bil-wufa may not have been redeemed by the usufruct or otherwise during the stipulated period, it may have been redeemed by the proceeds of the land during the years which followed the stipulated period, and if such proceeds could be taken into account, it is clear that no sale could ever become absolute. The Court see nothing in Reg. XVII. of 1806, or in any subsequent Regulation, to affect the above construction of the law. The provisions of Reg. XVII. of 1806 are *in addition to*, not in supercession of former laws, and the object of this enactment was to give the mortgagor additional facility of redemption, by enabling him to recover possession whenever he chose to pay down the principal with or without interest, according to circumstances, leaving the *account* to be adjusted subsequently in a regular suit under the provisions of the law (Reg. I. of 1798) already referred to" (*a*).

These cases, however, show that both Courts are agreed in holding, that in all mortgages by conditional sale, the mortgagor *after* the period limited in the deed has expired, has the right to demand an adjustment of accounts and restoration of property in a regular suit for redemption, without making any deposit, or without depositing more than the amount which is due, after deducting the profits of the

(*a*) N. W. P. v. 5, p. 456.

usufructuary possession of the mortgagee, and any payments which may have been made to him (*a*).

A mortgagor seeking an account from his mortgagee, and to redeem, must aver in his plaint, that the principal sum, with interest, has been tendered or been realised from the usufruct or otherwise (*b*). If he states an agreement to pay and receive interest at less than 12 per cent., and it appears from his own account that the debt cannot have been paid off, if a higher rate were allowed, he must establish the agreement for the reduced interest, or his suit will be at once dismissed. If he rests his suit on an averment that at a certain stipulated low rate of interest, the mortgage was redeemed, he cannot, on failing to establish the stipulation, go on to say that the principal with full legal interest has been realised; there must be a direct allegation of that, in the plaint (*c*).

If it appears, from the mortgagor's own evidence, that he is not in a position to redeem in consequence of a balance being still due to the mortgagee, the suit is to be dismissed at once (*d*). So, when on investigating the accounts, the receipts from the usufruct, or these receipts together with sums deposited, or paid to the mortgagee, are found not to cover the amount due, the suit must be dismissed, however small the

(*a*) N. W. P. v. 5, p. 456. S. D. A. 1847, p. 48. Cons. 339. *See* S. D. A. 1855, p. 432: 1857, p. 503.

(*b*) *See* N. W. P. v. 11, p. 3: v. 9, p. 371. S. D. A. 1855, p. 432.

(*c*) S. D. A. 1852, p. 748.

(*d*) N. W. P. v. 6, p. 221.

deficiency may be (*a*). In such cases, the Court cannot give a conditional decree, that, on payment of the balance due, the mortgage is to be held redeemed (*b*). But this is only where the mortgagor is not, according to the terms of his plaint, entitled to redeem. Therefore when it appeared in the pleadings, and was proved, that a tender of the sum due was made previous to bringing the suit, but was rejected by the mortgagee, a decree that the mortgage should be redeemed on payment of the money so tendered, was held to be good (*c*).

When a mortgagor brings a suit for redemption and an account, after service of notice of foreclosure and the expiration of the year of grace, he must be prepared to prove that at the date of the expiry of the year of grace, the whole sum advanced, together with interest up to that date, had been realised from the usufruct, or otherwise liquidated. And this he must do, although the mortgagee has taken no further step since issuing the notice of foreclosure (*d*).

And such a suit must be brought within twelve years from the expiry of the year of grace. On foreclosure taking place, the rights of mortgagor are at end,—there is no longer any mortgagor. And one suing afterwards to redeem as

(*a*) S. D. A. 1849, p. 392: 1852, p. 1120. N. W. P. v. 4, p. 37: v. 5, p. 104: v. 10, p. 543.

(*b*) N. W. P. v. 10, p. 543: 1860, p. 84. (*c*) N. W. P. v. 5, p. 106.

(*d*) S. D. A. 1848, p. 711; 1857, p. 503: 1859, p. 127.

mortgagor, must do so within twelve years from the date on which his cause of action, that, namely, which deprived him of his rights as mortgagor, arose (*a*.)

(*a*) S. D. A. 1854, p. 137: 1859, p. 1494: 1861, v. 1, p. 8. Act XIV. of 1859, Sec. 1, Cl. 12.

CHAPTER IX.

OF THE REMEDIES OF THE MORTGAGEE, INCLUDING FORECLOSURE.

The mortgage debt being the principal, and the land pledged being merely a security, the mortgagor, notwithstanding his breach of condition, still continues relievable from the strict letter of his contract, on payment of principal, interest, and costs. But this, except in the case of pure usufructuary mortgages, is only in the event of the mortgagee not coming forward and asking the assistance of the law to enable him to enforce his security, which assistance will be granted to him, in order that he may not remain subject to a perpetual account, or be deprived for ever of the money advanced by him. On this principal rests the doctrine of foreclosure, in the application of which, the forbearance of the law, towards the mortgagor, is carried very far. The mortgagee however, when once he has obtained his decree, is freed from all further uncertainty, as the foreclosure can never be opened or disturbed, on any ground, except one on which the Courts will in ordinary cases set aside their own decrees. In,

England, equity is so anxious to afford every reasonable relief to the mortgagor, that even after a degree of foreclosure has been made, and the mortgagee has been in possession for many years, the Courts will, under special circumstances, open the decree,—although after twenty years' possession, this will not readily be done *(a)*.

Under the old law of limitation a mortgagee had to bring his suit, whether for foreclosure, for possession, or for the money he had advanced, within twelve years from the time when his cause of action arose, unless he could show by clear and positive proof, that he had, within twelve years from the commencement of his action, demanded possession or payment, and that the mortgagor had admitted the right claimed,—or that he preferred his claim within that period for the matter in dispute, to a Court of competent jurisdiction, and had satisfactory reasons for not proceeding with that suit,—or that, from minority, or other good cause, he had been prevented from bringing a suit (*b*). The period or limitation as between the mortgagor and mortgagee, is therefore by no means necessarily to be calculated from the date of the mortgage deed: in fact it never is to be calculated from that date, unless it so happens that in the particular case in question, it was on that date that the cause of action first arose. If the suit is for possession, the twelve years count from the earliest date on

(*a*) Coote on Mortgages, p. 496.

(*b*) Reg. III. 1793, Sec. 14. Reg. II. 1803, Sec. 18. Both these Regulations are superseded by Act XIV. of 1859, as regards the limitation of suits instituted on or after the 1st of January 1862.

which the plaintiff was entitled to possession, if for money, from the day on which he might first have sued for it. Therefore, in mortgages by conditional sale, as the mortgagee's title to possession on foreclosure does not arise till the completion of the year of grace, the twelve years will run from that date. If it is stipulated that the sum lent shall be paid on a certain day, the time, in a suit for the money, counts from the default in payment. And, if the terms of the agreement are such that the mortgagee is entitled at once to possession as usufructury, a suit for possession must be instituted within twelve years from the date of the deed (*a*).

Where the deed stated that possession had already been given to the mortgagee, who was to hold it for three years, at the end of which time the mortgagor might redeem on payment of the loan with interest, and in default of his doing so the property was to become the mortgagee's—it was held, that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that as he had never been in possession, a suit for possession by him must be brought within twelve years from the date of the deed (*b*).

When a lease by way of mortgage was given in consideration of an advance, and the mortgagee held possession for many years, but was afterwards ousted, and after time sued

(*a*) S. D. A. 1857, p. 1816, *See* N. W. P. v. 5, p. 239 : v. 6, p. 54 : v. 7, p. 322: v. 8, pp. 100, 391 : v. 10, p. 243 : v. 11, p. 72 : 1860, p. 280. Khem Chund, *v.*—4th August 1845 ; Sel. Rep. v. 7, p. 77.

(*b*) N. W. P. v. 8, p. 550. *See* v. 10, p. 243.

to recover what was due on the loan with interest, the twelve years during which his suit would lie, were counted from the turning him out, not from the date of the deed under which he entered (*a*).

Certain mortgaged lands were sold by the Collector for arrears of revenue, while a suit for possession by the mortgagee was pending in the Civil Courts. The surplus proceeds of the sale were, before the possession suit was decided, appropriated by the Collector in payment of arrears on other estates belonging to the mortgagor. The mortgagee obtained a decree for possession. Within twelve years from the date of that decree, but more than twelve years from the date of the transfer made by the Collector, the mortgagee brought an action against him for the recovery of the surplus proceeds so transferred. The majority of the Court held that his suit was barred by lapse of time, and would not lie. And no doubt (*b*), the mortgagor's allowing the property to be sold for arrears, was such a breach of contract on his part, as gave the mortgagee an immediate right of action for the recovery of his debt. "It is argued that the decree for possession of the estate itself, forms the cause of action in the present suit, as, until that decree was passed, plaintiff could not enforce his right to possession of the estate, and consequently to the sale proceeds paid into the Collector's hands on account of it. But it appears to me, that a decree,

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(*a*) S. D. A. 1848, p. 722. (*b*) *Supra*, p. 103.

giving to the plaintiff a right to possess and hold the estate, passed after the sale, is not *primâ facie* sufficient to determine the legality of the demand of the plaintiff on the Collector for any surplus proceeds of such estate, or in itself to afford a cause of action, when those proceeds of sale had been carried to the credit of the defaulter before such decree was passed. I therefore cannot see that the decree affords in itself any date from which a time can be fixed for the law of limitation to run, and consequently the official act of the Collector in crediting the money to the defaulter is the only matter in dispute, to which I can attach the semblance of an injury accruing to the plaintiff, for which he seeks redress by this suit." "The plaintiff only succeeded to the rights of the previous proprietor in the property by that decree, and the property having been previously sold, no rights were left for him to succeed to. It has been urged, that the excess proceeds of sale formed a surviving right. This had been transferred before the decree was made. Supposing that they had been wrongfully transferred, the former proprietor, if he had remained in possession, must have brought his suit for recovery of the money within twelve years from that date, for which reason I hold that the plaintiff, who had only succeeded to his rights, was bound also to sue for them within twelve years from that date. As he has not done so, his suit barred" (*a*).

(*a*) S. D. A. 1854, p. 182.

The rule is of course the same, whether the transaction has been from the beginning one of mortgage, or whether being originally an absolute sale, it has afterwards been rendered conditional, and made redeemable on a certain date, on paying off the sum in consideration for which the deed of sale was executed.

A *birt putr* was granted, which was a deed of absolute sale, under which, if it had been unaccompanied by any other document, it would have been necessary to sue for possession within twelve years from the date of execution. But the sale was converted into a conditional one, by means of an ikrarnamah executed eight days afterwards, which gave the seller a right to redeem at the end of five years, on repaying the sum advanced to him with interest. The Court decided that the *birt putr* was virtually put in abeyance by the subsequent deed, and that the right of the purchaser under it did not revive, until the default of the seller at the end of the five years:—that consequently no cause of action arose until the expiration of the five years, and as a suit for possession within that period could not have been entertained, a suit within twelve years from its expiry was in time. It was further the opinion of the Court, that had the *birt putr* or the ikrarnamah contained any stipulation that the purchaser and lender should enter on possession, the date on which he might first have entered would be the time when his cause of action first arose, and within twelve years from which his suit must have been brought (*a*).

(*a*) N. W. P. v. 8, p. 391: v. 9, p. 130. *See* v. 10, p. 243.

But in calculating the date from which limitation begins to run, care must be taken not to confound the time at which the mortgage debt becomes recoverable, with the time at which some collateral debt, included in the deed, becomes due. Thus, where the mortgagor was to remain in possession at a monthly rent, and in default of payment, the mortgagee was to take possession, the mortgagor having failed in his first and all other payments, it was held that the limitation as to the mortgage debt, did not commence on these defaults (*a*).

Lands previously held rent-free, were, at the settlement, declared by the Revenue Authorities to be liable to assessment. No rent was paid, or sued for, for more than twelve years after this declaration. But it was held that the right to impose rent was not barred: arrears of rent for more than twelve years could not be recovered, but rent being a constantly recurring demand, the right to impose it could not be barred by lapse of time (*b*).

When the mortgage debt is made re-payable by instalments, on default of payment of any one of which the whole become payable and the mortgagee may foreclose, limitation as regards a claim for possession runs from the date of the first default, and a suit for foreclosure must be brought within twelve years from that date (*c*). Each separate instalment, however, is recoverable within twelve years from the date on which it fell due. And if a debtor makes payment

(*a*) N. W. P. v. 5, p. 239. (*b*) N. W. P. v. 9, p. 365.
(*c*) N. W. P. v. 7, p. 322.

in respect of instalments which are barred by lapse of time, he cannot afterwards say he need not have paid them, and set them off against later instalments which are not barred (*a*).

It is difficult to say, what under the old law will be considered to constitute an admission of the debt by the defendant, sufficient to prevent the plaintiff's claim from being barred. But it appears that an admission will not be sufficient, unless it applies to the *very identical* subject matter. Thus an admission as to other property held in the same right as that for which a suit was brought, was declared insufficient (*b*). And it has been ruled that the admission must be consequent on a specific demand on the part of the plaintiff who seeks to make use of it (*c*). When the mortgagee has been in occupation of a house belonging to the mortgagor, on the understanding that the rent should be credited to the mortgagor in liquidation of the interest due on the mortgage, and the rent has accordingly been so credited up to a date within twelve years prior to the institution of the suit, this is an acknowledgment of the mortgagee's claim, sufficient to prevent the limitation rule from barring a suit by the mortgagee for possession, although it was not brought within twelve years from the date when his cause of action originally arose (*d*). So the execution of a new bond, or the payment of a portion of the debt, within twelve years of bringing the suit (if such

(*a*) N. W. P. v. 8, p. 361 : v. 9, p. 477.
(*b*) S. D. A. 1855, p. 20. N. W. P. v. 10, pp. 338, 456, 667.
(*c*) S. D. A. 1855, p. 20. N. W. P. v. 10, p. 452. (*d*) N. W. P. v. 8, p. 27.

payment is not made as in full of all further claims, or is not accompanied by a denial of any further liability), is sufficient (*a*). In one case, the majority of the Court seem to have held, that an admission, coupled with a promise of payment on a contingency which could not be fulfilled, was sufficient to prevent the operation of the limitation law (*b*).

The Calcutta Court holds that under the old law a person who is a minor when the cause of action accrues, may bring his suit at any time within twelve years from the date of the attaining his majority (*c*). But when the cause of action accrues during the life time of the minor's ancestor, the minor is entitled only to such a period from the date of his attaining his majority as will, together with the period during which the ancestor was alive subsequent to the accruing of the cause of action, make up a period of twelve years (*d*).

The Agra Court has ruled repeatedly that the plaintiff whose cause of action accrues during his minority, has not twelve years from the time of his attaining his majority, but that he must bring his suit without any unreasonable delay, on attaining majority. What does or does not constitute unreasonable delay, is left to be decided according to the circumstances of each case (*e*). In one instance three years

(*a*) S. D. A. 1847, p. 277. *See Contra* an opinion expressed in N. W. P. v. 5, p. 140.

(*b*) S. D. A. 1854 p. 1. (*c*) S. D. A. 1855, pp. 281, 320.

(*d*) S. D. A. 1858, p. 116.

(*e*) N. W. P. v. 10, pp. 56, 59, 280: v. 11, p. 47: but there is very little doubt that the ruling in these cases is wrong.

was held to be an unreasonable delay, no sufficient cause being shown for it (*a*.) And the same Court has also decided, that the fact of the plaintiff's being a minor when his cause of action accrued, did not prevent his claim from being barred, when his guardian had in fact instituted a suit for the matter in question, during his minority. It was said, that the plaintiff's "having sued through his guardian, showed that his minority had not prevented the prosecution of his claim" (*b*.)

But the fact of the minor having had a guardian who *might have* sued, but did not, will not affect the minor's right to twelve years from the date of his majority (*c*) : and it is the minor's age, and not his guardian's, that is the question to be considered (*d*).

Proceedings taken by the mortgagee in the miscellaneous department with a view to foreclosure, cannot be considered as an application to a competent Court in regard to a claim, so as under the old law to prevent the twelve years' limitation rule from having full force. The reason of this is, that in such proceedings the question of the validity or otherwise of the mortgagee's claim is not, and cannot be, in any way entered into (*e*). But a petition presented by the mortgagor in the miscellaneous department, may be used against him, if it contains any admission favorable to the mortgagee (*f*).

(*a*) N. W. P. v. 10, p. 56. (*b*) N. W. P. v. 10, p. 27.
(*c*) S. D. A. 1860, v. 1, p. 303. (*d*) S. D. A. 1857, p. 445.
(*e*) N. W. P. v. 8, p. 100 : v. 7, p. 322. Cons. 813, Aug. 16, 1833. S. D. A. 1854, p. 1. As to the effect of an *exparte* Revenue Settlement,—*see* N. W. P. v. 10, p. 364. (*f*) N. W. P. v. 8, p. 288.

A suit was brought for the possession of certain lands. It appeared that one of the defendants, Nurhurree, had at one time been in the habit of paying rent for the ground in dispute to the plaintiff, and farther that he (Nurhurree) had instituted a suit for possession, within twelve years of the plaintiff's bringing his action. The lower Court considered, that inasmuch as the defendant had paid rent to the plaintiff and had sued for possession, his suit must be looked on as if it had been that of the plaintiff, and that consequently twelve years of dispossession had not elapsed without a preferring of the claim in a competent Court. But on appeal, it was decided that, "as the defendant in *his* suit alleged that the lands belonged to Radhahinpore, whereas the plaintiff claimed them as belonging to talook Kulleanee, the duration of the litigation in the case brought by the defendant Nurhurree, could not be deducted in the calculation of the twelve years. It was necessary for the determination of the question of applicability of Sec. 14, Reg. III. 1793 to ascertain, not whether rents, as alleged by the defendant Nurhurree, were paid to the plaintiff, but whether, as pleaded by the defendants, they had been in adverse possession as regarded the plaintiff or not; for the payment of rents solely, so called, was not proof of absolute possession" (*a*).

The plaintiff farmed a property from the defendant, and under-let the farm, pending the lease; the defendant ousted

(*a*) S. D. A. 1853, p. 673.

the under-tenant from one half of the property, who thereupon sued the plaintiff for one half of the advance on which he got his under-farm, and obtained a decree for the same. The plaintiff farmer then sued the landlord for one half of the advance on which he got his farm. But the judge dismissed the suit, on the ground of lapse of time, because the sub-tenant was ousted fifteen years before the date of suit,—the ousting of the sub-tenant, and not the decree obtained by him against the plaintiff, being the date at which the cause of action of the latter first arose. The ruling of the judge was upheld on appeal. "When the under-tenant instituted his suit, the plaintiff must have been aware that he was in some danger, and he should at once have taken steps to assert any claim he might have against his landlord, on the ground of his under-tenant having been injured. He chose to await the result of the under-tenant's suit;—not only so, after the decision of that case in 1840, from which date nine years had to run to complete the twelve years to make the law of limitation applicable, he waited more than twelve years from the date of his under-tenant's possession, before he brought this suit against the zemindar. If plaintiff chose to see the result of the case in which his under-tenant sued him, he did so at his own risk" (*a*).

A plaintiff is not under the old law entitled to deduct from the twelve years, periods during which previous suits brought with a similar general object were pending, these suits having

(*a*) S. D. A. 1854, p. 228.

been of a varied and intermediate character, and not a continuous prosecution of the same claim. Nor can he deduct the time occupied by a suit which has been nonsuited (*a*).

The cause of action of a purchaser at a sale for arrears of revenue under Regulation XI of 1822, arises on the date of confirmation of the sale by the Board of Revenue (*b*). In the case of a purchase at a sale in execution of a decree, it arises on the sale being confirmed by the Court (*c*). A purchaser at an execution sale found that the lands he had purchased were under farm for arrears of revenue. Many years afterwards he brought a suit to obtain possession: and it was held that as he could not have got possession until the expiry of the farm, it was not until that date that his cause of action arose (*d*).

A sued to recover an eight annas share of certain lands, and obtained a decree. In getting possession, he was opposed by B who claimed a portion of the land under a deed creating a *mokururee* tenure in his favor, and succeeded in keeping A out. More than twelve years after the date on which his right to the eight annas share accrued, but less than twelve years after the date of the decree establishing that right, A instituted a suit for the purpose of having B's deed set aside. It was held that his right of action was not barred (*e*).

A and B were joint proprietors of certain property. A's share was sold under a decree against him. The purchaser

(*a*) N. W. P. v. 9, pp. 543, 559. *See* S. D. A. 1854, p. 500.
(*b*) S. D. A. 1855, pp. 319, 350. (*c*) N. W. P. v. 10, p. 287,
(*d*) N. W. P. v. 9, p. 559: v. 10, p. 18. (*e*) S. D. A. 1855, p. 261.

dispossessed B as well as A, and took possession of the whole property. B's cause of action arose on his being dispossessed, not on the date of the decree (*a*).

In one case, the plaintiff sued to set aside a deed of mortgage by conditional sale executed by his brother who, the plaintiff alleged, had no power to make the mortgage without the plaintiff's consent. The time for payment of the money lent elapsed: three years subsequently notice of foreclosure was given to the plaintiff, who appeared and objected to the foreclosure but unsuccessfully: at the end of the year of grace the foreclosure became complete, and the mortgagee who had previously had possession remained in possession. Almost twelve years after the foreclosure was completed the plaintiff brought his suit. The Court held he was not barred, and that the twelve years counted from the expiry of the year of grace, when the mortgagee's title became independent and absolute (*b*). The soundness of this decision may, however, be doubted.

A mortgagee who has issued notice of foreclosure, has a further period of twelve years from the expiry of the year of grace, during which he may sue to be put in possession: but if he lets twelve years pass without bringing his suit for possession on foreclosure, his right is wholly lost to him (*c*). This rule, however, according to the Agra Court, is

(*a*) N. W. P. v. 9, p. 540. *See* p. 543. The following cases bear on the subject of adverse possession, N. W. P. v. 9. pp. 345, 395: v. 10, p 527: and see *post* pp. 189—192.

(*b*) S. D. A. 1856, p. 817,

(*c*) Sel. Rep. v. 7, p, 45.

good only in cases in which notice of foreclosure has been issued at the earliest possible moment. As the mortgagee's cause of action arises on the mortgagor's making default, his suit for possession on foreclosure must be instituted within twelve years from the date default: or rather, as the mortgagor is allowed the indulgence of the year of grace, within twelve years from the end of the year of grace, if notice of foreclosure was issued on the earliest day possible (*a*). But the Calcutta Court holds that the mortgagor has twelve years from the expiry of the year of grace, even although notice of foreclosure has not being issued on the earliest possible date: and that the words of sec. 8, Reg. XVII of 1806 are gerneral, and prescribe no limit beyond which the mortgagee shall be prevented converting his inchoate right into a complete right (*b*).

And the Privy Council has ruled that "it cannot be laid down as a rule universally true, that under Reg. III of 1793 sec. 14, a mortgagee's proceeding for a foreclosure under a mortgage of the class of bye-bil-wufa simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute: for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would

(*a*) N. W. P. 1860, p. 39. *See* N. W. P. v. 9, p. 234.
(*b*) S. D. A. 1857, p. 1816: 1859, p. 1494. *See* 1856, p. 817.

establish a bar arising from simple occupation and nct from the laches of the defendant or of others before him"*(a)*.

In certain cases undisturbed possession for twelve years will give a good title without reference, as it would seem, to the time when the plaintiff's cause of action arose. The Privy Council lras declared that the object of Reg. III of 1793 see. 14, and II of 1805, sec. 3, cls. 1, 2, and 3, "appears to be to protect the title of parties who have been in possession under a *bona fide* title, or what is supposed to be a *bona fide* title, for the period of twelve years. But certain exceptions are introduced into those Regulations, amongst others that the limitation of twelve years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within that period. Neither is it to apply, if the original possession obtained by the party in possession has been obtainedunjustly : and the Regulations are not to apply to cases where the property had so come into the hands of other persons from whom the parties in possession may have derived their title, and shall not have been subsequently held under a just and honest title" (*b*).

But it is only a really *bona fide* possession of twelve years that will give a title; and when the title has been throughout disputed and litigated, theposoession, even though undisturbed,

(a) Prannath Roy Chowdry v. Rookea Begum. Moore's Ind. Ap. Cases, v. 7, p. 323, and *post* Appendix.

(*b*) Rajah Enayat Hossein *v.* Sayud Ahmed Reza. Moor's Ind. Ap. Cases, v, 7, p. 238.

is not a *bona fide* quiet possession which will give any title. A's title accrued in 1813, but a suit which he brought in order to establish it was not finally decided by the Privy Council till 1842. It was held that as it was impracticable for A to bring a suit for possession until the question raised in his first suit was decided by the Privy Council, a suit for possession brought within twelve years from the date of the decree in 1842, was not barred. And it was also held that the possession of the other party under a Foujdary order by a Magistrate, although undisturbed and extending over much more than twelve years, was no *bona fide* possession so as in any way to bar A's right (*a*).

A mortgagor sold his rights and interests, and put the purchaser in possession. Some years afterwards, the mortgagee seems to have obtained a decree of foreclosure of his mortgage, but he did not make the purchaser who was in possession a party to the suit, and consequently was unable to turn him out. After the purchaser had been in undisturbed possession for fourteen years, the mortgagee brought a suit against him and others for possession. The majority of the Court appear to have been of opinion, that the twelve years counted from the date on which the purchaser obtained possession, and that he having been in undisturbed possession for more than twelve years, no suit would lie against him, "under the general law of limitation." But from this, one judge dissented, and held

(*a*) Rajah Enayat Hossein's case, Moore's Ind. Ap. Cases, v. 7, p. 238.

that limitation ran from the date on which the mortgagee first became entitled to sue for possession, not from the date on which the defendant first obtained possession *(a)*.

In a very similar case, the mortgagor's rights had been sold under decr ee of Court, and the purchaser obtained possession. Th e mortgagee subsequently got a decree of foreclosure in the Supreme Court, but did not make the auction purchaser a party of the suit. Within twelve years from the date of the decree, but more than twelve years from the date of the purchaser's getting possession, the mortgagee brought a suit for possession on his decree, making the purchaser defendant. The suit was dismissed as being barred by the law of limitation *(b)*. So, a second mortgagee having obtained a decree of foreclosure in the zillah court, was put in possession of the mortgaged property. A year or two afterwards, the first mortgagee sued in the Supreme Court, and got a decree for foreclosure. But he did not sue for possession on that decree, until the lapse of more than twelve years from the date of the second mortgagee's getting possession, although within twelve years from the date of his own Supreme Court decree. The Court decided, that the first mortgagee's right was barred. "The effect and principle of the law of limitation is, that an unquestioned *bona fide* possession for twelve years, of itself creates a title of property, unless either the plaintiff can give good reasan for not preferring a suit within that

(a) S. D. A. 1853, p. 21. *(b)* S. D. A. 1853, p. 210.

term, or, if he does show admissible cause for his delay, can prove that possession was originally obtained by means of force of fraud, the circumstances of which should be specially set forth, so as to be made matter of a special preliminary issue. The analogy of conflicting sales, of an earlier or later date, does not apply. There is, in our Regulations, a special means of obtaining a proprietary little and foreclosure, whatever may be the date of mortgage; and the possession of a little acquired in that legal course, cannot after twelve years be disputed, except upon pleas of absolute fraud or nullity"(*a*).

A suit was brought for the recovery of certain lands, and the plaintiff got a decree. In carrying out the decree, he found certain persons who had not been parties to the suit, in possession of a portion of the lands. They had been so for many years. Within twelve years from the date of his own decree, but more than twelve years after these third parties entered on possession, the plaintiff sued to establish his right as against them. It was held by a majority of the Court, that the plaintiff's cause of action arose on the date on which the defendants entered into possession, and that consequently his right of action was barred, as no fraud, &c. was shown(*b*).

A fraudulently obtained possession, and B purchased the property at an execution sale under a decree against A. More

(*a*) S. D. A. 1853, p. 546. So in S. D. A. 1854, p. 1; but this case (prannath Roy Chowdry's) was reversed on appeal by the Privy Council, Moore's Ind. Ap. Cases, v. 7, p. 323, and *post* Appendix.

(*b*) S. D. A. 1855, p. 187.

than twelve years after the dispossession by A, but less than twelve years after the purchase by B, a suit for possession was brought against the latter by C. It was held that C's right of action was not barred, B not having possessed under a *bona fide* title for twelve years (*a*).

Possession obtained by a mortgagee under his mortgage, is not a *bona fide* possession, or such as can convey a permanent title (*b*). "Under the Regulation an adverse title must also be a *bona fide* title under the shorter period of limitation, and as neither mortgagor nor mortgagee can in ordinary cases be unconscious of the conditional nature of their own titles, there is no ground for presuming generally between the immediate parties, adverse title from mere length of possession" (*c*).

When on the face of the record it appeared that more than the twelve years had elapsed, the plaintiff, who considered that his right of action was not barred on the ground that his case fell under Cl. I. Sec. 3. Reg. II 1805, was under the old law required distinctly to set forth his grounds either in the plaint or in the replication, specially claiming exemption from the operation of the ordinary limitation rule. And this he must do whether the defendant pleaded that his claim was barred

(*a*) N. W. P. v. 9, p. 391.

(*b*) N. W. P. v. 9, p. 425. *See* S. D. A. 1857, p. 121.

(*c*) Prannath Roy Chowdry's case, Moore's Ind. Ap. Cases, v. 7, p. 232, and *post* Appendix. S. D. A. 1860. v. 1, p. 443.

or not (*a*). And before a claim, otherwise barred, could be held not to be so on the ground that it fell under Cl. 1. Sec. 3. Reg. II of 1805, the Court must find *distinctly* that there was fraud or force in the original transaction, and no twelve years' *bona fide* possession (*b*).

A decree that the right to certain property is barred, extends to the right to *chur* land attached, although no special mention of the *chur* is made in the decree (*c*).

It has been held, that in cases of mortgage, as well of simple mortgage, as of mortgage by conditional sale, the cause of action of a third party (as of one who claims to be proprietor of the pledged land) arises at the date of the deed, not at the date of making the sale absolute, or of bringing the land to sale in satisfaction of the mortgage debt. The rendering the sale absolute, or bringing the land to sale, is a mere consequence depending upon the original pledge, and not a separate transaction by itself. The injury done is complete so far as third parties are concerned, unless the mortgagor avails himself of the condition enabling him to redeem,—of his doing which, there can be no certainty (*d*).

The law of limitation will in all cases be most strictly applied. It has been ruled that the fact of the twleve years having expired during the Dusserah vacation, is no ground for

(*a*) N. W. P. v. 10, p. 273: S. D. A. 1855, p. 203. *See* N. W. P. v. 10, p. 273. Under the Code of Civil Procedure if the cause of action has accrued beyond the period ordinarily allowed for commencing the suit, the ground upon which the exemption is claimed must be stated in the plaint. Act VIII of 1859, sec 26.

(*b*) N. W. P. v. 10, p. 248.

(*c*) S. D. A. 1855, 454. (*d*) S. D. A. 1857, p. 1001. N. W. P. v. 6, p. 1.

admitting the suit on the first Court day after the vacation (*a*). But if the time expires while the Court is unexpectedly shut, as in one instance from the death of a near relative of the judge, the suit will be admissible on the re-opening of the Court. The closing of the Court on such an occasion, without legal authority or public announcement, is a contingency against which the suitor cannot be expected to provide (*b*).

The law as to the Limitation of suits instituted on or after the 1st of January 1862, is to be found in Act XIV. of 1859 (*c*).

Suits to recover money lent, or interest, or for the breach of any contract, must be brought within the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest, or a contract in writing signed by the party to be bound thereby or by his duly authorized agent (*d*). If there is a written engagement or contract, and such engagement or contract could have been registered by virtue of any law or Regulation in force at the time and place of the execution thereof, the suit must still be brought within the period of three years from the time when the debt became due, or when the breach of contract first took place, unless such engagement or contract was registered within six months from the date thereof (*e*) in which case the period is six years (*f*).

(*a*) N. W. P. v. 8, p. 13: v. 10, p. 411. (*b*) N. W. P. v. 8, p. 428.
(*c*) *See* Act XI of 1861.
(*d*) Act XIV of 1859. sec. 1. cl. 9. (*e*) *Ibid*, cl. 10. (*f*) *Ibid*, cl. 16.

In cases governed by English law upon debts and obligations of record and specialties, the suit must be instituted within the period of twelve years from the time the cause of action arose (*a*).

A suit for possession by a mortgagee, or for the recovery of immoveable property, or of any interest in immoveable property must be brought within the period of twelve years from the time the cause of action arose (*b*).

If the person who, but for the law of limitation, would be liable to pay a debt, has admitted that such debt or any part of it is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, is to be computed from the date of such admission; but if more than one person be liable, none of them become chargeable by reason only of a written acknowledgment signed by another of them (*c*).

In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action is to be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt (*d*).

If any person entitled to a right of action has by means of fraud been kept from the knowledge of his having such right or of the title upon which is founded, or if any

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(*a*) Act XIV of 1859, Sec. 1, cl. 11. (*b*) *Ibid* cl. 12.
(*c*) Act XIV of 1859, sec. 4. (*d*) *Ibid*, sec. 6.

document necessary for establishing such right has been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessary thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, must be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document (*a*).

In suits in which the cause of action is founded on fraud, the cause of action is to be deemed to have first arisen at the time at which such fraud became first known by the party wronged (*b*).

If at the time when the right to bring an action first accrues the person to whom the right accrues is under a legal disability,—i. e., a married woman (in a case to be decided by English law), a minor, idiot or lunatic (*c*)—, the action may be brought by such person or his representative within the same time after the disability has ceased, as would otherwise have been allowed from the time when the cause of action accrued, unless such time exceeds the period of three years, in which case the suit must be commenced within three years from the time when the disability ceased. If at the time when the cause of action accrues to any person, he is not under a legal disability, no time is allowed on account

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(*a*) Act XIV of 1859, sec. 9. (*b*) *Ibid*, sec. 10. (*c*) *Ibid*, sec. 12.

of any subsequent disability of such person, or of the legal disability of any person claiming through him *(a)*.

The time during which the defendant has been absent out of the British territories in India is to be excluded from the computation of the period of limitation unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law (*b*). And the time during which the claimant, or any person under whom he claims, has been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bona fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause has been unable to decide upon it or has passed a decision which, on appeal, has been annulled for any such cause, including the time during which such appeal has been pending, is to be excluded from the computation of the period of limitation (*c*).

If any person without his consent has been dispossessed of immoveable property otherwise than by due course of law, he or any person claiming through him is, in a suit brought to recover possession of such property, entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided, that the suit be commenced within six months from the time of such dispossession. But this does not bar the person from whom such

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(*a*) Act XIV of 1859, sec. 11. (*b*) *Ibid*, sec. 13. (*c*) *Ibid*, sec. 14.

possession has been so recovered, or any other person, from instituting a suit to establish his title to the property and to recover possession of it within the ordinary period of limitation (*a*).

Under the old law all suits and complaints of a civil nature, required to be brought in the courts of the zillah or district within the limits of whose jurisdiction the real property to which the suit related was situated, or in other cases, the cause of action arose, or the defendant at the time of the commencement of the suit resided as a fixed inhabitant (*b*). And suing in a wrong Court was not a *technical* error cured by Act IX of 1854 (*c*).

Suits for possession on foreclosure had therefore to be brought in the zillah in which the lands lay. If situated within the limits of more than one zillah, an application had to be made to the Sudder Court, for leave to have the cause tried in one of the courts which had jurisdiction (*d*). A suit for the recovery of money advanced on mortgage, was cognizable in the district in which the money was advanced, and not in the district where the mortgaged land was situated, the loan being the cause of action (*e*). But it would seem that if it were not denied that the mortgage deed was executed within the jurisdiction of the court before which the suit was brought, and within which also the mortgaged,

(*a*) Act XIV of 1859. sec. 15.

(*b*) Reg. III 1793, Sec. 8: Reg. II 1803, Sec. 5. N. W. P. v. 10, p. 4.

(c) S. D. A. 1857, p. 1442. Act IX of 1854 is repealed by Act X of 1861.

(*d*) *Supra*, p. 140. (*e*) N. W. P. v. 7. p. 158.

property was situated, the suit would be entertained, although the money was not advanced, and the defendant had not resided, within the limits of that jurisdiction (*a*). An advance was made in Behar, both the lender and the borrower being residents of that district, on lands in Bhaugulpore. It was held that a suit to recover the sum lent, was rightly brought in the Court of Behar. In this case, the mortgage security was bad, and the lien of the mortgagee on the land had been destroyed (*b*).

Under the Civil Procedure Code a suit brought by a mortgagee, to recover the amount due to him, must be brought in a Court within the limits of whose jurisdiction the cause of action arose, or the defendant at the time of the commencement of the suit dwells or personally works for gain (*c*). If the suit be for possession of the property mortgaged, the rules as to the Court in which it is to be instituted are the same as those which apply in the case of redemption suits (*d*).

It has been ruled, that when land is mortgaged to two persons jointly, in security of a sum advanced by them in equal proportions, an action by one for his share of the money will lie, although he does not make his co-mortgagee a party to the suit (*e*).

Where there was a large body of co-sharers in an estate, which had fallen into arrears and was about to be sold by

(*a*) N. W. P. v. 7, p. 158. (*b*) S. D. A. 1853, p. 156. (*c*) Act VIII of 1859. sec. 5.
(*d*) *Supra*, p. 150. Act VIII of 1859, secs. 5—14.
(*e*) N. W. P. v. 8, p. 91, and a case there quoted.

Government, and certain persons saved the lands from sale, by advancing the sum required, in return for which they got a conditional sale of the property executed by thirty-nine sharers, it was held, that as this sale had been for many years recognised by the whole body of sharers, the mortgagees were entitled to foreclose the mortgage against the whole body, although it appeared that four or five sharers were not in any way parties to the execution of the original deed of mortgage (*a*).

It is only in mortgages by bye-bil-wufa, kut kubala, or conditional sale, that foreclosure can occur.

In pure usufructuary mortgages, including those by lease, the proprietary right of the mortgagor never is taken from him (*b*), nothing more than a temporary enjoyment of the land being given to the mortgagee, liable to be put an end to at any moment, on the mortgage debt being cleared off. In simple mortgages, and in mortgages by bye-bil-wufa, kut kubala or conditional sale, whether accompanied by possession and usufruct or not, the mortgagor may, on making default, be deprived of his whole interest in the property he has pledged; but in the former case the rights of the mortgagor are, under a decree of Court, put up for sale, and transferred to whosoever may be declared the purchaser: in the latter, foreclosure takes place, that is to say, all the

(*a*) N. W. P. v. 9, p. 133. (*b*) *See* S. D. A. 1859, p. 382.

interest of the mortgagor in the mortgage lands ceases, and passes directly from him to the mortgagee.

The mortgagee is bound by the terms of his contract, and cannot sue to foreclose, or to have his debt paid or the land sold in satisfaction of it, until the time fixed by the contract for the re-payment of the loan has passed (*a*).

I. In a case of simple mortgage, the mortgagee may bring his suit at any time (except when the ordinary limitation rules intervene) after the debt has become due according to the terms of the agreement, and no notice of the intention to sue need be given to the mortgagor, more than is required to be given to the defendant in any ordinary suit. The suit is brought for the recovery of the sum lent, with interest and costs, but the mortgage deed should be set out or referred to in the plaint, so as to show that the debt is something more than a simple money debt. The Court after inquiring into the amount remaining due, will give a decree for it. If the mortgagor does not pay the sum decreed, the mortgagee must apply to the Court to have the pledged land sold in execution: and the Court will order that the rights and interest of the mortgagor in the land, such as they were at the date of the mortgage deed, shall be sold. Any surplus which remains after liquidating the date, belongs to the mortgagor.

The decree is always against the mortgagor personally, but

(*a*) *See* S. D. A. 1854, p. 507.

should declare the mortgagee's lien on the land (*a*). If the land does not produce a sufficient sum, the mortgagee may still proceed against the mortgagor for the residue unpaid, as an ordinary decree-holder. And he is not restricted to the particular property over which he has a lien :—thus, if his lien extends only to one moiety of an estate, he may take out execution against the whole estate, if the other moiety also belongs to the debtor (*b*).

The course to be pursued by the mortgagee is the same whether the mortgaged property remains in the hands of the mortgagor, or has passed to a purchaser from him. And a party suing for a debt secured by simple mortgage, and to have the pledged property sold in satisfaction of it, need not include in his suit, any claim to set aside alienations of a date subsequent to that of his own mortgage, as the liabilities of the land are not affected by after-transfers, nor is the validity of such transfers in any way affected by the result of the mortgagee's suit (*c*).

A obtained a decree on a simple mortgage bond. B also obtained a decree on a similar bond, and sold the lands in execution. But B's mortgage was subsequent to A's. It was held that A's rights were not prejudiced by the sale, and that he was entitled to have the property re-sold in execution of his decree—free from all subsequent incumbrances. And

(*a*) S. D. A. 1858 p. 358 (*b*) S. D. A. 1859. p. 1009.
(*c*) *Supra*, p. 118. S, D. A. 1857, pp. 953, 1063.

the fact of A's not having taken out process of attachment against the lands, or given any intimation of his mortgage at the time of B's sale, did not injure A's right (*a*).

Where the mortgaged property has been sold by the mortgagor subsequent to the mortgage, and the purchaser is a party to the suit, the decree should reserve to such purchaser the right to save the property from sale on his paying off the sum due to the mortgagee (*b*).

The fact of the decree being silent as to the particular property against which the mortgagee may execute his decree, does not invalidate his lien, and he has a right in execution of his decree to sell such rights and interests as the mortgagor had in the land at the date of the mortgage deed, unaffected by subsequent incumbrances or transfers (*c*).

A person on borrowing a sum of money, gave his bond for it: and the bond also pledged certain property, providing that any sale or mortgage of it until the lender's claim was satisfied in full, should be invalid. The lender afterwards

(*a*) N. W. P. v. 10, p. 680. (*b*) S. D. A. 1858, p. 358

(*c*) S. D. A. 1857, p. 1063. But the High Court has recently held that when a person to whom property is pledged for a debt, obtains a simple money decree against his debtor, he cannot execute that decree against the property pledged, to the prejudice of a subsequent *bona fide* purchaser. He is simply in the position of an ordinary judgement creditor in respect to his decree, and can only seize the rights and interests of his debtor (such as they are). He may enforce his lien *by separate action* against the party in possession of the property pledged to him; but he is not entitled to execute *the money decree* against the property in the hands of the subsequent purchaser. *See Gopeenath Sing*, v. *Sheo Sahoy Sing* Sutherland's *Weekly Reporter* v. 1, p. 315.

brought a suit for the money in the Supreme Court and obtained a decree. He attempted to execute his decree, as an ordinary judgement creditor, on the property pledged, but was resisted by some intermediate incumbrancers whom he found in possession. He then instituted a suit in a Mofussil Court to realise the sum which had been decreed to him, by setting aside the intermediate incumbrances, as illegal and contrary to the terms of his mortgage. It was held that, inasmuch as there was an express pledge of the lands to him, and a proviso that any sale or mortgage of them prior to the payment of his debt should be invalid, the mortgagee's having already obtained a decree for money, without any allusion being made to the sale of this particular property in execution, did not effect his lien, and that he was still entitled to bring the mortgaged lands to sale free from any subsequent incumbrances (*a*).

In a case in which the mortgagee had got a mere money decree not alluding in any way to the existence of a mortgage, a subsequent decree holder came in and sold the right and interest of the mortgagor in the property mortgaged. It was held that the mortgagee might still follow the land until his debt was satisfied, but that he could not claim the money realised at the sale in execution of the subsequent decree which had been obtained (*b*).

Land in the hands of a purchaser, will be sold just as if

(*a*) N. W. P. v. 8, p. 316.

(*b*) S. D. A. 1860. v. 2, p. 35. So S. D. A. 1858, p. 498. *See* S. D. A. 857; p. 953.

it still belonged to the mortgagor: but if the names of the purchasers have been registered in the Collector's office, the property when brought to sale in pursuance of a decree obtained by the mortgagee, is rightly designated in the auction advertisement, as the "rights and interests" of the persons whose names stand recorded, these being in fact the subject of the sale in such a case (*a*).

But there is a summary case, the decision in which seems opposed to this in principle. A mortgagee, who had obtained a decree, applied for an order to have the mortgaged land sold in execution. He was opposed by certain persons who had not been made parties to his suit, and who were in possession under a decree of foreclosure of the Supreme Court. It was decided on appeal, that no sale could be ordered under the circumstances (*b*).

An estate was mortgaged to secure the payment of a certain sum. Another estate was by a subsequent deed mortgaged as a further security for the same sum. It was held that the mortgagee might proceed *first* against the estate which was *last* mortgaged to him, if he chose to do so (*c*).

There does not seem to be any objection to a mortgagee becoming himself the purchaser of the land, for the sale or which he has obtained an order, so long as no case of fraud of collusion is made out against him (*d*). In England, this is

(*a*) N. W. P. v. 7, 138.

(*b*) Sum. Cases S. D. A. Bholanath Coondoo, petitioner; 29th Jan., 1853.

(*c*) S. D. A. 1858, p. 1176.

(*d*) N. W. P. v. 6, p. 218.

not so : there, a mortgagee can become the purchaser, only by special leave of the Court (*a*).

II. In the case of mortgage by bye-bil-wufa, kut kubala, or conditional sale, foreclosure cannot be obtained until certain forms prescribed by law have been gone through ; and these forms must be very strictly complied with, any failure in this respect proving fatal to the whole proceeding.

The first thing (*b*) to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment of what is due on the mortgage, from the borrower or his representative. If the application is unsuccessful, he must present, by himself or by one of the authorised vakeels of the Court, a written petition to the judge of the zillah or city in which the mortgaged property is situated, stating that the petitioner is mortgagee by conditional sale of the property in question, that a certain sum is due to him for principal, with a sum for interest and costs, that the petitioner has made demands for payment but without effect,—and that therefore he wishes to have his sale made absolute, to be put in possession, and to be registered as proprietor.

On receiving this petition, the judge will cause the mortgagor or his legal representative, to be furnished as soon as may be, with a copy of it, and also with a notice or perwannah under his seal and official signature, notifying to him, that if he does not redeem the property mentioned in the petition, within one

(*a*) Daniel's Chanc. Practice, p. 1196.
(*b*) Reg. XVII. 1806, Sec. 8.

year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale be made absolute.

The judge will act upon the petition of one who professes to be the mortgagee of property within his jurisdiction, without making any inquiry as to the truth of its contents, or even as to the existence of a mortgage at all. And the production of the original deed of mortgage, prior to the issue of notice of foreclosure, is not necessary (*a*). But a judge may if he pleases satisfy himself, by requiring the production of the document, that the applicant for foreclosure is the "receiver or holder of a deed of mortgage" (*b*).

A copy of the mortgagee's application to foreclose, must accompany the notice issued by the judge to the mortgagor or his representative; but it is not required, that he should be served with a copy of the mortgage agreement (*c*).

The notice from the judge to the mortgagor must issue from the court of the zillah or city in which the pledged property is situated at the time of issue: and if this rule is not attended to, all the subsequent proceedings will be bad (*d*). But it appears that when the lands lie in several zillahs, a notice applicable to the whole lands, but issued from only one of the courts which have jurisdiction, is sufficient; and it is not necessary either that a separate notice should issue from each one of the courts, or that leave should be obtained from the Sudder Court to issue one notice which may

(*a*) Rep. Sum. Cases, 8 Sept. 1840. (*b*) Cir. Or., 5th June 1848, No. 46.
(*c*) Cons. 630, 11th March 1831.
(*d*) S. D. A. 1847, p. 485: Reg. XVII. 1806. Sec. 8.

suffice for all the property in dispute. In the case of Rasmunee Dabee *v.* Pran Kishen Dass (*a*), the mortgage deed on which the suit was founded, described the whole lands as situated in zillah Moorshedabad, and out of the court of that zillah notice of foreclosure was issued. The Collector was a party to the suit, and objected that part of the lands being in zillah Beerbhoom, the notice was incomplete: on which the mortgagee pleaded an order, of date subsequent to the notice, obtained by him from the Sudder Court, for the trial of the cause in the Court of Moorshedabad. Upon these facts, the Privy Council in giving judgment remark: "What is there to show in the whole course of these proceedings, that these lands were not situated partly in one, and partly in the other district; and what is there to show in the course of the proceedings, that if that were the case, an order (*i. e.* notice of foreclosure) made in the court of either district, would not be a proper order. We think that there is nothing in this case, to show that the order was not made in a proper court."

Judges are required to pay particular attention to prevent any unnecessary delay in issuing these notifications; and in justice to mortgagees, as well as in conformity with the Regulations, they should be issued as soon as possible after the receipt of the application for foreclosure. The mortgagee therefore, on filing his application, should be directed immediately to deposit the *tulubanah* of the peon through whom

(*a*) Moore's Ind. Ap. Cases, v. 4, p. 392. *See* S. D. A. 1859, p. 848.

the notice is to be issued to the other party, that the order for issuing the same may be passed without delay. The order for issuing the notice must be passed, after the deposit of the *tulubanah* of the peon by whom it is to be served (*a*).

The period of one year, during which the mortgagor may redeem, must be calculated from the date of the notice (*b*). And the notice is to bear date on the day on which it is actually issued, and not on the day on which the order for its issue is passed: but in computing the year, the date of issue is to be excluded (*c*). To this rule, that the year is to be calculated from the date of issue there is no exception; and no local custom can prevail against it (*d*).

It must be particularly observed, that the year allowed by law counts from the date of issue of the notice, not from the date of *service* on the mortgagor. Thus, the date of issue being the 28th May 1841, and the date of service the 17th June, the year counted from the 28th May. The Court in its judgment in this case, said,—"The one year's grace allowed by law to the borrower, after the period mentioned in his engagement has expired, being clearly a matter of favor, there can be no reason for allowing any further indulgence, and the enactment must be construed strictly and to the letter" (*e*).

(*a*) C. O. 9th April 1817, para. 3: Cons. 644. 24th June 1831: N. W. P. v. 7, p. 60.

(*b*) Reg. XVII. 1806, Sec. 8: Cons. 263, 23rd June 1817.

(*c*) S. D. A. 1858, pp. 627, 1477. *See* S. D. A. 1856, p. 818: Sel. Rep., v. 6, p. 166.

(*d*) Sel. Rep., v. 6, p. 166: S. D. A. 1847, p. 270.

(*e*) Sel. Rep., v. 7, p. 264.

So that it would seem, that if the notice of foreclosure is not *served* on the mortgagor until the last day of the year of grace, he will have no time at all left him for redemption.

From the last case it also appears, that the date of original issue, and not the date of any second or later issue,—as by the Sheriff, to whom the serving of the notice was entrusted,—is the period from which the year is to be calculated.

Notice is to be given to the mortgagor or "his legal representatives." These words are very strictly construed by both the Courts, and great care must be taken that all the proper parties have had notice.

Notice to the person who on the face of the deed appears to be the mortgagor, or to his representative, appears to be all that under any circumstances is required, and a change during the year of grace, in the parties entitled to redeem, does not make any further notice necessary. Thus if after notice has been duly served on the mortgagor he transfers his interest, no fresh notice need be given to the transferee (*a*). So, if after due service of the notice, the mortgagor on whom it was served becomes insolvent, and files his schedule in the Insolvent Court, no further notice is necessary (*b*). When A mortgaged land, B witnessing the deed, but being in reality a co-mortgagor with A, it was held that notice to A was sufficient, although the petition and plaint of the mortgagees, showed they were cognisant of the fact that B also was in

(*a*) S. D. 1857, p. 957. (*b*) S. D. A. 1858, p. 323.

truth a mortgagor (*a*). So it would seem, that A having mortgaged lands in the name of his son B, notice to B would be considered sufficient: and that this notice, having been served during A's life-time, would be binding upon the other parties who along with B, had on A's death during the year of grace, become his "legal representatives" (*b*).

It has for some time been ruled that a purchaser at a public sale, of the mortgagor's rights, is the mortgagor's "representative," so as to be entitled to notice: but it is only comparatively recently that it can be said to have been finally settled that a purchaser by private sale is so also.

When the mortgagor had sold his interest by private sale, and the purchaser was in possession, it was held that notice to the mortgagor was sufficient, without notice to the purchaser (*c*). And guided apparently by this decision, the Agra Court held more lately, that a purchaser by private transfer from the mortgagor is not entitled to notice, and that a mortgagor has no power to constitute a private purchaser his legal representative in a mortgage contract, as the mortgagee's engagement is with the mortgagor, and with him alone. But the Court at the same time decided, that a purchaser who comes in under a title derived from a public sale, is on a different footing, and is as much the "legal representative" of the mortgagor, as the natural heir; that notice must be served upon him; and that no analogy exists between a private sale

(*a*) S. D. A, 1849, p. 36. *See* S. D. A. 1856, p, 923. (*b*) S. D. A. 1852, p 423
(*c*) D. A. 1847, p. 499.

and a compulsory transfer, carrying with it *primâ facie* a valid title at law (*a*).

The Calcutta Court however has expressed its dissent from the doctrine laid down in these two cases, and declared that the purchaser *out and out* of a mortgagor's title, whether by public or by private sale, is his legal representative, and must be served with notice (*b*).

After much argument it has been ruled, that the procedure of the Courts does not require or admit of the issue of a notice of foreclosure to a second or other subsequent mortgagee (*c*). And when a second or later mortgagee intends to foreclose, it is sufficient if he gives notice to the mortgagor or his legal representative, without serving or giving any intimation to a prior mortgagee, even although such prior mortgagee is in possession (*d*). The soundness of these decisions may however perhaps be questioned (*e*).

When the mortgagor's representative was a minor, and notice was served on certain persons, who were believed to be, but who were not in fact, his guardians, the notice was bad (*f*). A mortgagor by deed directed that his widow should possess his zemindary (half of which was under mortgage), and

(*a*) N. W. P. v. 6, p. 210 : v. 9, p. 1 : and *see* v. 9, pp. 421 : also S. D. A. 1854, p. 1.

(*b*) S. D. A. 1853, p. 859.

(*c*) S. D. A. 1853, p. 859 : 1855, p. 948. *See* N. W. P. v. 8, p. 304. *Supra* pp. 129.—133.

(*d*) *See* S. D. A. 1847, p. 499 : N. W. P. v. 8, p. 804.

(*e*) *Supra*, pp. 129—133.

(*f*) N. W. P. v. 6, p. 278.

enjoy it during her life-time: he granted permission to her to adopt a son, and directed that on her death, such adopted son should inherit all his property: and he desired her to pay off his mortgage debts, by selling or mortgaging any portion of his zemindary. Under this authority, the widow did adopt a boy as son to her deceased husband. The adopted son was a minor, and under the guardianship of the widow. Service of notice of foreclosure on the widow, was held to be sufficient without notice to the son (*a*).

When the estate is under the control of the Court of Wards, by which a guardian and manager is put in possession, notice ought to be served on such guardian and manager; and the Collector of the district, and representing the Court of Wards, should be a party to the proceedings. If a new manager or guardian is appointed after issuing the notice, he is substituted in all future proceedings, for the original one (*b*).

It is very doubtful what the exact nature of the "notice of foreclosure" is: that is to say, whether it is a notice which requires to be served upon every person who has the right of redemption, or whether it is a mere proclamation which, even although the right of redemption may be vested in more than one class or persons, need be served only upon the mortgagor or the person or class or persons (hitherto undefined) coming under the head of the mortgagor's "legal representative."

(*a*) Moore's Ind. Ap. Cases, v. 4, p. 392.

(*b*) *Ibid.* And *see* Prannath Roy Chowdry's Case, v. 7. 323, and *post* Appendix.

The intention apparent from the Regulations is that all those who have the right of redeeming should be served,—the question as to who those are, being left upon (*a*). The tendency of many of the decisions of the Courts, however, has been to treat it as a mere proclamation.

Personal service on the mortgagor of the notice of foreclosure, is not absolutely necessary, if due efforts have been made to serve him, but have proved ineffectual. This has been ruled by the Calcutta Court, in a case in which the following judgment was delivered: "We are of opinion that, neither by the terms of the law itself, nor by constructions put upon it by the Court, is it imperative that personal notice should be served on the mortgagor. The words of the law are, that the judge shall cause the mortgagor or his legal representative, to be furnished as soon as possible, with a copy of the mortgagee's petition for foreclosure, and shall notify to him by a perwannah, that if he shall not redeem the property in the manner provided for by Sec. 7, within one year from the date of the notification, the mortgage will be finally foreclosed. There is nothing in the above terms which prescribes, or even alludes to the necessity of personal service upon the mortgagor; all that is required is, that he shall be made aware, through the Court, that an application of foreclosure has been made, and a year's grace is given him to fulfill his contract with the mortgagee. The Circular Order No. 7, dated

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(*a*) *See Supra*, pp. 129—133.

9th April 1817, points out that the year allowed for redemption must be calculated from the date *of issue of notification*. Here nothing is said of personal service: the year of grace is to commence from a date at which the notice had not, and could not have been served on the mortgagor. The notice was not yet issued, but the foreclosure is to be held to have been completed on the expiration of twelve months from the date of the notification. The several Regulations which lay down the mode of serving notice on defendants, namely, Sec. 11, Reg. IV of 1793, Cls, 2 and 3, and Sec. 3, Reg. II of 1806, clearly show that where personal service is not practicable, issue of proclamation for the defendant's attendance is prescribed, and the case goes on *ex parte*: so, by Sec. 6, Reg. II of 1819, in cases of resumption, and also in execution of decree, by Sec. 15, Reg. XXVI of 1814, and by Sec. 7, Reg. VII of 1825, where, if personal service is impracticable, notice is to be affixed to the defendant's house. To us, it appears that personal service must of course be held to be good; failing that, notice by any other means to the mortgagor is equally good, without actual service on him. The duty of the Court is to serve notice, or to use its best endeavors to give information to the mortgagor of the foreclosure. If upon duly certified returns to the Court by the serving officer, it should be proved that every attempt to serve or give notice was unsuccessful, the mortgagee is entitled to bring his action for possession after the lapse of the year of grace, calculated from the

date of the issue of the notification through the officers of the Court" (*a*).

And so, in the Agra Court. A decree for foreclosure was passed against several mortgagors; three of them, A. B. and C, appealed on the ground that they were not duly served with the notice. The Court in giving judgment, confirming the decree of the lower Court, said: "On referring to the summary proceedings under Sec. 8, Reg. XVII of 1806, relative to the foreclosure of the mortgage, the Court observe that the appellants A and B made appearance in the Judge's Court, and opposed the application of the mortgagee for foreclosure. The appellant C, it is true, did not appear on this occasion; but it is stated by the judge, to have been proved by the witnesses produced by the respondent, that the proclamation issued in consequence of this appellent C having evaded service of the original notice, was affixed at his residence in his presence. Under these circumstances, the Court are of opinion, that none of these three appellants are in a position to plead ignorance of the notice of foreclosure. The mortgagee did all that was possible to be done: no less than twelve separate proclamations were affixed at the residence of such of the mortgagors as had evaded receipt or acknowledgment of the original notice, and the Court are of opinion, that the requirements of the law have been substantially fulfilled as regards these three appellants" (*b*).

(*a*) S. D. A. 1854, p. 281. So, 1855, p. 8.
(*b*) N. W. P. v. 8, p. 400; 1260, pp. 34, 38.

A case was remanded to the zillah judge, because he had not given a sufficiently full and explicit opinion on the plea of the defendant, that the notice had not been duly served having only been stuck up on the door of his (the defendant's) house (*a*).

In one instance, in which the notice was returned with a report that the parties named in it could not be found, upon which a proclamation was affixed at the judge's cutcherry, and the residence of the parties,—this was reckoned to be insufficient; and it was said that the strict letter of the Regulation must be followed, and that the Regulation did not provide for the substitution of a proclamation, in such a case (*b*). Apparently, however, it was not proved that any very great effort had been made to serve the mortgagor personally: at any rate, this case is over-ruled by the latter decisions cited above.

Nine out of eleven sharers made a mortgage of the whole joint property. The remaining two afterwards gave their consent in writing to the mortgage. Notice of foreclosure was served on the *nine* only. But it was held that this was under the circumstances, sufficient notice to *all* the eleven (*c*).

The mere fact of cognizance on the part of the mortgagor, or his representative, that his property is liable to foreclosure, or cognizance of the steps which the mortgagee has been

(*a*) S. D. A. 1852, p. 557
(*b*) N. W. P. v. 6, p. 278. See S. D. A. 1858, p, 1775.
(*c*) S. D. A. 1854 p. 511.

taking, will not absolve the mortgagee from the necessity of strict compliance with the requisitions of the law as to issuing and serving the notice of the application to foreclose (*a*). The Calcutta Court in one case seemed to lay considerable weight on the mortgagor's being aware of what was going on: but the point was discussed merely as incidental to other questions which arose in the cause (*b*).

From these cases it appears, that if the mortgagor or his representative cannot be found and is really *bona fide* absent, and ignorant of the issue of the notice, foreclosure can be completed in his absence, and without his being in the least aware of the proceedings which are being taken against him, if the mortgagee has done all that could be done to effect service. This, in fact, is merely carrying out fully the rule, that the year of grace counts from the *issue* of the notice, not from its *service* on the mortgagor.

The objection that notice has not been duly issued is by no means a *technical* (*c*).

The notice to redeem, gives no efficacy to transactions not in themselves legal, and the non-appearance of the mortgagor within the prescribed year, does not bar him from disputing the contract, or from proving it to be void or voidable (*d*). The mortgagee must establish his case like any other plaintiff.

(*a*) N. W. P. v. 6, pp. 210, 278.

(*b*) S. D. A. 1847, p. 499. (*c*) S. D. A. 1858, p. 1775.

(*d*) Sel. Rep. v. 5, p. 81 : S. D. A. 1851, pp. 211,648 : Cons. 1140, W. C. 2nd,—Cal. C. 23rd,—March 1838.

Notice under Sec. 8, Reg. XVII. 1806 being issuable on application, without any sort of inquiry into the merits of the case, and without any intimation being given to the supposed mortgagor of the intention to make such application, no publicity can be considered to attach to its issue. And the fact of a man's having caused notice of foreclosure to be issued, is not in any way to be taken even *primâ facie* as affording a presumption of his good faith. Therefore the Court reversed the decision of a zillah judge by whom a conditional sale, alleged by the supposed seller to be collusive and fraudulent, was held good because amongst other reasons, "had there been collusion, they would not have entered into a deed of conditional sale, which they knew would have to come before the Court, under Reg. XVII, which publicity might have been avoided" (*a*). And the mortgagee's having served an occupant of the mortgaged lands with notice, is no admission of that occupant's right to redeem (*b*).

Notice of foreclosure having been issued, the mortgagor or his representative must take care, within the year of grace, to tender to the mortgagee, or to deposit in Court (which is always the safer plan), the whole amount of principal and interest, or if the mortgagee has had the usufruct of the land, the amount of the principal only which is due. If no rate of interest has been agreed upon, it must be deposited at the

(*a*) S. D. A. 1848, p. 36.

(*b*) Prannath Roy Chowdry's case, Moore's Ind. Ap. Cases, v. 7, p. 323, and *post* Appendix.

rate of 12 per cent; and no local custom can make a deposit at a lower rate of any use (*a*).

It has been already shown, that the tender must be made in money, but that if the mode of re-payment agreed on in the original contract is more favorable to the mortgagor than that provided by the Regulations, a tender made according to the contract is sufficient (*b*). But whatever stipulations to the contrary have been made, a tender or deposit in strict compliance with the terms of the Regulations, is all that is necessary. At least it was so decided in one instance, where the mortgagee having been in possession, a deposit of the principal was held sufficient to prevent foreclosure, although the mortgage deed contained a covenant, that the mortgage should be foreclosed, unless certain sums due for improvements, as well as the principal sum lent, were paid off within the year of grace (*c*).

Where it had been agreed between the parties, that a sum due from the mortgagee should be set off against so much of the mortgage debt, a deposit by the mortgagor of what remained due from him, after making the deduction, was held to be sufficient. But a mortgagor who makes a tender of this sort runs a very great risk, and ought to be very sure of his ground before he does so. For if the sum tendered or deposited falls short, though it be only to the extent of one rupee, of the amount due, the mortgagor's right is, on the expiry

(*a*) Reg. I. 1798, sec. 2, S D. A. 1859, p. 284.
(*b*) *Supra*, p. 148. Reg. XXXIV. 1803, Sec. 14. (*c*) N. W. P. v. 8, p. 161.

of the year of grace, wholly gone. In giving judgment in one case (*a*), it was remarked by the Court, "that although the legislative provisions for the redemption of mortgages, are specially framed with a view to the protection of mortgagors, the obligation imposed by them of meeting the call for the discharge of the mortgage debt within the period fixed, is strict and positive, and if the mortgagors fail to make the payment demanded, they must do so at their peril, since, should it prove 'that the alleged sale was authentic and valid, and that *any* part of the amount demanded was *due*,' the sale will have become absolute, and he must, on a suit being brought against him, lose his lands (*b*). The law makes no allowance for errors on the part of the mortgagor. The line must be drawn somewhere, and the difference of *one* rupee in the sum tendered is as fatal to the redemption, as of 10,000. The same strictness is observed in the parallel cases of the laws of limitation, and of appeal: it may seem hard that a difference of one day only should bar the suitor or appellant's entrance to the Court, but so the law has decreed, and it is the duty of judicial officers, in this, as in other cases, to conform to its provisions."

The tender or deposit must be made, within a year from the date of the issue of the notice of foreclosure. But if the last day of the year of grace happens to be a Sunday or other holiday, a deposit on the first ensuing business day will be

(*a*) N. W. P. v. 8, p. 447. *See* v. 10, p. 580: and S. D. A. 1859, pp. 127, 852
(*b*) Cir. Ord. 22nd July, 1813.

sufficient (*a*). It has however been declared by both the Calcutta and the Agra Courts, that when the last day of grace happened to be a holiday at the public offices, this might afford a sufficient excuse for not having paid the money into Court, but was no reason why there should not have been a private tender (*b*). The correct view of the law nevertheless is probably that stated above, although it may be well for the sake of security to make a private tender within the year if the Courts are closed.

When a sum of money is brought for the purpose of being deposited in Court, it ought to be received whatever its amount, and its receipt should be notified to the mortgagee. It is irregular for the Court to make a report as to the insufficiency of the tender, and the amount required (*c*).

The tender or deposit must be made unconditionally, and if it is fettered with any restrictions, it is bad,—as was held in a case where the deposit was accompanied by a denial of the mortgagee's title, and notice that a suit would be brought to recover back the money tendered (*d*).

The mortgagors some weeks before the expiry of the year of grace, applied for leave to deposit the money in court, subject to a condition, that it should not be paid to the mortgagee, but should be kept in court, until a regular suit disputing his claims could be brought; the judge gave the

(*a*) N. W. P. v. 10, p. 580. S. D. A. 1858, pp. 627, 1477. Rep. Sum, cases, 15th, July 1841. Sevestre's Rep. 27th, April 1840.

(*b*) Sel. Rep. v. 7, p. 264. N. W. P. v. 7. p. 60. (*c*) N. W. P. v. 10, p. 580.

(*d*) Prannath Roy Chowdry's case, *post* Appendix.

permission asked for, and received the money so conditionally deposited. The day after the year of grace came to an end, the judge called upon the mortgagors to take away their money, remarking that such a conditional deposit was not allowable; and he afterwards declared the conditional sale to have been absolute, because the money had not been paid or deposited within the year. On appeal, the majority of the Court expressed themselves thus: "We are of opinion, that the judge when applied to to receive the money, though coupled with certain conditions, did not act contrary to any law or practice in receiving the money. He complied with the mortgagors' request: but this did not remove from the mortgagors the responsibility of the consequences of their own act. The judge acts in such cases purely ministerially: it is not his place to indicate to any one the course he is to pursue; and any thing that he may do in compliance with such a request as that of the mortgagors, in this case, does not in any way affect the relation existing between the mortgagors and the mortgagee. The deposit was made with a request that it might not be paid to the mortgagee: that is not a tender or payment contemplated by Sec. 7, Reg. XVII of 1806, and Sec. 2, Reg. I of 1798, and had the judge never passed his second order (desiring the mortgagors to take away the money), the right of the mortgagors was gone the preceding day: and any order passed after that date, must be considered as a nullity as far as the merits of this case are concerned. We are therefore of opinion, that the

acts of the judge form no bar to the foreclosure of the mortgage." The dissentient judge, after expressing his opinion that the judge of the lower court had acted judicially, and not merely ministerially, remarks: "It is clear to me, that deluded by the judge's first order (allowing them to make the deposit conditionally), the mortgagors have lost their property; and this is a case in which the strictness of the law should yield to the unquestionable equity of the mortgagors' claims" (*a*).

So, when the mortgagor restrained the payment to the mortgagee of money deposited, until the result of a redemption suit which he was about to bring, should be seen, and the year of grace expired without any unconditional deposit being made, and the redemption suit failed, the mortgage was declared foreclosed as if there had been no deposit (*b*).

A mortgagee demanded a larger sum than was really due to him. The mortgagor paid into Court the sum he asked for, stating that he did so merely to obviate all objections, and not as admitting it to be due. The mortgagee having taken it all out of Court, the mortgagor sued for and recovered what he had taken in excess of that to which he was entitled (*c*).

The tender or deposit ought to be made in one sum, not by instalments; at least, it is to the mortgagor's advantage to pay in one sum, as his position is in no way benefited by the payment of any thing less than the whole amount due: and if

(*a*) S. D. A. 1847, p. 462. (*b*) S. D. A. 1848, p. 897. (*c*) S. D. A. 1855, p. 54.

he chooses to make several deposits on different dates, he will not be allowed interest on any of them, except from the date on which the demand was discharged in full, and due notice given to the mortgagee. The mortgagee is not obliged to receive sums deposited on account, until the whole is paid in; he defeats his own claim by accepting them, as his taking out of Court a sum paid in by the mortgagor, is an acknowledgment that such sum is in full discharge of all monies due in respect of the mortgage debt (*a*).

If the mortgagor admits the claim of the mortgagee, and has not means of paying what is due to him, he may put him in possession of the property, and without waiting till the end of the prescribed year, present a petition to the Court from which the notice issued, stating his inability to pay, and that he has made over possession to the mortgagee. And such a proceeding, if possession is actually given to the mortgagee, has apparently the same effect as a decree for possession on foreclosure, made in a regular suit. It has, however, been doubted whether a *bona fide* purchaser, who had purchased from the mortgagor before the presentation of the petition, might not, notwithstanding, redeem at any time during the year of grace. And if possession is not delivered over to the mortgagee, the mortgagor's having filed such a petition, will not bar the right of any one, who under ordinary circumstances would have been entitled to redeem, except that the

(*a*) N. W. P. v. 7, p. 60.

mortgagor himself would probably be held to be bound by his own act, and to be foreclosed (*a*).

In like manner, the mortgagor, without any proceedings whatever being taken in Court, may convey absolutely to the mortgagee, the property already conveyed to him conditionally. But in such a case, the mortgagee must be careful to obtain sufficient proof of his sale having been made absolute: and he ought to have his name at once registered in the Collector's books as proprietor, and should not allow it to remain there as mortgagee (*b*).

It is not, however, absolutely necessary that there should be any written agreement, in order to convert a conditional into an absolute sale, even though the conditional sale itself was in writing: any thing which proves that the mortgagor has agreed to the sale being made absolute, is sufficient. A suit was brought for possession of land which had at first been conditionally sold to the plaintiff, but which, it was alleged, had been afterwards absolutely conveyed to him. The plaintiff did not prove any positive contract making the sale absolute, but he produced from his own custody, the ikrars given by him to the defendant, declaring the sale to be only conditional, and he gave evidence to the effect that these had had been delivered up to him by the defendant, on the payment to him of a further sum of money. It was decided, that the return of these ikrars afforded conclusive evidence

(*a*) S. D. A. 1849, p. 311.
(*b*) N. W. P. v. 8, p. 273. *See* S. D. A. 1856, p. 948.

of an unconditional sale, and that, therefore, the plaintiff must have his decree (*a*).

But a mortgagee, ought for his own security, either to insist upon having a regular decree of Court, declaring the mortgage foreclosed, which undoubtedly gives him by far the safest title, or, if he chooses to have his sale made absolute without going into Court, he should see that the conveyance to him is made by a deed properly executed and attested.

If the mortgagor, or his representative, makes a tender or deposit within the year of grace, it remains for the mortgagee to consider, whether or not he will accept of the sum so tendered or deposited. He will accept of it only if it covers the whole of his demand, as he cannot take it out in part payment, and continue his suit for foreclosure, or for payment of what remains due.

If the mortgagee is ready to receive the sum deposited the judge in whose Court it has been placed will immediately pay it over to him; if he refuses to receive it, the judge will restore it to the person who deposited it. The mortgagor who has tendered or deposited a sufficient sum, or a sum which is accepted as sufficient by the mortgagee, being in exactly the same position as one who has come forward to redeem, and made a deposit or tender for that purpose under Reg. I of 1798, Sec. 2, is entitled to possession summarily without suit (*b*), And the mortgagee, on applying to the money

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(*a*) Sel. Rep. v. 7, p. 181. (*b*) Cir. Ord., 22nd July, 1813

out of Court, must surrender the mortgage deed, or show satisfactory cause for his not doing so (*a*).

Up to this point, the functions of the judge, in proceedings taken for foreclosure, are purely ministerial, he having merely, without instituting any inquiries into the merits of the case, or expressing any opinion as to them, to issue on the application of the parties, certain fixed notices and orders,—to receive, and pay over to the mortgagee if desirous of taking it, whatever amount may be paid into Court by the mortgagor, or if the mortgagee should refuse to accept the same, to restore it to the mortgagor,—and to receive proof of service of the several notices. And it is the duty of the judge strictly to confine himself to recording simply the facts which have occurred during the summary process, and to abstain from expressing any judicial opinion whatever on the proceedings. All questions as to their effect or as to the legality or validity of the alleged mortgage, or even as to the existence of a mortgage at all, must be left undecided at this stage, and form the subject of a regular suit to be subsequently instituted (*b*).

After the lapse of the year of grace, in the event of the proper sum, or such a sum as is accepted by the mortgagee, not being deposited or tendered, the mortgagee who wishes to complete the foreclosure must institute a regular suit to have the conditional sale declared absolute, or,

(*a*) *See* Sel. Rep. v. 7, p. 260: and *supra*, p. 163.
(*b*) Cir. Ord. 22nd July, 1813: 17th January, 1834.

if he has not had the usufruct, for possession of the mortgaged land, as on a conditional sale become absolute. And he must not sue merely for possession as mortgagee, but for possession as absolute proprietor by reason of foreclosure having taken place (*a*).

To succeed in his suit, the mortgagee must prove that all the legal formalities have been observed, that notice was issued from the proper Court, that it was duly served on the right parties, that the period of a year from the issue of it has elapsed, and that no sufficient tender or deposit was ever made before the expiration of the year of grace. Without proving all these points he cannot obtain a decree, whether the defendant pleads that there has been any irregularity or not, and even if the case is tried *ex parte*. The Court is not justified in overlooking any error in the summary proceedings, although its attention is not called to it by the parties most interested (*b*). So also the mortgagee must establish, that on the merits of the case, he is entitled to what he claims: for, as has been seen above, the mere issue of notice, and the proceedings in connection therewith, give no sort of validity to his claim, and if he cannot show a good title as mortgagee, his suit must be dismissed (*c*).

The mortgagor's not coming forward in Court, or taking any steps to protect himself during the year of grace, does

(*a*) N. W. P. v. 9, p. 234.
(*b*) Sel. Rep. v. 5, p. 346. S. D. A. 1847, p. 485: 1853, p. 231.
(*c*) *Supra*, p. 220: Sel. Rep. v. 5, p. 81; S. D. A. 1851, p. 648.

not in any degree debar him from appearing in the mortgagee's suit for possession, and raising any plea on the facts and merits of the case: and the judge is bound to investigate and decide the case on its merits, notwithstanding that no objections to the conditional sale are preferred till more than a year after the date of notice of foreclosure (*a*). But any defence which the mortgagor sets up must be one which existed prior to the expiry of the year of grace,—the one great question in all foreclosure suits being whether the mortgagee was on that date entitled to foreclose or not. With that year ends the mortgagor's whole interest in his property, unless he can prove, that previous to its lapse, he was entitled to have it declared by the Court, that the mortgage had been redeemed.

If the mortgagor takes no steps to redeem within the year, from the knowledge that the debt has been fully paid, and that therefore the mortgage cannot be foreclosed, he must nevertheless appear and defend a suit brought by the mortgagee to have the sale declared absolute and to obtain possession. If he does not do so, and a decree is made against him, it will be binding on him until he brings a fresh suit and has it set aside.

In all instances where the contract was made before the passing of Act XXVIII of 1855, the lender on a mortgage by conditional sale, who has been in possession and in the enjoyment of the usufruct of the land, must account to the borrower

(*a*) S. D. A. 1848, p. 6: 1851, pp. 211, 648.

for the proceeds of the estate, whilst in his possession. But this rule does not apply to the mortgagee's possession after the lapse of the year of grace, if the notice issued is followed within twelve years from the time when the mortgagee could first have sued, by a suit for foreclosure (*a*).

Therefore in such cases, in a suit by a mortgagee to render absolute a conditional sale, the mortgagor may plead, that prior to the expiry of the year of grace, the amount borrowed, together with legal or the stipulated interest, had been realised by the mortgagee from the usufruct of the property; and on this plea he is entitled to have an account from the mortgagee—and this, even although he fails to produce evidence in support of his plea. But this defence will be of no avail, unless, on the taking of the accounts, it appears that the whole sum due (including both principal and interest) had been realised before the close of the year allowed by law for redemption (*b*).

But the Court is not to decree in favor of the mortgagor *simply* because the mortgagee does not produce his accounts. The Court must examine the mortgagor's accounts and see whether they support his case, before deciding in his favor (*c*).

In the Lower Court the mortgagor did not insist upon the mortgagee's accounting, nor did he in his answer allege that

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(*a*) Reg. I. 1798, Sec. 3. S. D. A. 1857, pp. 96, 234: 1858 pp. 757, 1235, 1525, 1691: 1859, p. 127.

(*b*) S. D. A. 1848, pp, 311, 711: 1851, p. 211. *See* N. W. P. v. 9, p. 371, and the cases referred to in note (*a*).

(*c*) S. D. A. 1858, p. 757: and *see* next Chapter.

the mortgagee had repaid himself from the usufruct. It was held that under such circumstances the objection as to not accounting could not be for the first time raised in the Sudder Court (*a*).

A mortgagee in possession foreclosed, and continued to remain in possession. The mortgagor ousted him, and the mortgagee sued to recover possession. The mortgagor defended the suit, and pleaded that before the foreclosure the mortgagee had received from the usufruct more than the whole sum to which he was entitled. It was ruled that the mortgagee must account in the usual manner (*b*). So the mortgagee was forced to account, when he had had possession not avowedly but through a *benamee* farm to his nephew (*c*).

A mortgagee, who enters into a compromise with his debtor, and acknowledges in Court that he is satisfied, and renounces his right to foreclosure, cannot afterwards change his mind, and sue for foreclosure. During the progress of a foreclosure suit, the mortgagee made a compromise with the mortgagor, and filed a soolenamah, renouncing all further claim to possession; he afterwards brought a fresh suit for foreclosure, on the ground of non-performance of the terms of the compromise, but it was dismissed by the Court, without any inquiry into the merits.

In such a case, there is no remedy for the mortgagee, except by an action for damages for breach of contract (*d*). And so, a decree for foreclosure cannot be set aside, on

(*a*) S. D. A. 1859, p. 490.
(*b*) S. D. A. 1858. p. 1525
(*c*) S. D. A. 1857, p. 234.
(*d*) N. W. P. v. 6, p. 260

the ground that the mortgagor allowed the decree to go against him without offering any opposition, in consequence of the mortgagee's having executed a deed, during the year of grace, in which he covenanted to restore the mortgagor to possession on certain conditions, which covenant he had broken (*a*). But a mortgagee may waive his right to *immediate* possession on certain conditions, and his right to foreclose will revive on breach of these conditions, by the mortgagor (*b*).

A decree of court declaring a mortgage finally foreclosed, and the mortgagee entitled to possession, puts an end for ever to all right to the land, which the mortgagor may have, or any other person claiming under him, whose title did not originate prior to the date of the mortgage which has been foreclosed. It must be noted, however, that the Government may at any time cause lands to be sold for arrears of revenue, into whose hands soever they may have passed.

It is hardly necessary to observe, that care must be taken by the judges to ascertain the real nature of the mortgage they are dealing with, and that, if the remedies applicable to one species of mortgage are made use of when the transaction belongs to another, the whole proceedings will be bad.

When possession was given by the lower Court, under the impression that the mortgage agreement was one of conditional sale, and the transaction was afterwards, on appeal,

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(*a*) N. W. P. v. 5, p. 294: *Supra*, p. 140.
(*b*) N. W. P. v. 9, p. 564: v. 11, p. 119.

found to have been one of simple mortgage, the transfer of the land made by the Court below was cancelled, and the mortgagees were enjoined to accept a tender of principal and interest which was made by the mortgagor, notwithstanding that more than a year had elapsed from the issue of notice of foreclosure by the mortgagee, as in a case of mortgage by conditional sale (*a*). So, the Court of appeal, considering the mortgage to be by conditional sale, reversed the decision of the judge and moonsiff, who had respectively held that the transaction was a simple mortgage, and therefore not subject to the rules applicable to conditional sales (*b*).

In a suit for possession on foreclosure, a decree for money cannot be given (*c*). And a suit will not lie by a mortgagee, to foreclose and to recover interest. "Had the mortgagor repaid the money lent, interest would have been payable under the section referred to (*d*), but by foreclosing the mortgage, and obtaining possession of the property, the mortgagee must be considered to have secured all he was entitled to receive in the transaction" (*e*).

The mortgagee having obtained a decree for foreclosure and possession, is entitled to immediate possession of the property; and if he meets with any opposition or delay, he is entitled to recover all costs and expenses incurred by him in consequence, together with mesne profits or wasilat from the

(*a*) S. D. A. 1848, p. 194.
(*b*) N. W. P. v, 8, p. 370.
(*c*) S. D. A. 1851, p. 648. *See* N. W. P, v. 11, p. 75.
(*d*) Reg. I. of 1798, Sec. 2.
(*e*) S. D. A. 1856, p. 388.

date of his decree. And for these costs and mesne profits, the mortgagor and all those who represent him will be held liable. Thus when the mortgagor's rights were sold in execution of a decree against him, the purchaser (although he had never actually taken possession himself) and his assignee were, as it appears, made responsible jointly with the mortgagor, for wasilat accrued due between the date of the decree of foreclosure, and the date of the mortgagee's obtaining possession (*a*).

In one case, where the terms of the contract were, that in the event of the mortgagor's making default in payment on a particular day, he would put the mortgagee in possession of certain lands by way of absolute sale, and the mortgagor made default in payment and also in surrendering his property as agreed,—the mortgagee was allowed to sue for the recovery of the principal sum lent, with interest, and was not restricted to his suit for possession (*b*).

But it would not be so held now: for, although there are certain cases in which the mortgagee will be permitted to depart from the usual practice, and to sue for the recovery of the money lent by him instead of for foreclosure and possession, yet this is only when good and sufficient cause is shown for his adopting such a course. And apparently any thing by which, without any blame on his part, it is rendered impossible for the mortgagee to obtain possession, will alone be considered to be good and sufficient cause (*c*).

(*a*) S. D. A. 1847, p. 479. (*b*) Sel. Rep. v. 5, p. 10.
(*c*) Cons. 898, 5th Sept. 1834: Sel. Rep. v. 7, p. 92.

Thus the mortgagor having been all along in possession, and having neglected to pay the Government revenue, in consequence of which the land was, after the issue of notice of foreclosure, sold for arrears, the mortgagee was allowed to recover the principal and interest due to him, his lien having been destroyed through no fault of his (*a*). But, as the rights of a mortgagee are in no degree affected by any subsequent transfer of the mortgaged property, except a sale for revenue, a private sale by the mortgagor, or even an auction sale in execution of a decree and after the issue of notice of foreclosure, will not entitle a mortgagee by conditional sale to sue to recover the debt. His remedy is still against the land alone (*b*). And so, where the mortgagee had obtained a decree for foreclosure and possession, but before he could get possession, the property was advertised and sold in satisfaction of the decree of another judgment creditor (*c*).

One, who for good and sufficient reason sues for the money due, instead of for foreclosure and possession, must not sue merely as on a common money bond, but as for money which he has become entitled to claim in consequence of the mortgagor's breach of contract. His plaint, in short, must be consistent with the case he intends to prove (*d*).

It has been said that if a suit is brought for money when it ought to have been for possession, or *vice versâ*, the objec-

(*a*) S. D. A. 1848, p. 368.
(*b*) Sel. Rep. v. 7, p. 42: N. W. P. v. 3, p. 209.
(*c*) N. W. P. v. 7, p. 272. (*d*) S. D. A. 1850, p. 44.

tion must be specially pleaded by the party who wishes to take advantage of it, and that the Court must not of its own accord take notice of the error (*a*). But if a plaintiff sues for that to which, according to his own showing, he is not legally entitled, it is difficult to see how the Court can do otherwise than nonsuit him or reject his plaint, whether the defendant takes the objection or not.

In one instance, a mortgagee sued for and recovered one half of the sum advanced by him. The mortgagor, on receiving the loan, executed a deed engaging to make over, or to arrange for making over, certain property in mortgage by conditional sale; but he in fact made over only half of that property. The Court ordered that he should return to the mortgagee a proportional amount of the sum received by him, with interest (*b*).

When mortgaged lands are sold for arrears of Government revenue, not accrued through the default of the mortgagee, any proceeds which may arise from the sale, in excess of the arrears, belong to the mortgagee, and he has a right of action for their recovery. And this is so, whether process of attachment on decree has been taken out prior to the sale of the property or not (*c*).

And if the proceeds in excess of the arrears due in respect of the lands sold, are applied by the Collector in liquidation

(*a*) N. W. P. v. 8, pp. 272, 591. (*b*) S. D. A. 1851, p. 750.
(*c*) S. D. A, 1854, p. 182: 1855, p. 411. *See* 1853, p. 87: 1857, p. 527: 1859, p. 622.

of arrears due from the mortgagor on *other* lands, the sums so applied may be recovered by the mortgagee from either the Collector or the mortgagor (*a*).

A mortgagee who forecloses and then gets possession, is not liable for back rents which accrued due prior to his obtaining possession,—unless he has expressly agreed that he shall be so liable (*b*). And a mortgagee who has foreclosed may, if he pleases, sell his right title and interest in the mortgaged land, and the purchaser will be entitled to possession just as the mortgagee himself was entitled (*c*).

A plaintiff sued to have his name registered in the Collectorate as proprietor of certain lands, alleging that he was in possession, the property having first been leased to him, and then before the lease expired mortgaged to him, and the mortgage having been foreclosed. The judge nonsuited the case because the plaintiff "had not obtained possession of the foreclosure in virtue of his mortgage," and because "he was bound to sue for possession under the mortgage before he could prefer a claim for mutation of names." The Sudder Court decided that "as the plaintiff was in possession, and his suit for the mutation of names brought into issue every point that could have required investigation in a suit for possession under the mortgage," the judge should have tried the case on the merits. And it was accordingly remanded to him for re-trial (*d*).

(*a*) S. D. A. 1854, p. 182
(*b*) S. D. A. 1856, p. 1019.
(*c*) S. D. A. 1860, v. 2, p. 53.
(*d*) S. D. A. 1856, p. 8.

In a suit for foreclosure, a third party intervened, and proved an absolute sale to himself prior to the date of the mortgage. The mortgagee's foreclosure suit was consequently dismissed, and he was ordered to pay the costs of the intervening proprietor. On appeal this order was confirmed, as it was the mortgagee's suit which compelled the third party to come into Court; the mortgagee, however, would be entitled to recover from the mortgagor all the costs incurred by him in the case, including those of the intervener (*a*).

One who has the right of pre-emption may assert it, either at the time of making the mortgage, or when the conditional sale comes to be made absolute (*b*).

(*a*) S. D. A. 1853, p. 574.

(*b*) N. W. P. v. 10, p. 588.

CHAPTER X.

OF ACCOUNTING.

In every case, not coming under Act XXVIII of 1855, in which it is not admitted by the mortgagor that the sum alleged by the mortgagee to be due to him is, or at the expiry of one year from the date of the issue of notice of foreclosure was, really so due, the Court must take an account of the principal interest, and costs due on the mortgage—whether the suit be brought by the mortgagor for redemption, or by the mortgagee for foreclosure. And this rule is of such universal application, that a suit for redemption on the ground of the debt having been liquidated from the usufruct, is not to be dismissed without taking the accounts, although the judge sees that one of the items set out in the mortgagor's statement of the receipts of the mortgagee, and without which the full amount would not, according to the mortgagor's own showing, have been made up, is of an illegal nature, and must necessarily be struck out (*a*).

The mortgagor is not bound in the first instance to make out a *primâ facie* case, and an admission by him that something

(*a*) N. W. P. v. 6, p. 319.

may be due does not bar his right to have the accounts taken. The mortgagee must file his accounts before the mortgagor is called upon to prove that the debt has been satisfied: so far, the *onus probandi* does not lie on the mortgagor (*a*). And it is the duty of the Court, when it dismisses a redemption suit on the ground of the mortgage debt not having been liquidated from the usufruct up to the date of suit, to determine the exact sum then outstanding, by making up a correct account, and disposing of the several objections of the parties in regard to the items composing it, in order that no matter admitting of adjudication in that action, may be left open to future litigation (*b*).

It is the privilege of the mortgagor not to be bound to account for the rents and profits received by him from the land; and there seems to be no exception to this rule, however insufficient the security may be. But if, in breach of an express agreement to the contrary, he remains in possession, to the exclusion of the mortgagee, the latter will have his remedy in a suit for possession and mesne profits.

The mortgagee is subject to an account from the time he is put in possession, and for the whole period that he remains in the character of mortgagee (*c*). But he will not be so subject if the mortgage was made after Act XXVIII of 1855

(*a*) S. D. A. 1855, p. 432. N. W. P. v. 9, p. 371.
(*b*) N. W. P. v. 8, p. 112: v. 9, p. 388.
(*c*) Reg. I. 1798, Sec. 3. S. D. A. 1857, pp. 96, 234: 1858, pp. 727 757, 1235, 1525, 1961: 1859, pp. 127, 490.

came into force, and there is an express stipulation that he shall not be called on to account. If the mortgagee during a part of his term, has held under some title other than that as mortgagee, he will not have to answer to the mortgagor for the proceeds accrued during that period. In one case, it happened that neither the mortgagee in possession, nor the mortgagor, chose to pay up certain old balances of revenue which had become due before the making of the mortgage. The Collector having entered on the estate, the mortgagee afterwards came forward and paid the arrears, whereupon the Collector gave him a farm of the land for ten years. These ten years were held to constitute a gap in the mortgage possession, and the mortgagee could not be compelled to render an account of the profits then received by him (*a*).

Where the mortgage deed declared that the mortgage was to have effect from a date prior to that of the deed, it was held that the mortgagee was liable to account for the proceeds from such prior date, but that the mortgagor must be charged with interest from the same date (*b*).

In taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of the loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realised over

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(*a*) N. W. P. v. 7, p. 7. (*b*) N. W. P. v. 10, p. 684.

and above the interest to which the mortgagee is entitled, from the date of realisation :—or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal (*a*). The result attained by these methods is the same. There is no law which restricts the mortgagee to the receipt in the whole of interest only equal to the amount of the principal lent (*b*).

When on the accounts being adjusted, it is found that the mortgagee's claim for principal and interest has been completely satisfied, all subsequent receipts are to be considered to belong to the mortgagor, and he will be entitled to simple interest on them until they are repaid to him (*c*). But although the general practice of the Courts is to allow interest on mesne profits or wasilat, still it will not be given if there has been any improper delay in the institution of the suit for their recovery, or if any special ground exists for withholding it. There is no rule rendering it compulsory on the Courts to decree a specific rate of interest; a discretionary power is vested in them, in reference to the circumstances of each case (*d*). And mere delay is not necessarily *improper* delay (*e*).

(*a*) S. D. A. 1848, p. 549 : 1852, p. 831 : 1859, pp. 497, 1211, 1543.
(*b*) S. D. A. 1859, p. 1543.
(*c*) S. D. A. 1853, p. 464. See as to allowing interest, N. W. P. v. 10, p. 257
(*d*) N. W. P. v. 8, p. 228 : v. 10, p. 8.
(*e*) N. W. P. v. 9. p. 368. See S. D. A. 1855, p. 404.

Any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal. Thus, if they have agreed that the residue of the sums received from the land, after payment of interest, shall be carried to liquidation of the principal, and the account closed to the end of each year, the accounts must be taken in this manner (*a*).

As a general rule, in cases to which the usury laws are applicable, where there is no agreement that a less rate shall be taken, the Courts will allow interest at the rate of 12 per cent per annum. But they are not bound to award 12 per cent: that is the highest rate which they are permitted to give, and though it is customary, and the general understanding of the country, that 12 per cent should be awarded on deeds containing no stipulation for a lower rate, still this general custom will be departed from, if the mortgagor can establish any good reason for its being so (*b*). In cases to which the usury laws are not applicable, the Courts will allow interest at the rate stipulated for in the contract: or if no rate of interest shall have been stipulated for, and interest be payable under the terms of the contract, at such rate as they shall deem reasonable (*c*).

Any stipulation by which the mortgagee agrees to take interest at a rate lower than 12 per cent will be binding on

(*a*) S. D. A. 1848, p. 549. N. W. P. v. 10, p. 22.

(*b*) S. D. A. 1852, p. 748. N. W. P. v. 8, p. 228: v. 9, p. 368: v. 10 pp. 22, 684. *See* S. D. A. 1854, p. 518.

(*c*) Act XXVIII of 18[illegible] Sec. 5

him. And where he has consented to take the usufruct of the land in lieu of interest, he cannot claim interest at the legal rate or otherwise, on the ground of the usufruct having fallen short of the legal, or any other rate (*a*). In usufructuary mortgages the law requires an account of the proceeds in order to prevent the mortgagee receiving more than his principal with interest at 12 per cent. If the proceeds do not give what is equivalent to interest at 12 per cent, and no rate is stipulated for, "the presumption is that the usufruct was deemed by the mortgagee sufficient interest for the money debt, and the mortgagor is not bound to pay a further sum, to make up any particular rate" (*b*).

In one case of a non-usufructuary mortgage, interest not being expressly stipulated for, the mortgagee was held to be entitled to interest only from the date upon which the loan became re-payable (*c*). And in another case, interest was allowed only from the date of suit, until realisation of the principal sum decreed (*d*).

It seems almost superfluous to remark that the ordinary rules regarding the allowance of interest will be followed, even when the parties are both Mussulmans (whose religion and law forbid the taking or giving of interest). The Mahommedan law is not to be acted on in this instance, as the suit does not relate to the "inheritance of, or succession to,

(*a*) N. W. P. v. 7, p. 307; v. 8, p. 178; S. D. A. 1852, p. 678.
(*b*) S. D. A. 1860. v. 2, p. 223. *See* N. W. P. v. 3, p. 417.
(*c*) S. D. A. 1855, p. 54. (*d*) N. W. P. v. 10, p. 363.

landed property," in which cases alone the Regulations require that the proceedings should be regulated by the peculiar law of the litigant parties (*a*).

Under Sec. 5, Reg. XXXIV of 1803 (*b*), the Courts are not in any case whatever, except those specified in Sec. 11 (which relates to respondentia loans and policies of insurance), to decree a greater sum for interest than for principal. But this rule of course does not apply to interest accrued due after the institution of the suit (*c*).

Interest above the rate of 12 per cent per annum is not to be allowed under any circumstances in the case of contracts entered into before Act XXVIII of 1855 came into force. And compound interest, arising from intermediate adjustments of accounts, is never to be given in such cases. But this rule does not apply where accounts between the parties have been adjusted, and the former bonds or agreements cancelled, and new bonds or agreements taken for the aggregate amount of principal and interest due, consolidated into principal (*d*).

In one case the accounts were prepared on the principle of striking a balance of interest at the close of the year, deducting the principal of all payments by the debtor, from the

(*a*) Reg. V. 1831, Sec. 6, Cl. 2. S. D. A. 1848, p. 530. N. W. P. v. 7, p. 88

(*b*) Reg XV. 1793, Sec. 6 repealed as well as Reg. XXXIV 1803. Sec. 5, by Act XXVIII. of 1855. N. W. P. v. 8, p. 479.

(*c*) Sel. Rep. v. 1, p. 242: v. 3, p. 270: v. 4, p. 261. See S. D. A. 1859, p. 1543.

(*d*) Reg. XV 1793, Secs. 4, 7, 8: Reg. XXXIV 1803, Secs. 3, 6: Reg. XVII 1806 Sec. 2, (all repealed by Act XXVIII of 1855). S. D. A. 1852 p. 1021. N. W. P. v. 11, p. 175.

principal of the debt, and setting off only the interest accruing to the debtor on his payments during the year, against the interest becoming due on his principal debt: but the Court held that this mode of accounting was wrong, as no compound interest was allowable, and that the debtor was entitled to have all sums, whether principal or interest, credited to him during the year, applied first to the liquidation of interest due, and the surplus only, remaining after such liquidation of interest, carried to the reduction of the principal (*a*).

Under Act XXVIII of 1855, a contract by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties. And upon any mortgage or contract entered into after the passing of that Act interest is be to calculated at the rate stipulated therein, or if no rate of interest has been stipulated for, and interest be payable under the terms of the contract at such rate as the Court shall deem reasonable (*b*).

The mortgagee is required to deliver accounts of his gross receipts and of his expenditure, and it is a positive duty that he should do so (*c*). Moreover the accounts rendered must be full and complete, and the judge may not rest contented with a mere rough abstract of the receipts during the time the mortgagee has been in possession (*d*).

(*a*) S. D. A. 1853, p. 464. (*b*) Act XXVIII of 1855, Secs. 4. 6.
(*c*) N. W. P. v. 7, pp. 68, 511. S. D. A. 1856, pp. 328, 522: 1857. p. 1513. Reg. XV. 1793, Sec. 11: Reg. XXXIV 1803, Sec. 10.
(*d*) N. W. P. v. 5. p. 244

The mortgagee must swear, or if he is a person exempted from taking oaths, must subscribe a solemn declaration, that the accounts delivered are true and correct. And this must be done by the mortgagee himself, the oath of his karinda or manager being wholly insufficient, and it being the duty of the judge who tries the suit, to require the mortgagee to attend his Court in person, and to depose to the truth and authenticity of his accounts (*a*). But native ladies whose attendance in Courts of Justice is usually dispensed with, are not obliged to appear in Court to swear to the truth of the accounts prepared by their Agents. The oath of the Agent is all that is required in such cases (*b*).

When there are several joint mortgagees, the oath of one or more of them, competent to discharge the duty, is sufficient in regard to the *primâ facie* admission of the accounts. How far such accounts are deserving of credit, is another question (*c*).

In a case in which the oath of the gomastah of the mortgagee was by consent taken in the lower Court as sufficient, the Sudder Court refused to listen to the objection that the mortgagee himself ought to have sworn (*d*).

It appears that when a mortgagee, no longer in possession, sues to recover a balance from the mortgagor, he is not bound to swear to the accounts. These may possibly be no longer in his possession (*e*).

(*a*) Reg. XV. 1793, Sec. 11; Reg. XXXIV. 1803, Sec. 10. N. W. P. v. 7, p. 607, D. A. 1856, p. 522. *See* S. D. A. 1858, p. 1525.
(*b*) N. W. P. v. 9, p. 465. (*c*) N. W. P. v. 9, p. 465: v. 10, p. 318.
(*d*) N. W. P. v. 10, p. 318. (*e*) *Ibid.*

A mortgagee who evades the rendering of the required accounts, or who will not swear or depose to the truth of those rendered, subjects himself to a fine (*a*). And in such a case, any reasonable proof, even if offered by the mortgagor (*b*), may be accepted by the Court. In one instance, a mortgagee in possession had applied to the Collector to have a renewal of the settlement of the estate made in his name, and sent in *doul* papers along with his application, praying to be admitted to engage for the estate at the jumma therein specified; these papers, when produced afterwards by the mortgagor, were held to be sufficient evidence, as against the mortgagee, he having failed to furnish any proper account (*c*). So an account made out by an Ameen on the spot, and from local inquiry, has been held to be a good basis on which to proceed, and to be binding on the mortgagee who had chosen to withhold his accounts (*d*).

It is a very common practice, when there are disputes as to the items of the account, for an Ameen to make out a statement of the collections, from investigation made by him on the spot; and when this is done, the collections are to be assumed as estimated by him, unless objections are at once taken to his report. And it is not proper to put aside the Ameen's report to which no objection has been taken by the parties, and to

(*a*) N. W. P. v. 7, p. 68.
(*b*) S. D. A. 1858, pp. 727, 1235: 1859, pp. 270, 812.
(*c*) N. W. P. v. 7, p. 511.
(*d*) S. D. A. 1848, p. 346. *See* 1856, p. 328: 1857, p. 1513: 1862, pp. 51, 57.

take the rent-roll as the basis of the accounts. Nor is the rent-roll admissible as conclusive evidence, when the party in possession has filed his papers showing the amount collected (*a*).

It has been said that an Ameen ought not to be deputed to make inquiries on the spot unless the mortgagee produces his accounts. But this dictum is scarcely borne out by the practice which prevails (*b*).

The account will be taken on the footing of village papers regularly filed by the mortgagee and not objected to at the time by the mortgagor, unless very good reason is shown for putting these accounts aside and proceeding to a settlement on other and independent data (*c*). If the mortgagee has not kept accounts, or has kept them badly, the presumption in every thing will be against him (*d*). But if the mortgagee does not file proper accounts, it does not follow that those of the mortgagor are necessarily to be taken as correct without any inquiry (*e*).

The mortgagee having rendered, and sworn to the truth of his accounts, the Court will permit the mortgagor to examine them, and after hearing his objections, will proceed to take evidence on both sides. But the objections of the mortgagor must be specific and distinct, as to each item intended to be

(*a*) S. D. A. 1852, p. 831. *See* 1860, v. 1, p. 239.
(*b*) S. D. A. 1857, p. 1513 : *but see* S. D. A. 1858, p. 756.
(*c*) N. W. P. v. 10, p. 684. (*d*) N. W. P. v. 10, pp. 684, 378,
(*e*) N. W. P. v. 9, p. 352. S. D. A. 1858, p. 756.

disputed: and a mere general charge of falseness and inaccuracy will not be attended to (*a*).

A judge is not bound to adopt the accounts which he believes to be false, either of one party or of the other, but, rejecting the detailed accounts furnished, he may on some equitable principle fix a sum, according to his best judgment, as the amount of the annual produce. And in one case, where the judge, doubting the accounts of both parties, valued the lands at the sum assessed on them by the Collector during a period of temporary resumption, the Court considered this a very equitable mode of calculation, and confirmed it (*b*).

But the valuation put upon the lands by the judge must be founded on some distinct tangible ground, and not on mere conjecture or guess according to the best of his information and belief. Thus when the lower Court disallowed the rent entered against certain lands in the yearly rent-roll filed in the Revenue office, and assumed in its place a conjectural rate obtained from an average of the several rent rates leviable from the other lands in each of the mouzahs which were the subject of the suit, it was held that the average struck in such a manner must be purely arbitrary, and that the enhanced rate fixed on such uncertain grounds, and unsupported by evidence, could not be maintained (*c*).

The *nikasee* accounts annually given in by the Putwarree,

(*a*) Reg. XV 1793, Sec. 11: Reg. XXXIV. 1803, Sec. 10, N. W. P. v. 6, p. 32: v. 7, p. 607; v. 8, p, 107.

(*b*) N. W. P. v. 4, p. 317.

(*c*) N. W. P. v. 8, p. 107.

furnish a valuable test of the accuracy of the accounts and papers filed by the parties, and a judge may with great propriety refer to them (*a*). But though they are useful as a test, they are not in any way indispensably necessary, when the details furnished by the mortgagee fully enable the Court to proceed to an adjustment without them. And although the judge may refer to them of his own accord, in order to check accounts given in by the parties, a decree of which they are the sole foundation is bad unless they have been regularly filed in the suit; the judge must not of his own accord send for them to the Revenue office, and from them alone make out an account (*b*).

If the mortgagee makes an admission in his pleadings, as to the amount of his receipts from the land, believing it at the time to be for his own benefit, he will not afterwards be allowed to contradict or to explain away the statements he has so made (*c*).

As a general rule, the Court will give the mortgagor credit for every sum entered in the accounts rendered by the mortgagee as realized, and will not allow the latter to repudiate any such sum on the ground of its being an illegal cess, or payment which could not have been enforced. On the other hand, such illegal payments when not admitted by the mortgagee, cannot be allowed; and the mortgagor will not be

(*a*) N. W. P. v. 5, p. 244: v. 6, p. 82. (*b*) N. W. P. v. 7, p. 68.
(*c*) N. W. P. v. 8, p. 225; v. 9, p. 371.

permitted to go into proof of them (*a*). But although the mortgagor will not be credited with sums derived from *haut*, or fair tolls, he is nevertheless entitled to credit for the rent of land on which the *haut* or fair was held (*b*).

The gross receipts referred to in the Regulations are the gross sums paid by the tenantry of the estate mortgaged, not merely what actually reaches the mortgagee's hand. And if he creates a middle-man between himself and the tenants, this does not exonerate him from the liability to account for the gross receipts (*c*). He must answer for the rents appearing in the jummabundee, and not merely for his actual collections: but he will of course only be liable for the amount realised, if he can show good reason for not having realised the whole rent-roll exhibited in the jummabundee (*d*). If the land is held by under-lessees by virtue of leases granted prior to the mortgage being made, so that the mortgagee has not in fact had the full usufruct of it, the mortgagor is to be credited only with the net profits received by the mortgagee (*e*). So if the estate, though nominally in the hands of the mortgagee, is actually managed by the mortgagor (*f*).

It has been already seen, that the mortgagee is responsible

(*a*) N. W. P. v. 7, p. 248; v. 8, p. 178; Rep. Sum. Cases, 10th Feb., 1846.

(*b*) Rep. Sum. Cases 10th Feb. 1846.

(*c*) S. D. A. 1852, p. 1137. *See* D. A. 1857, p. 1513.

(*d*) N. W. P. v. 8, p. 564; v. 9. pp. 159, 201, 465; v. 10, pp. 51, 355. S. D. A. 1858, p. 1847; 1860, v. 1, p. 639.

(*e*) N. W. P. v. 8, pp. 107, 112, 564. (*f*) N. W. P. v. 10, p. 115.

for gross mismanagement, or for waste committed by him (*a*). If he chooses improperly to record certain lands as rent-free, which are not so, he will be charged with the full rent which they would have brought in (*b*). And a clause in a mortgage deed to the effect, that an allowance shall be made to the mortgagee "for losses," has been held to apply only to losses beyond his control, and not to cover arrears which he wilfully or by negligence allowed to remain outstanding (*c*).

All expenses fairly incurred in respect of the property will be credited to the mortgagee. He will be allowed a charge for the wages of Chowkeydars and Putwarrees, which form regular items in village expenses, altogether independent of the will of the mortgagee, and which he, as a representative of the owner is compelled by the orders of Government to disburse (*d*). But those payments only will be allowed which have been *bona fide* made: and therefore where the possession of Jagheer or service land by the Chowkeydars of each mouzah, was shown by the entries of rent-free lands under their names in the yearly jummabundees, a charge for Chowkeydars was struck out of the mortgagee's account (*e*).

The reasonable costs of collection and management will also be allowed; and, in the Agra Court, it seems that as a general rule, 5 per cent will be held to be a proper charge when the villages are settled or when they are sub-let, and 10 per cent

(*a*) *Supra*, p. 108. (*b*) N. W. P. v. 9, p. 525. (*c*) N. W. P. v. 9, p. 159. (*d*) N. W. P. v. 7, pp. 248, 477: v. 8, pp. 107, 564.

(*e*) N. W. P. v. 8. p. 107. And *see* generally as to what will be allowed, v. 9, pp. 201, 371: v. 10, pp. 355, 378.

when they are not settled or sub-let: there being more trouble in the case of the latter, and an allowance for contingent expenses being considered not improper (*a*). In one case, the lower Court allowed the mortgagee who had been in possession, only 7½ per cent for village expenses, collection and management. On appeal, it was held that this was wrong, and that the mortgagee was "entitled to the usual deduction of 10 per cent" for collection and management, and also to the charges on account of the putwarree and police, together with losses incurred in batta or exchange (*b*). The percentage for collection, is apparently charged on the gross rental (*c*). And it is considered to cover ordinary balances (*d*).

A Mortgagee is to be allowed all payments in respect to Government revenue, made by him while in possession; and this, whether the revenue fell due after the making of the mortgage or before it, the mortgagee being entitled to do any thing which it is the duty of the mortgagor to do in order to secure the possession of the land for him (*e*). But if it has been expressly agreed that these charges shall be borne by the mortgagee, he will, of course, not receive credit for them in passing his accounts (*f*). Nor, on the other hand, will he be debited with any thing which it has been specially agreed he shall not be liable for. And therefore when there was a provision that

(*a*) N. W. P. v. 7, p. 477: v. 8, pp. 112, 564.
(*b*) N. W. P. v. 8, p. 564. v. 9, p. 371.
(*c*) N. W. P. v. 8, p. 112. (*d*) N. W. P. v. 9, p. 371, v. 10, p. 51.
(*e*) S. D. A. 1848, p. 346. 1852, p. 1063. N. W. P. v. 7, p. 7.
(*f*) N. W. P. v. 8, p. 225.

the mortgagor should make good the balances of rent unpaid by the cultivators, the mortgagee was held not to be liable for such balances, with which the mortgagor sought to charge him on the ground of their having been lost through his neglect (*a*).

A mortgagee who, being in possession, lets the estate fall into arrears, in consequence of which the Collector enters on the land for a time, must account for the full profits of the whole of that period, just as if he had never been disturbed in his possession,—it being his duty, in the absence of an express stipulation to the contrary, to pay the Government revenue before disbursing any other sum (*b*). And this is so, even when the balance did not originally accrue from his own personal default, but arose from the default of the owners of other lands, which together with those mortgaged formed a single undivided mehal, every portion of which was responsible for the revenue due in respect of the whole. The possibility of the proprietor of one mouzah being called upon to make good arrears unpaid by the proprietor of the other, necessarily arose out of the nature of the tenure, and was one for which the mortgagee was as much bound to provide, as for the revenue paid by the mouzah which was pledged to him (*c*).

(*a*) N. W. P. v. 7, p. 477. But *see* v. 9, p. 159.
(*b*) N. W. P. v. 3, p. 417. *See* v. 7, p. 7. v. 9, p. 465; v. 10, p, 553.
(*c*) N. W. P. v. 9, p. 164. *See* S. D. A. 1855, pp. 31, 44.

But the mortgagee will not be liable if the default, though nominally made by him, is in reality that of the mortgagor (*a*).

If the nature of the mortgage agreement is such that there is an annual payment to be made to the mortgagor, and these payments are allowed to fall into arrears, the law of limitation will have effect: and the mortgagor cannot, when the accounts are taken in a case to which the old law of limitation is applicable, be allowed credit for sums which became due more than 12 years previous to the institution of the suit. Therefore when the contract was that the mortgagee should pay an annual rent of 40 Rupees to the mortgagor, but no payment was in fact made for many years, the mortgagor was credited with rent for 12 years only, his claim for the rest that was due being barred (*b*).

(*a*) N. W. P. v. 11, p. 115. (*b*) S. D. A. 1850, p. 205.

CHAPTER XI.

OF MOFUSSIL MORTGAGES AS DEALT WITH BY THE LATE SUPREME COURT.

It may be that the High Court, in the exercise of its original jurisdiction, has a concurrent jurisdiction with the Mofussil Courts in a matter connected with a mortgage which is about to become the subject of litigation; and in such a case the plaintiff has his election, and may bring his suit in either Court.

If he seeks his remedy in the Mofussil Court, his title will be tested by, and disposed of according to the Mofussil law (*a*). But if he sues in the High Court, his title will be tested and disposed of, according to the law as there administered. What that law is as regards mortgages, when the defendant is a Mahomedan or Hindu, is still somewhat doubtful. It has however been ruled by the late Supreme Court, that when the evidence shows that the contract was made *especially with reference to the Mofussil law*, the Supreme Court must decide the case according to that law, although it would not be bound to follow the Mofussil Courts as to matters of *mere procedure*. In

(*a*) S. D. A. 1847. 354.

delivering judgment in the case of Skinner *v.* Sandyal (*a*), the Chief Justice Sir Lawrence Peel said: "A preliminary question arises, viz., by what law should the cause be decided? It is a case of contract, and the defendants are Hindus, and by the terms of the statute the contract should be governed by their law. But in truth the law of mortgages in the Mofussil now depends on the Regulations, and not simply on the Mahomedan or Hindu law, and that statute consequently furnishes no rule. Had the evidence shown that these contracting parties had contracted with reference to a different law than the law of the *forum*, then, as we conceive that it would be perfectly competent for them to do so, the Court must have decided the case by the law of their adoption. There is certainly considerable difference between the law of mortgages as administered in the Company's Courts and the law of mortgages as applied in this Court. Still the fundamental principle under both systems, is that the mortgage security is to be a security for principal, interest, and costs only; and in whatever form it be taken, so far as it is a mortgage security, it will not be allowed to have any other effect. The law as to land tenure in India, and the effects of the revenue system there on the rights of proprietors or of persons interested in lands, are very different from the law of real property in England, and the effects of any fiscal law upon land; and may well justify the adoption of securities differing from those

(*a*) Supreme Court 4th August, 1855. And *see* Doe d. Sibchunder Doss *v* Sibkissen Bonnerjee, 1 Boulnois' Rep. p. 70.

which are commonly adopted under the English law. And when the forms of securities which are adopted in Mofussil mortgages, and the estates which are created there to give effect to such securities, obtain in contracts between British subjects, or between British subjects and natives, the adoption of them may be evidence that the parties meant, so far at least, to contract on the basis of the local law. The English law has nothing opposed to such an adoption and incorporation into itself, of a local law not forming part of it."

But the doctrines laid down in this judgment, were scarcely acted upon in the subsequent case of Bholanath Coondoo Chowdry *v.* Unodapersad Roy (*a*). That was a suit brought by a second mortgagee to redeem the first mortgagee, all the parties being Hindus. It was unsuccessfully contended that the Mofussil law governed the case, and that according to it, the first mortgagee having a mortgage in the nature of a conditional sale, could not be redeemed against his will by a second mortgagee.

In the Supreme Court there was at one time considerable uncertainty as to the relief to which a mortgagee is entitled on a Mofussil mortgage,—that is to say, whether there ought to be a sale or a foreclosure. For a considerable period the decree in all cases was for a sale (*b*). More lately, however, the practice was to follow the intention of the parties, as evidenced

(*a*) Boulnois' Rep. v. 1, p. 97. *See* S. D. A. 1858. p. 657.
(*b*) Collydoss Gungapadhia *v.* Sibchunder Mullick, Morton's Rep. 111.

by their contract; or if the intention could not be gathered from the terms of the agreement, to allow the plaintiff to make his election.

This rule, and the reasons on which it is founded, are laid down in the following judgment of the Court (*a*). "Three claims were brought before the Court, in each of which the plaintiff sought an order of foreclosure. Two of these were upon Bengali khuts; the third upon an equitable mortgage constituted by deposit of title-deeds, and an English memorandum in writing declaring the purpose of the deposit. The Court took time to consider whether the relief to be granted on these securities in the event of the non-payment of the sums found to be due thereon respectively, should be a sale or foreclosure. It appears that the Court has ordinarily given effect to Bengali securities of this nature by sale. There seems however to be no reason why, if the Bengali instrument, as many mortgage khuts or bye-bil-wufas do, actually imports a conditional sale, intended to become absolute if the money be not paid by a certain time, this Court should not do what the Courts of East India Company do in like case, and give effect to the security by a decree of foreclosure. The practice of this Court was, we believe, adopted in supposed conformity with the practice of the Court of Chancery in cases of equitable mortgages: the course of practice in England, however, as the nature of the relief to be granted

(*a*) Ramnarain Bose *v.* Ramcunny Paul, and Pertaubchunder Paulit *v.* Ashlam Holdar, 24th December, 1851.

on equitable mortgages has not been uniform. In some of the earlier cases the decree was for foreclosure, with a direction for an absolute conveyance by the mortgagor. There followed a period in which the ordinary decree was for a sale; and in one or two cases the sale was directed to be immediate. In Parker *v.* Housefield (*a*), however, Lord Cottenham when at the Rolls decided, that whether the relief granted was sale, or whether it was foreclosure, the period of six months given for redemption by a decree on a legal, must be equally given by a decree on an equitable, mortgage; and in most of the modern cases (*b*), the Court has reverted to the earlier form of decree, and directed a foreclosure, and absolute conveyance. The form of order to be made on a claim founded on an equitable mortgage as issued by the Court of Chancery, and adopted by this Court also shows that foreclosure is now considered in general cases the proper mode of relief. There are however exceptional cases; and such decisions as Sampson *v.* Pattison (*c*) and Lister *v.* Turner (*d*) show, if the security afford evidence that a sale and not a foreclosure was in the contemplation of the contracting parties, the relief granted will be the former. In the case of Ramnarain Bose *v.* Ramcunny Paul, we think there is such evidence. The parties have expressly stipulated that in the event of the non-payment of the money

(*a*) 2 Mylne and Keene, p. 419.

(*b*) See amongst others Ball *v.* Harris, 8 Simons, p. 485, confirmed on appeal, 4 Mylne and Craig, p. 264; Tylee *v.* Webb. 6 Beavan, p. 552; Holmes *v.* Turner, 7 Hare, p. 369.

(*c*) 1 Hare, p. 533. (*d*) 5 Hare, p. 281.

the property shall be sold. In this case therefore we think the decree should be for sale. In Pertaubchunder Paulit *v.* Ashlam Holdar the security says nothing about a sale; it does not clearly define what is to be done in default of payment, but it is termed a khut mortgaging lands, and there seems to us to be no reason why, if the plaintiff prefer it, he should not have the usual order of foreclosure. In the other case, the order may be the usual order of foreclosure on an equitable mortgage by deposit."

Act VI of 1854, Sec. 17 enacts that the Court may, in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, directed a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the Court may think fit to direct.

Whether the mortgage be by conditional sale or not, the mortgagee was allowed in the Supreme Court to recover the money advanced by him, with interest, on default being made by the mortgagor in payment at the appointed time. At first, however, the Court seems to have entertained doubts on this point, and in one or two instances, it was held that when the terms of the contract implied that the mortgagee was to look to the land alone for payment, he could not recover the money debt (*a*). But it has now been

(*a*) Radachurn Seat *v.* Punchanund Sealmoney, and Ruggonauth Shaw *v.* Ramdun Deb Surmono. Morton's Rep. pp. 233, 4.

long established, that an action for money lent will lie, on the expiration of the time limited, the mortgage being treated merely as evidence of the original loan,—and such actions are of frequent occurrence (*a*).

Where the plaintiff after having obtained a decree in the Supreme Court, is obliged to have recourse to a Mofussil Court in order to have it carried out, the latter is bound to accept and to respect the subsisting decree, and the question which has been decided can be re-opened only in the Court which decided it. So long as the decree stands, "the Mofussil Courts have nothing to say to the nature of the transaction. Instead of acting upon their own laws governing private transactions, they will act on the more general rule which requires them to respect the judgments and proceedings of a Court of competent jurisdiction and authority" (*b*).

A decree for foreclosure having been given in the Supreme Court, the mortgagee sued in the Mofussil for possession of the land, but was resisted by the mortgagor, on the ground that the mortgage had been redeemed. The Court said: "the mortgage has been foreclosed; and therefore, no plea of payment of the amount on which the mortgage was effected, can be taken up in this Court, as the foreclosure was made under process of the Supreme Court. No question of the validity

(*a*) Tilluckram Puckrassy *v.* Choitmachurn Naut, and Sopteram Day *v.* Panchanund Mitter. Morton's Rep. pp. 230, 232, and 233 note (*b*).

(*b*) S. D. A. 1847, 354. *See* 1853, p. 859: 1856, p. 323: and Macpherson's Civil Procedure, 4th Ed. pp. 57—61.

or maintenance of the order of the Supreme Court, declaring foreclosure in favor of the appellant before us, in a suit to which the mortgagor himself was a party, can be raised in this Court" (*a*).

The issuing of native and other proceedings, which by the Regulation law are necessary preliminaries to a foreclosure suit, being unknown in English as well as in Hindu and Mahomedan law, and being mere matters of procedure, are not requisite when the suit is brought in the High Court sitting as a Court of original jurisdiction. And the Mofussil Courts will put the plaintiff in possession, on a suit brought by him for that purpose founded on a decree of the Supreme or High Court, although that decree was made in a suit, prior to the institution of which no notice of foreclosure was issued. "As we have a decree of the Supreme Court before us, cutting off by express decretal words the equity of redemption against the mortgagor's estate, there remains no room for the issue of the notice admitting of such equity, to the representative of that estate" (*b*).

But decrees of the Supreme Court cannot be enforced in the Mofussil Courts against any persons, except the parties to the original suit, or their representatives. Therefore when the mortgagee sued the mortgagor alone in the Supreme Court, and got a decree for foreclosure, and afterwards brought a suit for possession, found on this decree, against a third

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(*a*) S. D. A. 1850, p. 458. (*b*) S. D. A. 1853, p. 859.

party whom he found in occupation of the lands, that party having purchased the mortgagor's rights before the institution of the suit in the Supreme Court, it was held that, as the defendant had not been a party to the original suit, the decree formed no ground for a claim against him in the Mofussil Court (*a*).

So it was held to be quite clear that a Supreme Court decree obtained by a first mortgagee against the mortgagor was not binding on, and could not be put in force against a second mortgagee in possession, he not having been made a party to the suit in the Supreme Court (*b*).

A judgment for the balance due on a bond, was obtained in the Supreme Court. The bond also expressly pledged as security for the loan, certain property therein specified, and the lender afterwards sued in a Mofussil Court to recover, by the sale of the property pledged, the amount for which he had obtained judgment. The defendants pleaded, that the lender having obtained a judgment of the Supreme Court which was for money only, could not afterwards be allowed to bring an action to have the lands sold. But the Court held, that "the mere fact of the decretal order of the Supreme Court making no allusion to the property, and containing no provision for its sale in execution, could in no way be construed to the prejudice of the lender's lien upon the property, or affect his right to bring the property to sale in satisfaction of his

(*a*) S. D. A. 1853, p. 210.

(*b*) S. D. A. 1853, p. 859. *See* N. W. P. v. 8, p. 316; S. D. A. 1850 p. 45.

decree, free from the incumbrances which had since been created in respect of it" (*a*).

A mortgagee having obtained a decree of forcelosure in the Supreme Court, sued on it in the Mofussil Court for possession, bringing his suit against the person whom he found in occupation. The defendant pleaded that he had bought the land from the mortgagor, subsequent to the date of the plaintiff's mortgage, but more than twelve years before the institution of the foreclosure suit. The Court ruled that the suit was barred by lapse of time, the defendant having been more than twelve years in undisturbed possession (*b*).

And it has been held, that when a second mortgagee has obtained a decree for foreclosure in a Mofussil Court, and has had undisturbed possession under that decree for more than twelve years, a suit for possession brought by a first mortgagee, based on a decree of the Supreme Court, is barred by the limitation rule, although instituted within twelve years from the date of his Supreme Court decree (*c*).

(*a*) N. W. P. v. 8, p. 316. (*b*) S. D. A. 1853, p. 210.
(*c*) S. D. A. 1853, p. 546. *See* supra p. 191.

APPENDIX.

Hunoomanpersaud Panday v. *Mussumat Babooee Munraj Koonweree (a).*

The following is the judgment of the Privy Council in this case, delivered on the 26th of July, 1856, by,

The Right Honorable the Lord Justice KNIGHT BRUCE:—

The complainant in the original suit, was Lal Inderdowun Singh described in the plaint as proprietor of the Raj of Pergunnah Munsoor Nuggur Bustee. The suit was against the present appellant the chief defendant, and Ranee Degumber Koonweree, the second defendant, the mother of the complainant. The complainant sought by his plaint the possession of certain immoveable property described in his claim, the particulars of which it is unnecessary to state. He sought also to set aside a mortgage bond bearing date Assar Soodee Poorunmashee, 1246, Fuslee, set up by the appellant; to oust the appellant; to cancel the name of the appellant, as mortgagee in the Collector's records; and to recover mesne profits.

To this suit the defendant put in his answer. The title of the complainant to the lands as heir was not denied by the answer, but the defendant alleged his title as mortgagee except as to some Birt lands, the claim to which was abandoned in the suit, and to which it is unnecessary further to refer. The substantial dispute between the parties was, as to the lands for which the suit proceeded, whether the defendant could resist, under his title as mortgagee to the extent of that interest, the title of the complainant as heir and proprietor of the lands.

It is unnecessary to enter in detail into the pleadings or proceedings in the suit. It is sufficient to state that in the result the Sudder Ameen decided in favor of the security, and dismissed the claim generally, but that on appeal from that decision, the Sudder Court decided against the security, and in substance granted the relief asked by the plaint, except in so far as it was abandoned,

The reasons for the decision of the appellate Court are contained in their judgment. The Court says, "The question with which the Court

(a) Moore's Ind. Ap. Cases, v. 6, 393.

have first to deal, respects the right of the Ranee to execute the instrument before them." They then remark, "that the bond itself assigns to the Ranee a proprietary character and that it was not amongst the defendant's pleas that the Ranee acted as her son's guardian, but that he has claimed for her the proprietary character, both in his answer to the plaint, and still more broadly and unreservedly in his answer to the pleadings in appeal. The plaintiff, on the other hand, has throughout argued for the avoidance of the bond by denying the Ranee's proprietary title in any way; and such being the issue joined between the parties, the Court looking to the fact that the estates in dispute unquestionably devolved on the plaintiff, to the exclusion of the Ranee, on the death of the plaintiff's father Raja Sheobuksh Sing, have no hesitation in declaring that even on the assumption that the Ranee voluntarily executed the bond, and received full consideration for it, the bond is not binding on the plaintiff, and that neither he nor his ancestral property can be made liable in satisfaction of it. It is needless for the Court, their inquiries being thus stopped *in limine*, to enter on the real merits of the transaction as between the Ranee and Hunoomanpersaud Panday."

Their Lordships collect from this judgment that the Court thought that a bar was interposed by the pleadings, and by the Ranee's act of assumption of proprietorship, to the further consideration whether the appellant's charge could in any character be sustained against the estate.

The Court did not enter upon the question of the validity of the charge in whole or in part, as a charge effected by a *de facto* manager, or proprietor, whether by right or by wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of so much weight.

This judgment may be considered under the following points of view;

First. Did the appellate jurisdiction rightly construe the pleadings, and take a right view of the issues framed under the direction of the Judge, according to the practice of those Courts?

Secondly. Did it take a right view of the relation in which the Ranee intended to stand to her son's estate? And

Thirdly. Did it consider the point, whether the rights of these parties could wholly depend upon the question whether that relation was duly or unduly constituted?

On the first point, their Lordships think it right to observe, that it is of the utmost importance to the right administration of justice in these

reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her; that she must be viewed as manager, inaccurately and erroneously described as "proprietor" or "heir;" and it is to be observed, that the Collector takes this view, for, whilst he remarks on the improper description of her, as heir or proprietor, he continues her name as "Surberakar." If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient in their Lordships' judgment, to show the real character of her proprietorship.

Upon the third point it is to be observed that under the Hindoo Law, the right of a *bonâ fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not, (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title. Therefore, had the Ranee intruded into the estate wrongfully, and even practised a deception upon the Court of Wards, or the Collector exercising the powers of a Court of Wards, by putting forth a case of joint proprietorship in order to defeat the claim of a Court of Wards to the wardship, it would not follow that those acts, however wrong, would defeat the claim of the incumbrancer. The objection then to the Ranee's assumption of proprietorship, in order to get the management into her hands, does not really go to the root of the matter, nor necessarily invalidate the charge; consequently, even had the view which the Sudder Dewanny Adawlut took of the character of the Ranee's act, as not having been done by her as guardian, been correct, their decision against the charge without further inquiry would not have been well founded. It would not have been accordant with the principles of the Hindoo law, as declared in Coleb. Dig. Vol I, p, 302, and in the case of Gopeechurn Burral *v.* Mussummaut Ishwuree Lukhee Dibia (3 Sud. Dew. Adaw. Rep. 93), and as illustrated by the case cited for the appellant in the argument, against the authority of which no opposing decision was cited. Their Lordships, however, must not be understood to say that they see any ground of probability for the assertion that the Ranee really meant to deceive the Court of Wards, or the Collector exercising its authority, by any consciously false description of herself. The title to this Raj cannot readily be supposed to have been unknown in the Collector's Office, nor is it probable that the Ranee could have deceived the Office by such a false description of herself.

It is a circumstance worthy of remark, too, that the complainant does not ascribe this conduct to her in his plaint. The case that the plaint makes is not that she intruded upon him and assumed proprietorship: the plaint itself say she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them, notwithstanding the use of terms inconsistent with it. For these reasons, their Lordships think that the judgment of the Sudder Dewanny Court cannot be supported on the grounds which that Court has assigned.

It then remains to be considered whether the judgment is substantially right, though the reasons assigned for it are not satisfactory or sufficient.

If the evidence discloses, as it is contended for the Respondent that it does disclose, no *primâ facie* case of charge at all on this ancestral estate, then, as the only bar to the resumption by the heir of his estate is the alleged mortgage title over it, the proof of which lies on the mortgagee, the complainant's title to the estate, to the mense profits, and to the other relief, is made out; but if, on the other hand, the evidence discloses even a *primâ facie* case of charge, some inquiry at least ought, as it seems to their Lordships, to have been directed.

The question then next to be considered is, whether a *primâ facie* case of a subsisting charge is made out by the Appellant. This question involves the consideration of two points: first, the actual *factum* of the deed; and, next, the consideration for it.

First, as to the *factum*. The execution of the bond by the Ranee is stated by several of the attesting witnesses. It was argued, however, on behalf of the Respondent, that the Court ought not to act on their evidence. Some discrepancies,—such, however, as are not unfrequently found in honest cases in native testimony,—were dwelt upon. The Sudder Ameen, who decided this case originally, has made some pertinent remarks on the confirmation which circumstances give to the oral evidence that the bond is the deed of Ranee. The decision by a native judge, possessing the intelligence which this judgment of the Sudder Ameen evinces, on a question of fact in issue before him, is, in the opinion of their Lordships, entitled to respect; he must necessarily possess superior knowledge of the habits and course of dealing of natives, and that knowledge

would be likely to lead him to a right conclusion upon a question of disputed fact. The Sudder Ameen observes, in substance, that possession went along with this bond, and that the mortgagee was inscribed in that character as proprietor on the records of the Collector. He was therefore put in possession as mortgagee, and was publicly known as mortgagee in the Collector's office.

It is to be observed further, that his receipt of the rents and profits of the lands included in this conveyance would diminish, *pro tanto* the annual income of the estate which would come to be administered by the Ranee, and that this state of things continued for several years after the execution of the bond. The Ranee's ignorance then, of such title, possession, receipt, and diminution, is, as the Sudder Ameen justly observes, not a probable supposition. It could be rationally accounted for only on one supposition—that the Ranee was a mere cypher, and entirely ignorant of that which was done in her name. This, however, does not appear to have been the case: she herself denied it on a subsequent contest as to the managership: and the act of the Collector, in his decision upon that dispute, in putting her into the management, confirms her own statement of her capacity. Had her incompetency been of so flagrant a character as the above hypothesis demands to be attributed to her, it is not reasonable to suppose that it would have been unknown in the Collector's Office, nor is it reasonable to suppose that the management would have been confided to her, had such been her charactar. It was argued, indeed, that she may have become by that time capable; but it is to be observed that a long course of neglect, and mismanagement, which is attributed to her, would not be a school of improvement.

It was argued that the complainant was not to be bound by the Ranee's allegations of her own competency; that she had tasted the sweets of management, and would desire their continuance. Certainly the complainant is not to be bound by her assertion; but it is not the assertion that is relied on as confirmation. What is relied on is the result of the contest, and the acknowledgment of her as one competent to the management of the estate, by an officer in its right administration.

Their Lordships cannot but concur with the Sudder Ameen in thinking that these circumstances do materially confirm the story of the attesting witnesses as to the Ranee's execution of the deed. The story of her non-execution of it is based, in a considerable degree, on a supposition of her incapacity. That the deed is hers, is, in the

opinion of their Lordships, further confirmed by the great improbability of the history which some of the witnesses of the Respondent give as to the *factum* of the instrument. The story told by the witnesses, Heeraloll, and Gyapershaud Patuck, is so destitute of probability, so little in harmony with the ordinary conduct of men in like circumstances, that their Lordships can place no reliance upon it. According to the case of the Respondent, this bond was fraudulently executed in the name of the Ranee, without her sanction or knowledge, in order to fix a false charge of Rs. 15,000 in the defendant's favor, on the property of the infant Raja. The defendant and several associates were, according to this story, conspiring together for this object. According to the witnesses, who give nearly verbatim the same account of the transaction, these conspirators had witnesses ready, though not present, who were to attest consciously the false deed as true; yet, such is at once the impatience and the folly of these conspiring parties, that every one of the witnesses, each of whom is described as dropping in by chance, as it were, is solicited without any assigned adequate motive, and with no previous sounding, to become a party to this fraud by consciously attesting the false deed as true. Each witness declines, and each is entreated to secrecy; and each preserves the secret inviolate, contrary to duty, and without any assigned motive for secrecy. The communication and the concealment are both without motive according to the account which is given us. And the story of this utterly needless communication of his crime, is told of a man used to business, intelligent, and described by the Respondents as the habitual accomplice of crafty and designing men, the karindas, in acts of fraud.

Taking the whole circumstances as to the *factum* of this instrument into consideration, their Lordships concur in the finding by the Sudder Ameen as to it.

Next, as to the consideration for the bond. The argument for the appellant in the reply, if correct, would indeed reduce the matter for consideration to a very short point; for according to that argument, if the *factum* of a deed of charge by a manager for an infant be established, and the fact of the advance be proved, the presumption of law is *primâ facie* to support the charge, and the onus of disproving it rests on the heir. For this position a decision, or rather a *dictum*, of the Sudder Dewanny Adawlut at Agra, in the case of Omeed Rai *v.* Heera Lall (6 Sudder Dewanny N. W. P. 218,) was quoted and relied upon. But the *dictum* there, though general, must be read in connection with the facts of that

case. It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father, were with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate. Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and dependant on them. Thus, where the mortgagee himself with whom the transaction took place, is setting up a charge in his favor made by one whose title to alienate, he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir, namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan.

It is to be observed that the representations by the manager accompanying the loan as part of the *res gestæ*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of Calcutta between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required. A case in the time of Sir Edward Hyde East, reported in his decisions in the 2nd. Vol: of Morley's "Digest,"

seems the foundation of this practice. (See also the case of Brown *v.* Ram Kanaee Dutt, 11 Sud: Dew: Adaw. Rep. 791).

It is obvious, however, that it might be unreasonable to require such proof from one not an original party, after a lapse of time, and enjoyment and apparent acquiescence; consequently, if, as is the case here as to part of the charge, it be created by substitution of a new security for an older one, where the consideration for the older one was an old precedent debt of an ancestor not previously questioned, a presumption of the kind contended for by the appellant would be reasonable. The case before their Lordships is one of a mixed character; the existing security represents loans and transactions at various times and under varying circumstances; it is a consolidating security; and as to part at least, namely, the ancestral debt, there is in the opinion of their Lordships, ground to raise a *primâ facie* presumption in the appellant's favor of a consideration that binds the estate. It is unnecessary to the decision to pursue the inquiry as to the other items of charge, but that part of it which relates to the advance for payment of the revenue seems to be at least *primâ facie* proved as against the estate. And as to the whole charge, there is also at least *primâ facie* evidence in the admissions of the plaintiff, proved by several witnesses; uncontradicted on the point. As to the debt of the ancestors, it was said that it was already secured, and that the estate being ancestral, could not according to the law current in the North Western Provinces, be charged, in the hands of the heir, for an ancestor's debt. But it is to be observed as to the change of security, that there was a reduction of interest; it is, therefore, a transaction *primâ facie* for the benefit of the estate; and though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the Decisions of the Sudder Dewanny Adawlut, North Western Provinces, incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindoo Law, the freedom of the son from the obligation to discharge the father's debt, has respect to the nature of the debt, and not to the nature of the estate whether ancestral or acquired by the creator of the debt. Their Lordships, therefore, are clearly of opinion that a *primâ facie* case of charge for something was made out; and it is not necessary to determine, nor, indeed, have their Lordships the necessary facts before them to enable them to

determine, for how much, if for any thing, this deed must ultimately stand as a security.

One point remains to be considered, namely, whether in taking the account between these parties the defendant is to be charged, as mortgagee in possession, with the actual rents and profits, or only with the rent fixed by the pottah. It is said for the appellant that the Sudder Dewanny Adawlut did not set aside the pottah. In terms they certainly did not. But their Lordships think that it was part of one mortgage-security, consisting of several instruments of equal date with the mortgage bond; and that it was intended to create, not a distinct estate, but only a security for the mortgage money. Mr. Palmer contended that a stipulation such as this pottah evidences, may stand in India between mortgagor and mortgagee, and that the Regulations as to interest do not touch such a case. The Regulations provide for the case of an evasion of the law as to interest by invalidating the mortgage security, and forfeiting the claim of the mortgagee to his principal and interest; but Mr. Palmer contends that where there is no such evasion and a *bonâ fide* and fair rent is fixed upon as representing, *communibus annis*, the rents and profits of the estate, the Court ought to stand on that, the agreement of the parties, and not to direct the taking of the accounts between mortgagor and mortgagee on any other basis. It is certainly possible that, by reason, of the provision that the rent shall be a fixed one, notwithstanding losses and casualties, the mortgagee might be a loser, in his character of lessee, on an account calculated on this basis; but, notwithstanding that contingency, their Lordships think that, as it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and that the decree of the Sudder Dewanny Adawlut, directing an account of the actual rents and profits, therefore, proceeds on the right principle, and is in accordance with the true nature of the security and the spirit of the Regulations.

In the case of Roy Juswunt Lall, *v.* Sreekishen Lall, reported in the decisions of the Sud. Dew. Adaw, in 1852, vol 14 p. 577, the Court seems to have thought that where a mortgage lease was granted, and whilst the term was running, the mortgage account could not be taken; but it appears from that case that in former decisions of that Court not reported, where the lease had expired, the Court directed the account to be taken on the ordinary footing of the receipt of rents and profits of the mortgaged estate. Their Lordships think that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate

created as part of a mortgage security, whatever be its form or duration, can be viewed only as a security for a mortgage debt, and must be restored, when the debt, interest, and costs are satisfied by receipts.

Upon the whole, their Lordships are of opinion that the cause must be sent back for further inquiry. They think it desirable, however, in order to prevent a future miscarriage, to state the general principles which should be applied to the final decision of the case.

The power of the manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived.

Prannath Roy Chowdry v. Rookea Begum and others (a).

The following is an extract from the judgment of the Privy Council in this case, delivered on the 27th of July, 1859, by

The Right Honorable LORD KINGSDOWN :—

The questions to be considered are, whether the appellant, the mortgagee, was barred by limitation of time from proceeding to forclose the parties entitled to redeem him; and if he were not so barred, whether he proceeded so as to foreclose such parties; and lastly, the effect of such foreclosure on the suit which he instituted for possession. By Regulation III 1793, a suit is barred where "the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money; or that he directly preferred his claim within that period for the matter in dispute, to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that either from minority or other good and sufficient cause, he had been precluded from obtaining redress."

In considering the effect of a legislative bar on the suit of a plaintiff created as it is here by general words, it is often important to regard the nature and object of the suit; the nature of the title to which the bar is set up; who the parties are who raise the objection, and against whom it is raised. The bar from a twelve years' possession under that Regulation does not depend simply on the length of possession: it may exist in favor of one occupant and not of another; it may be powerful against one demand, or one sort of claim, and be at the same time inoperative as against others. The time may run from a date prior or subsequent the plaintiff's title to possession. A "cause of action" is not prolonged by mere transfer of the title. It cannot be laid down, therefore, as a rule universally true, that under the Regulation III of 1793, section 14, a mortgagee's proceeding for a foreclosure under a mortgage of the class of Bye-bil-wuffa simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the

(a) Moore's Ind. Ap. Cases, v. 7. pp, 352—360

expiration of which the conditional sale will become absolute; for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the demandant or of others before him. The contention on the part of the Respondent, indeed, was not pushed to that extent, and it was conceded that a possession continuing under, and in privity with, and with ackowledgment of the claimant's title, would not operate as a bar; as, for instance, in the case of a trust and the ordinary possession of a cestui que trust, or trustee under it. These instruments of conditional sale, have now an operation different from that which they originally had. They are mortgages now, redeemable like ordinary mortgages, and subject to foreclosure. There is some danger of falling into error in decisions as to the limitation of suits founded on them, if their old, rather than their present character be regarded. As long as the transaction was one of sale, conditional at first and absolute at a certain period afterwards by lapse of time, unless on the prior performance of a certain condition, the title to the land was, on that condition terminating in favor of the conditional purchaser, the same as that of any ordinary owner, and a possession *primâ facia* irreconcileable with it, might well be deemed adverse from the date of the completion of the perfect title in the buyer.

But if the transaction be viewed, as it should now be regarded under the Regulations, as one of mortgage, redeemable at any time by the mortgagor, or those claiming under him in privity with his title as mortgagor, then, as no difference between the law prevalent in India, and the law prevalent here as to the relation between mortgagor and mortgagee on this point has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem, and advance no other title inconsisted with it, must, *primâ facie* at least, be treated as perfectly reconcileable with and not adverse to the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes, be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality.

In addition to this it is to be observed that, as under the Regulations an adverse title must also be a *bonâ fide* title under the shorter period of limitation; and as neither mortgagor nor mortgagee can, in ordinary

cases, be unconscious of the conditional nature of their own titles, there is no ground for presuming, generally, between the immediate parties, an adverse title from mere length of possession. Where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows as a consequence, that the mortgagee foreclosing will be able, in a suit for possession, to make good against all occupants a title to possession. Foreclosure is a step towards that object under the law relating to these securities, where the object is to obtain a proprietary right; but in the mortgagee's suit for possession consequent on the foreclosure notice, the plaintiff may, according to the character of the defendant, be met and defeated by proof of a prior, or of a superior title; or by proof of want of title in himself, or that he has not perfected his title to possession. But such defences are not open alike to all defendants, and between mortgagee and mortgagor some of them would be inadmissible.

Their Lordships can find in this case no evidence, and nothing to support an inference, that the once undoubted right of the mortgagee to enforce possession was at an end, or barred, or incomplete. His intervention in the litigation before alluded to, his proofs and proceedings in that litigation, the decrees in relation to his title, the objection made to it by Ram Rutton Rae, on the untenable ground that his mortgage title was merged, as it were, in a conditional purchase which never took effect, afford the strongest proof that no payment or other act had extinguished his lien on the lands hypothecated to him. The defendant Ram Rutton Rae, if he became a purchaser, as he has alleged, took with notice of the mortgagee's title, which in terms forbade any subsequent sale.

A mitigation of this restrictive condition appears to have been established by a series of decisions in the Company's Courts, which limit it to sales or mortgages, not made subject to the prior mortgage; so that, in the view, most favorable to the defendant, the case stands thus; if his could be considered a *bonâ fide* possession at all, it must be taken to have been a possession originally not adverse to, but consistent with, the mortgage title. If such were its character, there is nothing whatever to show that it became adverse at any time before twelve years preceding the institution of the appellant's foreclosure suit. The litigation before referred to was consistent with the recognition by both parties of the title of the mortgagee, who intervened in that suit. It is stated by one of the judges, that both parties admitted the mortgage title. Whether this was so

or not their Lordships have not in this suit the means before them of judging; but they find, certainly, no proof of a repudiation by Ram Rutton Rae of the mortgage title at any period twelve years before the institution of the foreclosure proceeding and the notification under it. Had such a repudiation appeared, such repudiation, whilst it would have established from its date the commencement of adverse possession, would, at the same time, under the circumstances of this particular case, have established in the opinion of their Lordships, from the same date, an absence of *bonâ fide* in Ram Rutton Rae as to the mortgagee's title; consequenlty their Lordships, in any way of viewing the question, are unable to concur in opinion with the majority of the Judges in the Sudder Court that the claim was barred by limitation as to time.

The intervention of the appellant in the suit, his proceedings in it, the recognition of his title in the decrees, all serve to show that the appellant was not sleeping upon his claims, and that he was deterred from the enforcing them in a distinct suit of his own only by the circumstances of that litigation. He was certainly not precluded by any physical or legal impediment from the institution of a suit; but, as one of the litigant parties admitted his title: as the right of the Respondent was still *sub judice:* as the title to redeem could be but in one of these parties: as he had been allowed to intervene and was a continuing party in that suit; their Lordships think, that it would be an inconsistent course in the Courts to hold that he had been guilty of laches, and that the pendency of such a litigation, with the proceedings in it, furnished no "good and sufficient cause" for his not proceeding with his own claim in a distinct suit, a step which would have increased the cost of litigation to the parties who were only contesting *inter se* for title, which gave the right to redeem. The case in this point of view falls in with the principle of that lately decided in the Privy Council, Raja Enayet Hossein, *v.* Sayud Ahmed Reza.

The question remaining to be considered is, whether the foreclosure proceedings were regular. The mortgagee, under this form of mortgage, unless he be put into possession of his pledge by the act of the mortgagor, must, accordiug to the law prevalent in the Courts of the East India Company, under the Regulations, seek the assistance of a Court to give him possession of his pledge. When his object is also to foreclose the mortgage, he must effect that object in the mode prescribed by Regulation III of 1793, Sec 14; Regulation II of 1805, Sec 3; and Regulation XVII of 1806, Secs: 7 and 8.

If this mode be not allowed, the foreclosure will not be regular, and the mortgagee's title to possession will not be complete.

The objections which were raised at the Bar to this proceeding were, that the heir of the mortgagor was not duly served, and that the mortgagee had refused a valid tender of the money to him under his mortgage.

With respect to the first objection, it appears to their Lordships, upon the evidence, to be sufficiently established for the purposes of this cause, that Rookea Begum, upon whom the notice was served, was the heir of Noor Jehan.

The remaining objection relates to the payment into Court, in the nature of a tender, which was made by the defendant Ram Rutton Rae. Ram Rutton Rae directed the money to be paid out to the appellant; but, at the same time, in his petition to the Court, he disputed the validity of the appellant's title to foreclose, and expressed an intention, amounting to a notice, to sue the appellant to recover back the very money which he was tendering.

The meaning of the direction that the money may be paid into Court, clearly is, that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgment of the title.

The mortgagee would have little inducement to take the money, waiving his lien by its acceptance, if litigation on the very same subject were to recommence upon his acceptance of the money; and though mere words in the form of a protest, which may accompany a tender, will not defeat it, where they can reasonably be regarded as idle words, their Lordships think, that the proceedings of Ram Rutton Rae with respect to the mortgagee's title to foreclose, forbid such an interpretation of his language and his act. But independently of this objection to the payment, another and a graver reason exists for holding it to be not such a payment, as the Regulations contemplate.

The title of Ram Rutton Rae to redeem was neither proved nor admitted. A grave suspicion rested on his alleged purchase, which the litigation, so far from dispelling, had increased. Had the mortgagee accepted his money, he would have admitted a title to redeem in which he was not bound to acquiesce; and as that title has not been proved in this case, the refusal must be viewed now in the same light as if the money had been tendered by one who had no title to redeem the mortgage, and who did not

offer it with due consent, in the name of the heir of the mortgagor. Their Lordships think that the service of the notice on Ram Rutton Rae raised no case of estoppel. The mortgagee cannot tell the exact nature of an occupant's title in all cases, nor how far he may be entitled, with the mortgagor's consent, to tender in his name. It is best to have a general rule, and service on the occupant is calculated to prevent errors. Consequently, their Lordships think that the objections to the foreclosure fail.

Had the course of proceeding in the Courts below admitted of a judgment for the mortgage money, with interest and costs, on a suit for possession of the property pledged to secure it, their Lordships would have so limited their decision on this appeal. As the decision in this proceeding is not final, it will not affect any right to redeem to which the heirs of Noor Jehan may be entitled, upon which their Lordships forbear from offering any opinion.

Their Lordships will recommend to Her Majesty to reverse the decision which has been given, and to direct judgment to be given for the plaintiff with his costs below, and the costs of this appeal.

I. PURE USUFRUCTUARY MORTGAGE. *(a)*

I WRITE this instrument of mortgage of talook Barnagore, in pergunnah Beerbhoom, in the District of Nuddea, the net annual profit of which, after deducting the sum of Co.'s Rs. 400 for the Government revenue, is Co.'s Rs. 500. In consideration of my mortgaging to you the aforesaid talook, I borrow from you the sum of Co.'s Rupees 1,200, re-payable with interest at the rate of 12 per cent. per annum.. I will immediately put you in possession of the said talook, and you will collect the rents, &c., thereof: after paying the Government revenue from the said collections, you will apply the remainder to the payment of interest that will accrue due to you on the said sum, and in case there shall be any surplus after such payment of interest as aforesaid, such surplus shall be taken by you in part payment of the principal. You will so remain in possession of the aforesaid talook till the whole amount of my loan, together with interest at the rate aforesaid, is liquidated. Dated, &c.

(a) The first three precedents are nearly literal translations of mortgage bonds on which advances were actually made, and which were afterwards put in suit.

II. SIMPLE MORTGAGE.

I WRITE this instrument of mortgage of land, situated in Aheeritola Street, in Shootanooty, which I purchased in the year 1820, (that is to say) 17 beegahs, 5 chittaks of land, bounded on the North by the house of Sibchunder Ghose, on the South by a garden belonging to Ramloll Sen, on the East by the house of Rammohun Doss, and on the West by the house of Sreekishen Bhose. In consideration of my mortgaging to the aforesaid land, I borrow from you the sum of Co.'s Rs. 1,600, which is to be repaid on the 16th March 1855 with interest, at the rate of 12 per cent. per annum. Every partial payment, which I shall make on account of the said loan, I shall specify on the back of this instrument of mortgage, and no payments that I may make other than those specified on the back of this document, shall be allowed to me *(a)*. In default of my paying the abovementioned sum with interest, within the limited time, you will cause the aforesaid land to be sold and pay yourself by the proceeds thereof. I deposit with you the title deeds of the aforesaid land, which shall be returned to me, on the re-payment of the aforesaid loan with interest. Dated, &c.

III. MORTGAGE BY CONDITIONAL SALE, KUT-KUBALA, OR BYE-BIL-WUFA

I WRITE this instrument of mortgage of 6 beegahs, 2 chittaks of ancestorial rent-free land, in mouzh Borocota, in the District of Hooghly, which has for a long time been my property. The said land is bounded on the North by the house of Sibchunder Ghose; on the South by the house of Shamachunder Mullick; on the West by a pond belonging to Madhubchunder Paul; on the East by a piece of land belonging to Mahadeb Sircar. In consideration of my mortgaging the aforesaid land to you, I borrow from you the sum of Co.'s Rs. 175, which is to be re-paid at the end of one year from this date, with interest, at the rate of 12 per cent per annum. In default of my paying the above-mentioned sum with interest, within the limited time, I agree to relinquish my interest in the aforesaid land and to put you in possession thereof as rightful owner and proprietor. I deposit with you the title deeds of the aforesaid land which shall be returned to me on the re-payment of the above-mentioned loan with interest. Dated, &c.

(a) This condition will not be strictly acted on by the Courts. *See supra. p.* 40 S. D. A. 1853, p. 544. But its insertion can do no harm.

IV. ENGLISH MORTGAGE IN FEE, WITH POWER OF SALE.

THIS indenture, made the day of between A. B., of &c. (mortgagor) of the one part, and C. D., of &c., (mortgagee) of the other part, Witnesseth, (that, in consideration of the sum of £ this day paid to the said A. B., by the said C. D., (the receipt whereof the said A. B., doth hereby acknowledge), he, the said A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, and administrators, that the said A. B., his heirs, executors, or administrators, will pay to the said C. D., his executors, administrators, or assigns, the sum of £ (the principal), with interest for the same in the mean time at the rate of £ per cent per annum on the day, next (*a*), without any deduction. And This Indenture (*b*) also Witnesseth that, for the consideration aforesaid, the said A. B, doth hereby grant and release unto the said C. D., his heirs, and assigns, all those lands, tenements, messuages and hereditaments, situate in the Parish of , in the county of , delineated in the plan in the margin of these presents, and specified in the Schedule hereunder written, together with all commons, ways lights, waters, water-courses, rights, privileges, easements, advantages and appurtenances whatsoever to the said hereditaments, or any part thereof appertaining, or with the same or any part thereof held, used, or enjoyed, or reputed as part thereof, or appurtenant thereto; and all the estate and interest of the said A. B. in the said premises: To hold the said premises unto and to the use of the said C. D., his heirs and assigns. Provided always, that, if the said A. B. his heirs, executors, administrators, or assigns, shall pay unto the said C. D., his executors, administrators, or assigns, the said sum of £ (the principal), together with interest for the same in the meantime at the rate of £ per cent per annum, on the said day of next without any deduction, then the said C. D., his heirs, or assigns, will, at any time thereafter, upon the request and at the cost of the said A. B., his heirs, executors, administrators, or assigns, re-convey the said premises unto the said A. B., his heirs and assigns, or as he or they shall direct, free from incumbrances by the

(*a*) Generally six Calendar months from the date of the mortgage.

(*b*) When the property mortgaged is situated in India, the words "which is executed in pursuance of, and intended to take effect under Act IX of 1842 of the Legislative Council of India," must be here inserted.

said C. D., his heirs, executors, or assigns. And it is hereby declared, that the said C. D., his executors, administrators, or assigns, may at any time or times after the said day of next (a) without any further consent on the part of the said A. B., his heirs, or assigns, sell the said premises, or any part thereof, either together or in parcels, and either by public auction or private contract, and may buy in or rescind any contract for sale, and re-sell, without being responsible for loss occasioned thereby; and may execute and do all such assurances and acts for effectuating any such sale as the said C. D., his executors, administrators, or assigns, shall think fit; And that upon a sale by any person or persons who may not be seized of the legal estate, the person in whom the legal estate shall be vested, shall execute and do such assurances and acts for carrying the sale into effect, as the person or persons by whom the sale shall be made, shall direct: Provided nevertheless, that the said C. D., his executors, administrators, or assigns, shall not execute the power of sale hereinbefore contained, until he or they shall have given to the said A. B., his heirs, executors, administrators, or assigns, or left on the said premises, a notice in writing to pay off the monies for the time being owing on the security of these presents, and default shall have been made in such payment for six calender months after giving or leaving such notice: Provided also, that, upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether the case mentioned in the Clause lastly hereinbefore contained has happened, nor whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale; and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly. And it is hereby declared, that the receipt of the said C D., his executors, administrators, or assigns, for the purchase monies of the premises sold, or any part thereof, shall effectually discharge the purchaser or purchasers therefrom and from being concerned to see to the application thereof, or being accountable for the non-application or mis-application thereof; And that the said C. D., his executors, administrators, and assigns, shall, out of the monies arising from any sale in pursuance of the aforesaid power, in the first place, pay the expenses incurred on such sale, or otherwise in relation to the premises; and, in the next place, apply such monies

(a) The day for payment of the principal sum.

in or towards satisfaction of the monies for the time being due on the security of these presents; and then pay the surplus (if any) of the monies arising from such sale to the said A. B., his heirs, or assigns; And that the aforesaid power of sale and other powers may be exercised by any person or persons for the time being entitled to receive and give a discharge for the monies then owing on the security of these presents; Provided always, that the said C. D., his executors, administrators, or assigns, shall not be answerable for any involuntary losses which may happen in the exercise of the aforesaid power and trusts, or any of them. And the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs, and assigns, that the said A. B., now hath power to grant and release all, and singular the said premises unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, and free from incumbrances; And that he the said A. B., and his heirs, and every other person lawfully or equitably claiming any estate or interest in the premises, will, at all times, at the request of the said C. D., his heirs, executors, administrators, or assigns, but at the cost of the said A. B., his heirs, executors, or administrators, execute and do all such assurances and acts, for further or better assuring all or any of the said premises to the use of the said C. D., his heirs and assigns in manner aforesaid, as by him or them shall be reasonably required. In witness whereof the said A. B., and C. D., have hereunto set their hands and seals the day and year first above written.

The Schedule to which the above written Indenture refers.

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