

# LAW SCHOOL NOTES

SUBJECT TITLE:

## **T.O.P.A.**

TRANSFER OF PROPERTY ACT



Prepared by Adv. Govinda S. Zalte | For educational use only  
Contact: +91 77987 90378 | Email: govindazalte2001@gmail.com

## Immovable Property

↓

**Sec. 3**

It does not include

- ↳ Standing timber
- ↳ Growing crops
- ↳ Grass

Negative definition

**General Clauses Act**

It includes

↓

A  
B  
T

LAND

benefits arising out of land

things attached to the earth

(Sec. 3)

(It means)

R  
I  
A

Rooted in the earth

Imbedded in the earth

attached to what is so embedded permanently enjoyment of that to which it is attached

→ Trees & shrubs (except standing timber, growing crops & grass)

→ walls or buildings

\* Right to receive future maintenance is Immovable Property.

\* Case Law. A.R. (1961) 2 C.L.J. 452

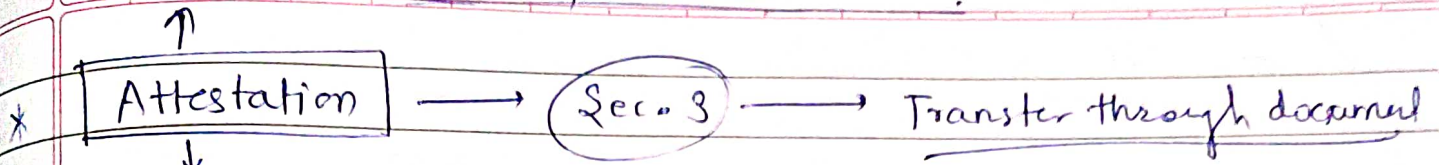
S. i) Moti Singh v. Deoki Singh (1936)  
 fruit bearing trees are immovable property.

ii) Marshall v. Green.

→ If the trees are planted for the purpose of timber to cut and taken away then it is Movable property.

→ If that tree should have further nutriment from the land, then it is Immovable property.

# Act of giving evidence / becoming witness !



Executant → transfers

2 person must attest apart from person entering into contract

Object

- ① Ensure authenticity / truthfulness
- ② It confirms executant & no one else executed document
- ③ It confirms free consent of executant

H - Heir apparent  
E  
I  
M

Cannot be transferred

- H - Heir apparent (Spec Succession)
- R - Right to Re-entry
- E - Exonant apart from dominant heritage
- I - Interest restricted to own
- M - future maintenance
- S - Right to sue
- P - Salary of public office / P.O
- S - Salary to ex. military, n, aids, one pr of govt
- Not - for unlawful object
- Not - opposed to nature of interest affected thereby
- Not - for legally disqualified person

Transfer (Sec. 5)  
or a living person  
himself  
himself and one or more other persons

\* Contingent Interest (S.21)

Where an T.O.P. interest is created in favor of person which is to take effect <sup>i)</sup> on happening or <sup>ii)</sup> non happening of some uncertain event, it is called as contingent interest.

- i) on happening it becomes vested interest
- ii) non happening, it gets fail.

\* Contingent become vested

- i) if interest is depend upon happening of some uncertain event and if that event happen contingent interest become vested interest.
- ii) if interest is depend upon happening of some uncertain event and if that event does not happen or happening become impossible, contingent interest fail.

Nature of Contingent Interest

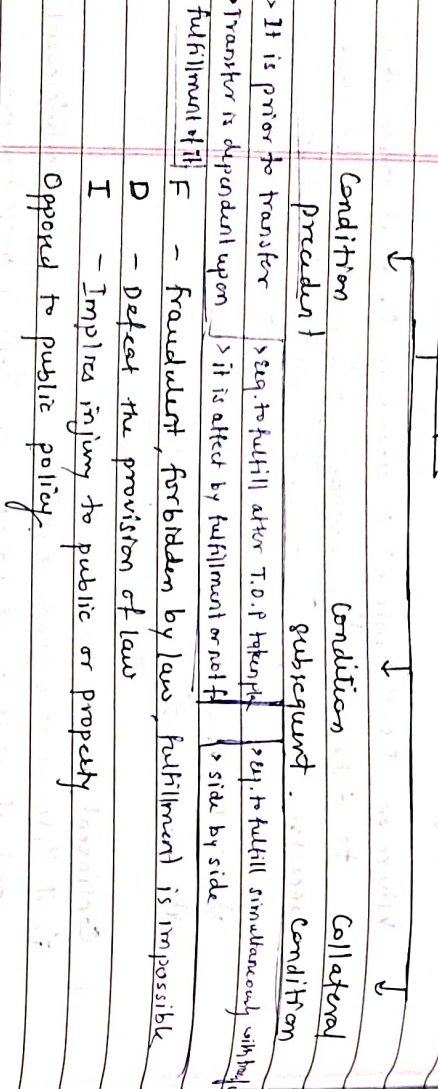
20/09

- i) It is possible and future interest
- ii) It is not heritable
- iii) It is not transferable subject to (except) contingent interest become vest interest.

	<u>Vested Interest</u>	<u>Contingent</u>
i) Sec	S.19	S.21
ii) Def <sup>n</sup>		
iii) Herit <sup>a</sup>	Heritable	Non-heritable
iv)	Transferable	Non-transferable
v)	It can't become contingent	It can become vested interest

§.25

\* Conditional transfer (subs to §.23 of ICA)

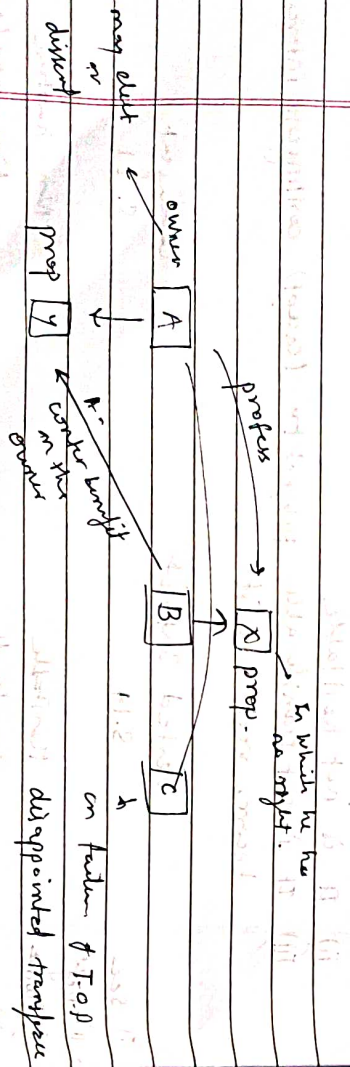


12M

\* Doctrine of election [§.35]

(attemping to transfer)

"Where person professes to transfer a property he has in which he has no right to transfer to another person is same transaction confer benefit on the owner of the property, such owner must elect either assent or dissent the transaction and in latter case he shall relinquish / waive the benefit conferred upon him."



\* Essential conditions

- i) Transferor professes to transfer of property in which he has right to transfer (transferor must be competent + MSD)
- ii) Transfer confer benefits on the owner of the property
- iii) T.O.P. and conferment of benefits on the owner of property by way of same transaction.
- iv) It is the duty of the owner of the property either to assent or dissent the transaction.

\* Election may be expressed or implied.

\* Modes of election

i) Expressed or ~~expressed~~ - by words or mouth (Contract).

ii) Implied

a) If owner of property (B) enjoy the benefit ~~for some~~ conferred upon him for two years or more.

b) If the owner of property exhausted the benefit conferred upon him then it is deemed as it cannot be referred to its original position.

c) If the owner of property does not assent or dissent the transaction within one year than transferee may require the owner to assent or dissent the transaction and after requision (request) he fails to elect within reasonable time then it is deemed election.

\* Rights of disappointed transferee.

- i) To make good.
- ii) If transfer is without consideration and transferor dies or becomes incapable to make further transfer

ii) If transfer is for consideration and whether the transferee is alive or dead at the time of election then transferee or his legal representative shall give reasonable compensation to disappointed transferee transferee transferee

21/09/22

If transferee is incapable

- > In case of disability, election postponed until disability is seized or election by competent authorities
- > Any direct benefit conferred upon owner need not relinquish

S.41

Transfer by ostensible owner

(apparent owner)

Where person with consent express or implied of a person who has interest in immovable property is an ostensible owner and if he transfers such immovable property then such transfer is not voidable on the grounds that transferee had no authority to transfer such property. Provided that the transferee must have acted in good faith.

\* Essentials.

- i) Transfer by ostensible owner
- ii) Consent may be expressed or implied.

iii) Immovable property.

iv) Transfer is not voidable

S.43

Doctrine of feeding the grant by estoppel

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

Spec Successionis

Where any person fraudulently or erroneously, without that he is authorised to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall can operate at the option of transferee to the extent any interest subsequently acquire by the transferee in that property - at any time during which the contract of transfer exists.

Essentials

- i) Transfer by unauthorised person
- ii) fraudulently or erroneously.
- iii) represent himself authorised to transfer (not entitled)
- iv) certain immovable property for consideration (specific)
- v) transferee subsequently acquires interest in property.
- vi) such transfer can operate at the option of transferee.

S. 44

Transfer by co-owner

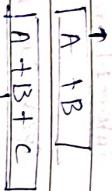
Co-owner :- no unity of title, but have unity of possession

In joint owner there is both unity of title and possession

Whether one of two or more co-owners

> Where one of 1) two or

ii) more



co-owner of any immovable prop<sup>y</sup>,

transfers his share on transfer transferee acquires all

enjoyment & rights of the transfer including common enjoyment,

provided that nothing in this section shall apply transfer of

share in dwelling house. [BHM]

\* Joint owner

In case of joint owner there is unity of title and possession, if

any joint owner dies his share devolves upon surviving joint

owner. [eg:- coparcenary]

\* Co-owner

In case of co-owner there is unity of possession and not title

If any co-owner dies his share devolves upon his legal heir

S. 52

\* Doctrine of lis pendence

(1)

During the pendency of any suit or proceeding in a court of

competent jurisdiction and such suit/proceeding and in which

right in respect of any immovable property is directly and

specifically in question such property cannot be transferred except

the order of court

(concerned court) (case law)

\* collusive suit

\* Pendente lite

> Pending litigation

\* Essentials

1) There must be pendency of suit.

2) Such suit is said to be pending from the date of presentation of

plaint to the proper authority.

3) such suit must be pending in a court of competent jurisdiction

if it is pending in a court without jurisdiction, such section

is not applicable.

4) It is applicable to immovable property not movable property

5) such suit shall not collusive

6) Right in respect of immovable property must be directly and

specifically in question

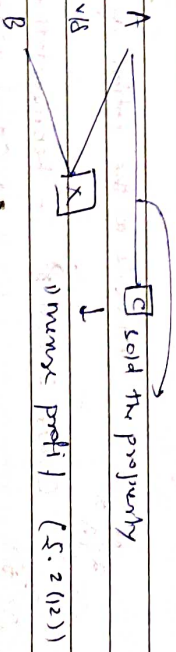
7) such property shall not be transferred without permission of court.

8) If property is transferred then decision of the court is binding on

the transferee

\* S. 52

(O. 39 of CPC)



O. 39 Rule 1, 2 :- Not to create interest in favour of any third party.

1) Kacchi Property (I. Chavan) (2010)

It is necessary that to grant temporary injunction there must be proved that protection granted u/s 52

Temporary Injunction for

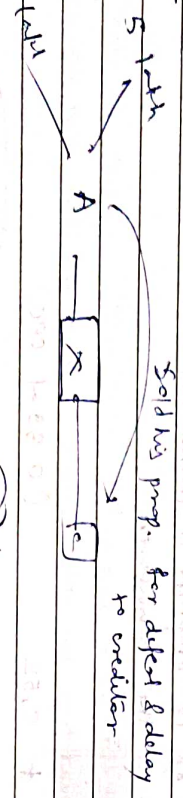
- i) Peaceful possession of property.
- ii) against dispossession.
- iii) not to create third party interest.

2) Prathad (S. Oak) (2011)

It is not necessary that in every case to direct plaintiff to prove that how protection granted u/s. 52 under TOPA is not adequate. court may grant T.I. in reple of s.52

\* Which judgment to follow when both are conflicting followed by same court?   
 1) Earlier court should follow earlier judgement if latter judgement do not discuss about earlier judgement

\* S. 53.



Voidable at the option of creditors

Order 1 Rule 8 :- Representative suit -> for same interest -> Cause action may be dismissed.

Contract to transfer / Agreement to sale   
 24.08.2011 of 1981

- > Every transfer of immovable property made with intent to defeat or delay the creditors of transferor voidable at the option of any creditor who is so defeated or delayed.
- > All creditors on behalf of all may institute representative suit
- > Nothing in this section shall affect the right of bona fide transferee

2 Transfer of I.P. made without consideration to defraud subsequent transferee shall be voidable at the option of such transferee

\* Sec. 53-A.   
 Part Performance.

Where any person contract to transfer immovable property in writing and signed by transferor for consideration and in furtherance of such contract transferee has obtained possession, or already in possession then continue in possession.   
 -> If transferee has performed or ready and willing to perform his part of contract, transferee debarred from claiming or enforcing any right in respect of property which transferee has taken or continued in possession except those provided under the contract and bona fide transferee.

Based on Equities

If looks into intention and not formalities



Nowadays contract of transfer must be in writing and registered

Indian Registration Act.

S. 17A

Registry is compulsory-

Essential Elements.

- i) Contract to ~~sale~~ transfer
- ii) written
- iii) consideration. (धरति)
- iv) Registered deed.
- v) possession transferred

Conditionation of delay not applicable to courts, only to applications & appeals.

\* Essential Elements. (by sir)

i) There must be contract : contract must be valid contract.

ii) Contract must be in writing and signed by transferor : Doctrine of part performance is not applicable in case of oral contract.

iii) It is applicable ~~only~~ in case of only immovable property not movable property.

iv) Transferee must be in possession, if he already in possession then continue in possession.

v) Transferee must have performed his part of contract or transferee is ready and willing to perform his part of contract.

VI

Transferee debarred from claiming or enforcing any right in respect of property which transferee has taken or continue in possession.

VII

Doctrine of part performance protects the possession of transferee.

VIII

for claiming protection u/s 53-A, that contract must be registered under the provision of Indian Registration Act as per sec. 17(1)(A).

\* Present position of S. 53-A.

After enactment of Registration Amendment Act, 2001 w.e.f. 24/9/2001, the present position of S. 53-A is zero.

Now, S. 53-A of TOFA is amended and the words "the contract, though required to be registered has not been registered" has been omitted from S. 53-A.

Thus, now registration of deed of transfer of immovable property is compulsory. If there is any other defect except registration, with the help of doctrine of part performance can be taken, but registration of sale deed must be as per S. 17(1)(A) of Indian Registration Act.

It could said that now the protection of S. 53-A has lost its importance.

# SALE (S. 54-57)

\* Dept. of Registration & Stamps  
 1) Rural → (Open land, agricultural land, NA land)  
 2) Urban  
 3) Influence → (eg: Name loan Mumbai)

**Sale: Definition**  
 ① Contract for sale  
 ② Rights & liabilities of seller & buyer

**S. 4**  
 Sale of Goods Act  
 Sale: Contract of sale of goods  
 Agreement to sell  
 ↓  
 Transfer of ownership  
 ↓  
 The 200 of future time one party  
 ↓  
 subject to fulfillment of conditions

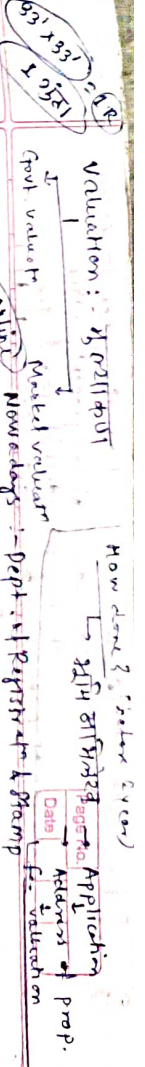
**8** → Define sale. Discuss right and liabilities of seller and buyer

→ **S. 54** :- Sale

Sale is a transfer of ownership in consideration of price paid or promise or partly paid or partly promised  
 X price defined under S.O.G.A. Sec. 2(10)

**A** \* Essentials of valid sale:

- i) Parties : There must be two party.
  - a) seller
  - b) Buyer
- ii) Subject matter : Property must immovable property. sale of movable property one given in Sale of Goods Act
- iii) In sale ownership of property is transferred from transferor to transferee from seller to buyer.



iv) Consideration : It must be money consideration. Price may be paid or promised or partly paid or partly promised

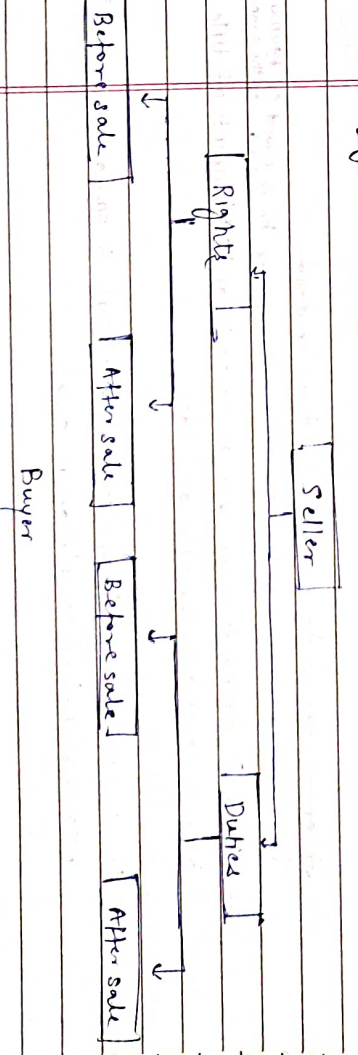
Need not be adequate [but not too less or illusory]  
 In form of money or debt / down etc. [Hiba-bil-Ewaz]  
 sale How made.

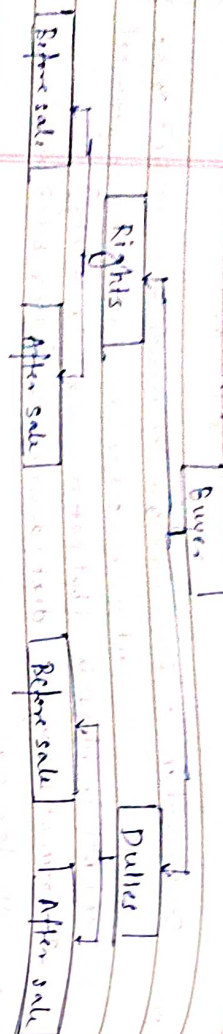
**B** \* **1**) Registration is compulsory : If value of immovable property is more than hundred rupees or hundred sale shall be effected by registered instrument, or in case of reversion or other intangible thing, sale must be by a registered instrument.

**2**) Release of tangible.

Registration is optional : In case of tangible immovable prop of a value less than one hundred rupees. Such transfer may be made either by registered instrument or by delivery of the property.

**C** Rights and Liabilities of buyer and seller





I \* Seller's duties before sale

- i) The seller is bound to disclose to the buyer any material defect in title of which seller is not aware and which buyer could not with ordinary care discover.
- ii) Seller is bound to the buyer on his request for examination of all documents of title, relating to the property.
- iii) Seller is bound to answer any relevant question put to him by the buyer in respect to the property.
- iv) ~~Seller is bound to create the transfer deed.~~  
The seller's next duty is to create the conveyance he is bound on payment of the price of the amount.
- v) Seller is bound to take care of property and documents of title in between contract for sale and sale.
- vi) It is seller's duty before completion of sale to pay all the outgoings before completion of sale.

II SELLER'S DUTIES AFTER SALE

- i) After completion of sale it is seller's duty to give possession to the buyer or any other person directed by the buyer.

ii) It is seller's duty to deliver title deeds.

\* Seller's Right Before Sale

Sec. 55(4)(a) provides that the seller is entitled to rents and profits of the property till the ownership thereof passes to the buyer. Thus before completion of sale, the seller is entitled to all rents or profits of the property.

\* Seller's Right after Sale

If after completion of sale the price or any part of it remains unpaid the seller acquires a lien or charge on property. Accordingly to sec. 55(4)(b) if price remains unpaid the seller cannot refuse delivery of possession.

\* Buyer's Duties & Rights

I Buyer's duties before sale  
 Before completion of sale it is duty of buyer to disclose facts which materially increase the value of property. Sec. 55(5)(a) of the Act provides that the buyer is bound to disclose to the seller any fact as to the nature or the extent of seller's interest in the property of which the buyer is aware, but of which he has reason to believe the seller is not aware and which materially increase the value of such interest.

ii) The buyer is bound to pay or tender the purchase to the seller  
 unconditional offer

II Buyer duties after sale

1) Where the ownership of property has passed to the buyer, the buyer is bound to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller.

ii) Acc. to Sec. 55(5)(d) after the completion of sale, the buyer is liable to pay outgoings. For example, revenue taxes, govt. dues.

III Buyer's Rights before Sale

i) As per Sec. 55(1)(a) of the act provided that buyer is entitled;

- a) a charge on the property for the purchase money properly paid by him in anticipation of the delivery
- b) interest on such purchase money
- c) buyer may compel for specific performance of contract

IV Buyer's Rights after Sale

• After sale the buyer is entitled to the benefit of the any improvement.

\* Marshalling by subsequent purchaser (Sec. 56)

→ Right of buyer to ask mortgagee to not sell his property

→ Mortgage :- make some arrangement

\* Contract for sale :-

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

Mortgage

→ In every sale, there is preceding contract of sale.

upon execution of this contract property is transferred.

This implied contract may be called contract for sale

or

Agreement to sell

→ Sometimes it is entered into, to have an evidence and to have permanent proof for parties intending to enter into its sale.

→ It creates neither legal estate nor equitable estate in favour of the transferee.

→ It does not itself create any interest or charge on the property.

→ It does not transfer ownership upon fulfilling terms of contract i.e. consideration, (unless sale deed is duly executed in his favour).

> Such contract merely create a right to obtain another document namely a duly executed sale deed.

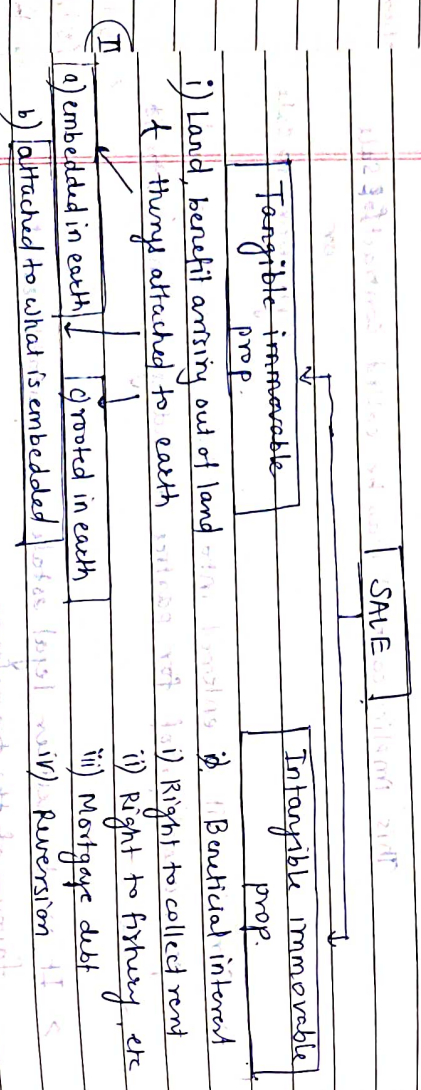
> Such contract does create any interest in the land.

\* If a person takes possession on basis of such contract & agreement it cannot be defended U/S. 53-A. As it applies to only those documents which are duly completed except registration.

\* SUNIL KUMAR JAIN V KISHAN & AIR (1955)

\* U/S. 53-A possession cannot be defended on the ground of existence of contract of sale.

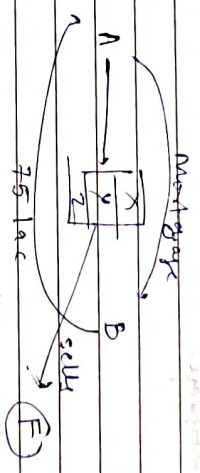
\* Subject matter of sale



\* At one's death, the property goes to the legal heirs. If there are no legal heirs, the property goes to the State. This is called escheat.

> This right is available only to purchaser.

If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, [in the absence of a contract to the contrary], entitled to have the mortgage debt satisfied out of the property not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.



B has right to sell prop. X & Z to clear his mortgaged debt.

Also, Z prop. if it mortgage debt is not satisfied from prop. X & Y.

> The rule under this section exist for the benefit of the buyer, not for the owner.

Pledge - (movable prop)  $\rightarrow$   $\left[ \begin{array}{l} \text{possession} \\ \text{possession stays with} \\ \text{person taking money} \end{array} \right]$

Hypothecation - (movable prop)  $\rightarrow$   $\left[ \begin{array}{l} \text{possession} \\ \text{possession stays with} \\ \text{person taking money} \end{array} \right]$

Actionable claim - it is an unsecured & debt other than pledge, hypothecation and mortgage.

English mortgage :- ownership remains. →  
 'Once a mortgage is always mortgage'

\* Kinds of Mortgage.

- 1)
- 2)
- 3)
- 4)
- 5)
- 6)

\* Essentials of Mortgage.

- 1) Written
- 2) Attachment
- 3) Registration

\* Sec. 59-A. Deriving title.

Sec. 60 Redemption

→ Recovery to original position by way of repayment.  
 → Suit of redemption can be filed within 30 years.  
 → Though there is written clause in deed regarding not availing right of redemption yet mortgagor has right to avail the same as it is substantiated right. Such clause has no effect.  
 → "Once a mortgage is always a mortgage" [S. 58, 59, 59-A, 60] tends - unconditional offer to payment.

\* Clog on Redemption (Obstacles).

> It can be done by mortgage by way of inserting any clause in deed.  
 > Generally, it cannot be made for period of more than 100 years

MORTGAGE

→ Sec. 58 :- Definition

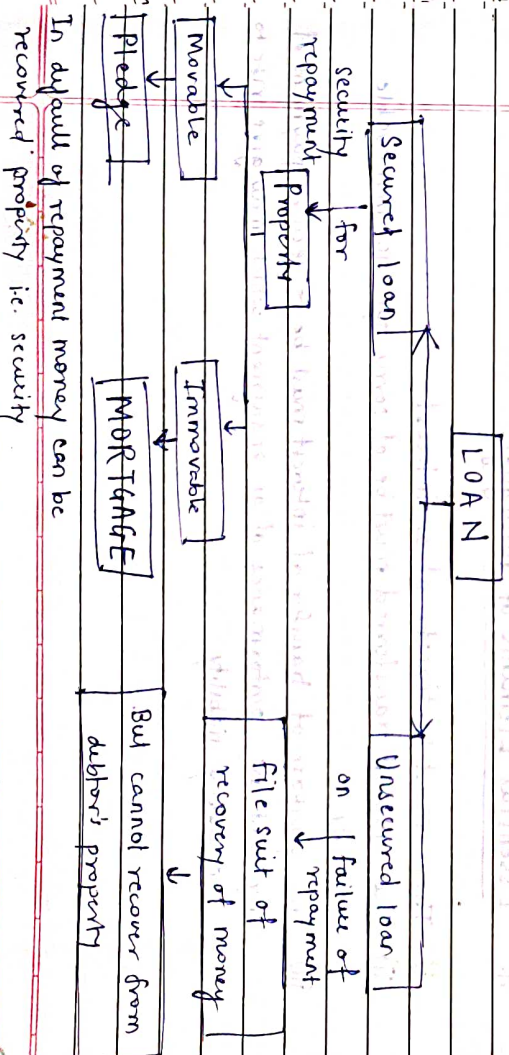
A mortgage is the transfer of an interest in the specific immovable property for the purpose of securing the

- i) payment of money advanced to or to be advanced by way of loan.
- ii) an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

→ Mortgagor :- Transferor Mortgagee :- transferee

→ Mortgage money :- the principal money or interest of which payment is secured for the time being.

→ Mortgage deed :- the instrument by which the transfer is effected



\* Mortgage concept existed in Roman times, Even in Hindu and Muslim law

\* In England

Mortgage created legal estate in favour of creditor

On failure of repayment, land absolutely belonged to the creditors.

Such situation was regarded as unjust by equity.

Equity provided such transaction is entered into for borrowing purpose not sale.

Thus, Equity provided

"Once a mortgage, always a mortgage"

\* Essential Elements of Mortgage

i) These must be transfer of an interest

ii) The interest transferred must be of some specific immovable property

iii) The purpose of transfer of interest must be to secure payment of any debt or, performance of an engagement which may give rise to pecuniary liability.

i) Transfer of Interest

→ No transfer of absolute interest/ownership.  
→ such interest transferred to itself is an 'immovable property'

→ Thus, it falls within of Transfer of Property Act.  
→ Interest transferred depends on the kind of mortgage.

eg) i) Simple Mortgage :- Right to sell the property.  
ii) Usufructuary mortgage :- Right to possession & enjoyment of usufruct.

\* Agreement to mortgage.

→ It does not create any interest in favour of mortgagee.  
→ It does not constitute any mortgage nor charge

→ It creates only personal obligation  
→ There is no transfer of interest in any property

→ Remedy available against such agreement = claim of damages for breach of contract

→ Agreement to mortgage creates right in favour of creditor  
→ Mortgage creates right in rem

\* It must possess all the essential conditions of valid transfer  
→ two living competent persons

ii) Specific immovable property

→ Property must be specifically mentioned in the mortgage deed  
→ Identified property.

→ It also includes things attached to what is so embedded in each other  
→ eg:- machinery attached permanently in house for beneficial enjoyment

iii) Purpose of Mortgage : Consideration of mortgage

→ to secure a debt

a) money advanced or to be advanced

\* Can deed of mortgage be executed before mortgagor gets full payment from mortgagee?

→ Yes, mortgage may be executed for a sum of money advanced or to be advanced in a future date

→ Raghunath v. Amir Bakh. AIR (1922) 141. 299

b) An existing or future debt

→ Existing debt :- debt which exist in present not ~~debar~~ barred by limitation

→ future debt :- a sum of money Mortgagee is entitled to get from mortgagor on a future date.

→ It may also be contingent-liability.

c) Performance of any engagement giving rise to pecuniary liability

→ 'engagement' means contract (under sec. 2 of ICA, 1872)

→ engagement here is consideration for contract.

→ 'pecuniary liability' means liability to pay a sum of money

\* Essential

→ i) A mortgage must be executed

ii) engagement is consideration

iii) engagement giving liability to pecuniary liability.

Example :- A borrows paddy from B & mortgages his field to secure

return of the paddy and also some additional paddy in form of interest. Paddy has pecuniary value just like borrowing money

→ It was held transaction was mortgage.

Kinds of Mortgage

Acc. to. S. 58

- 1) Simple Mortgage
- 2) Mortgage by conditional sale
- 3) Usufructuary mortgage.
- 4) English Mortgage.
- 5) Mortgage by deposit of title deeds.
- 6) Anomalous mortgage.

① Simple Mortgage [Sec. 58 (b)]

Where the mortgagor promises to pay the mortgage-money (loan) without delivering possession of the mortgage-property and expressly or impliedly that in case of non-payment of loan, the mortgagee shall have the right to cause the mortgage property to be sold; the mortgage is simple mortgage.

\* Characteristic of simple Mortgage.

① The mortgagor takes a personal undertaking to pay the loan

② The possession of the mortgage property is not given to the mortgagee.

③ In the case of non-payment of loan the mortgagee has right to have the mortgage-property sold.

④ Mortgagor's personal obligation.

→ This personal liability to repay may be expressed or implied.

→ Method of security does not displace mortgagor's obligation

→ In absence of personal covenant to repayment of loan, the transaction is not mortgage.

(A) No delivery of possession  
→ Mortgagee not entitled to get possession of property

- (C) Right to have property sold
  - on mortgagee's failure to repay the loan
  - Mortgagee himself has no power to sell the property
  - He has to get decree from court to the sale
  - For such sale mortgagee can recover loan with interest and remaining part is given to mortgagee.

**★ Mortgagee's Remedy / Simple Mortgage.**

- 2 remedies:
  - (i) Recovery of money
    - by suing mortgagee
    - as he takes personal obligation to repay
  - (ii) Sell Mortgagee's property
    - by moving to court for sale of property mortgaged
    - thus recover his money

**\* Both cause of action can be put in one suit**

**\* Limitation :- to file suit :- 12 years from date on which loan becomes due**

**\* Registration**

- > All simple mortgage are made only through registered document
- > Even if sum of money returned is less than 100 rupees

**(B) Mortgage by conditional sale [Sec. 58(c)]**

- It is an apparent sale [but intention of parties is to secure mortgage]
- with condition that upon repayment of the consideration amount
- the purchaser shall retransfer the property to the seller
- Common among Muslims.

**\* Essential element.**

- 1) There is an ostensible sale of an immovable property
- 2) The sale is subject of any of following conditions:
  - a) On non-payment of mort. money sale would be absolute
  - b) On payment of mort. money the sale shall become void or the buyer shall re-transfer the said property to seller
- 3) The condition must be embodied in the same document
- 4) Existence of debt
- 5) Condition must be embodied in same document
- 6) proviso & added by amendment act of 1929
- 7) Whether such condition & sale deed are laid down in different documents amount to mortgage by conditional sale?

Sunil v. Ayher AIR (1989) Gau. 38

H.C. held that such transaction was not in the nature of mortgage by c/s further observed that condition effecting the sale as a mortgage transaction must be incorporated in the one & same document

**\* Registration**

When the consideration of mortgage money is one hundred rupees or more, the document must be registered

Mortgage by conditional Sale with condition of Repurchase.

i) Existence of debt by buyer + Absence of any debt seller

ii) Transfer of only some interest in the property Transfer of all the interest in the property

Case law: Balubhai Tethabhai Shah v. Chananbhai Bamanbhai  
AIR (1901) Gyi. 85.

② Munir Md. Khan v Sajeda Bano AIR (2000) SC 1085

③ Usufructuary Mortgage [Sec 58(d)]

→ Usufruct :- produce, benefits, rents or profits of property

→ It is a mortgage where the mortgagor gives possession of the property to mortgagee

→ In usufructuary mortgage, the mortgagee is entitled to enjoy the benefits of mortgage - property in lieu of interest on the principal money advanced by him

→ Where the property is capable of giving good produce or benefit, the parties may also agree that mortgagee is entitled to get the usufruct of property not only in lieu of interest but also in part-payment of money advanced

\* Essential Elements

a) Delivery of possession of mortgage property  
→ an express/implied undertaking by mortgagor to deliver such possession

→ Right of mortgagee to retain such prop. in case of default of repayment  
→ Delivery could be instantaneously or on future date

→ Mode of delivery of possession depends on nature of property  
eg:- mortgage property = tenanted house  
possession will be given by way of right to collect rent & appropriate them towards debt

b) Enjoyment of use of the property by mortgagee until his dues are paid off

→ Generally, mortgagee adjust the interest out of rent & profit of mortgage property

→ As soon as capital money is paid, the mortgagee waives it  
→ They agree to discharge the debt (capital money) from remaining benefits

→ Accordingly parties may agree that rents & profits are a) in lieu of interest

b) in lieu of principal money  
c) in lieu of principal & interest both

c) No personal liability of the mortgagor

→ Mortgagee cannot sue the mortgagor personally for payment of his debt

→ He is only entitled to retain possession till his debt is fully paid.

→ Mortgagee cannot compel to pay such debt to Mortgagee  
→ Once mortgagee sue mortgage, it doesn't remain usufructuary mortgage

d) Mortgage cannot foreclose or sue for sale of mortgage property

→ Under usufructuary mortgage no time is fixed for payment of debt.

\* Registration

↳ Where mortgage money is Rs 100 or more, Registration is compulsory.  
for M.M. to be less than 100 → no registration  
→ only delivery of possession

Butho Khisto v. Govindram AIR (1935) Pat. 540

4) English Mortgage

→ In English mortgage there is absolute transfer of property to mortgagee with a condition that when the debt is paid off on a certain date, mortgagee shall re-transfer the property to mortgagor

\* Essentials

- a) The mortgagor binds himself to repay the mortgage money (debt) on a certain date
- b) The mortgage - property is transferred absolutely to mortgagee
- c) The absolute transfer is subject to a proviso that mortgagee will re-transfer the property to mortgagor on payment of

mortgage - money on the said date.

→ It is therefore settled law that the word 'absolutely' in English mortgage is used merely as a matter of form, what really passed to the mortgagee under this mortgage is only an interest in the property which is liable to be redeemed by the mortgagor i.e. 50 of this act.

\* Registration

When principal is Rs. 100 or more the mortgage deed must be registered otherwise it is optional (For less than Rs. 100)

5) Mortgage by Deposit of Title deeds.

→ It is peculiar kind of mortgage.  
→ In this mortgage, execution of mortgage deed by mortgagor is not nec.  
→ Mere deposit of title deeds by mortgagor to mortgagee is sufficient.

\* Essential Elements

- i) Existence of ~~title deeds~~ a debt.
- ii) Deposit of title deeds.
- iii) Intention to create security
- iv) Territorial restrictions, applicability of this form of mortgage only in specified towns



S. 59 - Mortgage when to be by assurance.

\* Mode of Completing Mortgage (for sum of debt  $\geq 100$ )

- i) Registration.
- ii) Delivery of Possession.
- iii) Deposit of Title Deeds

Mode when debt is -  
100 or more than 100  
( $\geq 100$ )  
less than 100  
( $< 100$ )

① Simple Mortgage Registration Registration

② Mortgage by conditional sale Registration Delivery of Possession

③ Usufructuary Mortgage Registration Delivery of Possession

④ English mortgage Registration Delivery of Possession

⑤ Mortgage by deposit of title deeds Deposit of title deeds from mortgagor  
Deposit of title deeds by mortgagee

\* Simple Mortgage

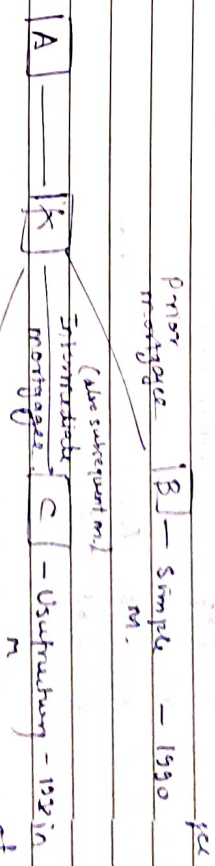
Registration - Personally liable

- i) Right to sell
- ii) Possession with mortgagee

\* Right of Mortgagor

s. 69 of ICA  
60 to 65 A  
66 to 78

i) Right of Redemption



[A] can file suit for redemption U/S 91 of TPA. prop.

[B] paid 10k to [C] and demanded 30k from [A] prop.

[C] can now sell the prop. [D] Thus [C] goes into the shoes of [D] and entitled to all rights.

\* s. 98 :- Prohibition of factories

[B] returned [A] & demanded 60k from [A] Now valuation of prop. deemed to 60k

[D] demands 60k from [A] [C] demands to pay off acc. n priority

S. 48 :- Doctrine of priority. s. 78 -> F.M.G. s. 78

fraud misrepresentation -> Green negligence

S. 78

Prin mortgagee committing F.M.G with subsequent mortgage

\* Right of Mortgagee [S. 60 - 66]

- (A) 1) Right of Redemption [S. 60 to 65A]
- ii) S. 91
- iii) S. 92
- iv) S. 93 - Prohibition factoring
- v) S. 48
- vi) S. 78 - Fraud misrepresentation
- vii) S. 69 - TICA

\* Rights of Mortgagor

① Right of Redemption [S. 60]

→ Mortgagor's right to recover or get back the property after making payment of loan

→ Thus transferred interest revert back to the mortgagor

→ Exceptions: (can be extinguished under following cases)

- i) By act of parties
- ii) By operation of law
- iii) By decree passed by court

② Right to transfer mortgaged prop. to 3rd party instead of retransferring

→ This right provides the mortgagor with authority to ask the mortgagee to assign the mortgage debt and transfer the property to a third person directed by him

→ The purpose of this right is to help mortgagor to pay of the mortgage by taking a loan from a third person on the same security

③ Right to inspection and production of documents [Sec. 60-B]

→ It is the right of mortgagor to ask mortgagee for the production of copies of documents of mortgaged property in his possession for inspection on notice of reasonable time

④ Right to Accession (Sec. 63)

→ Accession :- addition to property.

→ It is the right of mortgagor to such accession to his property which is in the custody of mortgagee

→ In case accession is inseparable mortgagee needs to pay mortgagee to acquire such accession

⑤ Right to Improvements [Sec. 63-A]

→ Acc to it, if mortgaged property has been improved while it was in possession of mortgagee, then on redemption and in the absence of any contract to the contrary, mortgagor is entitled to such improvements

⑥ Right to Renewed Lease [Sec. 64]

If the mortgagor is entitled to mortgaged property is a leasehold prop. and during the duration of mortgage the lease gets renewed

then on redemption the mortgagor is entitled to have benefit of new lease (except he enters into any contract to the contrary)

⑦ Right to grant a lease [Sec. 65-A]

→ A mortgagor has the right to lease out the mortgaged property while he is in possession of that property

Subject to following condn

- i) in accordance with local laws & customs
- ii) No rent or premium shall be paid in advance by mortgagee.
- iii) Contract shall not contain any provision for renewal of lease.

iv) Increase of Mort. prop. is building, lease not to exceed for 3yr.

⑧ Right to recover the possession

Right of Mortgagee

- 1) Right to sue for mortgage money. [S. 68]  
→ Mortgagee has right to file a suit in court of law for M.M. in full.  
Case :- i) When mortgagor binds to repay near M.M.  
ii) M.P. is destroyed or mortgagor not provided further security.  
iii) Mortgagee deprived of whole or part of his security.  
iv) Mortgagor fails to deliver mortgaged property.
- 2) Right of sale :- [S. 69]  
→ The mortgagee has right to sell the property after filing a suit & getting a decree from court  
→ Sec. 69 provides when sale can be effected without intervention of court
- 3) Right to foreclosure [S. 67]  
→ Mortgagee has right to obtain from court a decree of foreclosure against the mortgagor i.e. mortgagor absolutely debarrred of his right to return the property.  
→ It is allowed in i) Mortgage by conditional sale ii) Anomalous mortgage
- 4) Right of accession to property [S. 70]  
→ If any addition is made to the mortgaged property, the mortgagee is entitled to such addition for the purpose of security provided there is no contract to the contrary.
- 5) Right of possession  
The mortgagee is entitled to the possession of the mortgaged property as per the terms of mortgaged deed.
- 6) Right to removal of lease of mortgaged property. [Sec. 71]
- 7) Right of mortgagee to spend money [Sec. 72]
- 8) Right to Merge Profit [S. 94]

Sec. 5 :- Transfer of Property  
Sec. 6 :- What may be transferred  
Sec. 7 :- Person competent to transfer (MSD)  
Sec. 8 :- Operation of Transfer

Illegal Restrictions on certain alienations.

↓  
Ss. 10-12 and 17-18  
↓  
Cumulative effect of these sections is that transfer becomes void.

four restrictions.

- ① Condition restraining alienation [S. 10]
- ② Restriction on free enjoyment of property [S. 11]
- ③ Condition making interest determinable on insolvency or attempted alienation [S. 12]
- ④ Direction for accumulation of income [Ss. 17-18]
- ⑤ When such direction is void [S. 17(1)]
- ⑥ When such direction is void [S. 17(2) & S. 18]

① S. 10

If any property is transferred subject to condition or limitation which absolutely restrains the transferee (or any person claiming through him) from parting with or disposing of his interest in the property

such condition or limitation (not the transfer itself) is void

Exception :- i) In case of lease

for the benefit of the lessor, cond<sup>n</sup> is valid.

ii) A transfer to or benefit of the a woman which provides that she would not have the power

during her marriage, to transfer or charge the same or her beneficial interest there in is valid.

Doctrine of restraint in anticipation

→ Absolute restraining conditions are void  
→ But partial restraint is allowed.

\* Roshan v. Roshan (26 Ch. D. 501)

a condn imposed on transferee to sell prop. to his wife at a fixed price much less than market price is absolute restraint.

\* A condn to not sell to particular person a property is held to be a partial restraint

→ Principle :- Right to transfer is incidental to, and inseparable from the beneficial ownership of property

② S.11 :- Restriction repugnant to interest created

\* Essentials:

- ① Transfer of property.
  - ② an interest created absolutely in favor of any person.
  - ③ restriction of interest to be enjoyed in particular manner.
  - ④ restriction or condition is imposed by the terms of contract.
- transferee is entitled to receive and dispose of prop. as if there was no such restriction

\* Exception :- Direction in respect of one immovable prop for purposes of securing the beneficial enjoyment of another piece of such property, can be enforced

→ An agreement not to partition prop. will also be hit by S.11

→ as partition is natural incident of joint prop.

→ Jahn Begum v Syed Ali (1921 14 All 111)

③ sec. 12 :- Cond<sup>n</sup> making interest determinable on insolvency or attempted alienation

④ Direction for accumulation of income [Ss. 17-18]

(a) when such direction is void [S.17(1)].

→ Where the terms of a transfer of property directs that the income arising from the prop. is to be accumulated (either wholly or in part) during a period longer than

(a) the life of the transferor (or) or

(b) a period of 18 years from the date of the transfer

such direction shall be void to the extent to which period during which the accumulation is directed exceeds the longer of aforesaid periods.

At the end of such last mentioned period ~~during which~~ the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed

→ Based on The Illusion Act → English Act

Exceptions [S.17(2)]

Such direction for accumulation is valid, if such direction is for the purpose of

i) Payment of the debts of the transferor, provision of pension for children or similar issues of the transferor.

ii) preservation or maintenance of prop transferred, when property is transferred for benefit of public or for advancement of religion, knowledge, commerce, health, etc., any other object beneficial to mankind.

based on donor's intent v. v. Fairly

\* Transfer for benefit of unborn person [Sec. 13-14 & 18]

- Sec. 13, 14, it deal with the same
- One of requisite of transfer is transferee must be living person
- Thus, prop directly cannot be transferred to unborn person
- ↳ But an interest can be created for the benefit of such person

Where, on transfer of a property

prop. cannot be transferred to U.B.

an interest therein is created for the benefit of a person not in existence at the date of transfer

subject to a prior interest created by the same transfer

the interest created for the benefit of such person shall not take effect unless

it extends to the whole of the remaining interest of the transferor in the property

↳ only Absolute interest may be given

A child in mother's womb is a child as well as mother (even posthumous)

Unborn person is a person, who is not in existence during mother's womb

g) Why prop. cannot be transferred to U.B. and why?

If a prop. is transferred to one person not in existence, the interest so transferred shall be divested from the transferor but it would have to remain in abeyance (void) and wait for the transferee to come into existence, so when it could vest

legally, every transfer of prop. involves transfer of interest

↳ And such situation would be against concept of interest

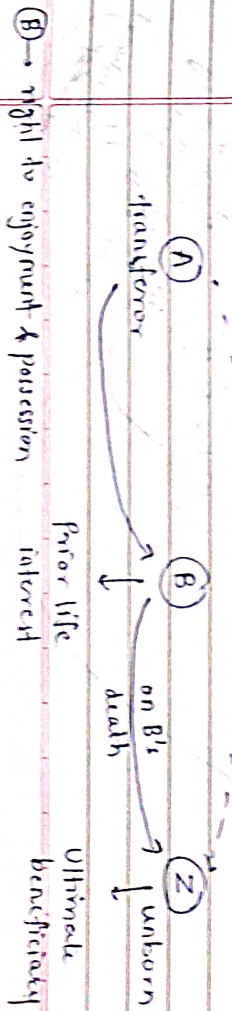
Thus, transfer to an unborn person is void

But, transfer for the benefit of an unborn person is valid.

\* Essential of Transfer for benefit of U.B.

- i) Transfer of property
  - ii) Interest created therein for benefit of a person not in existence
  - iii) Prior interest or life interest
- Transfer for an unborn person must be preceded by a life interest in favor of a person in existence at the date of transfer.
- only absolute interest may be transferred in favor of the unborn

\* Prior life interest.



\* (B) is holding property in trust for the benefit of U.B. (Z)   
 > Successive life interest may created (ie more than one)

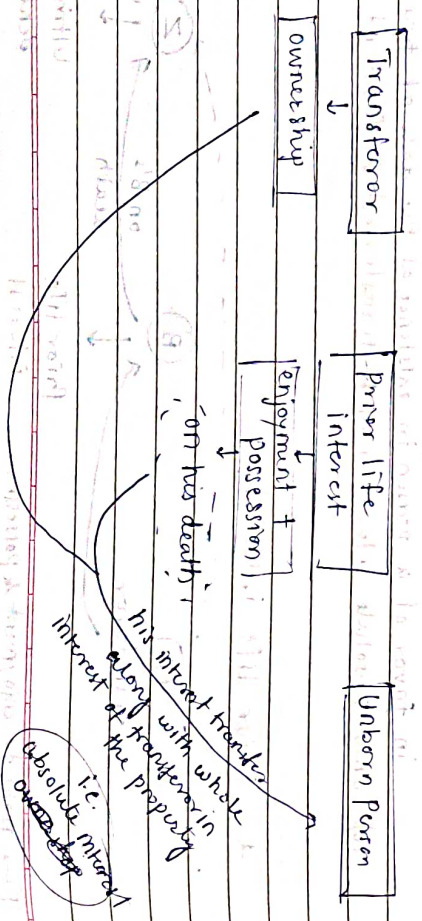
\* If (B) died before birth of (Z), property will revert back to the transferor (A) and will go to his legal heirs

Prior in life interest / life-estate

- ↳ He is an intermediary
- ↳ He holds the property till his life and till that time the U.B. would come into existence
- ↳ P case is taken of his interest during his lifetime (as he can enjoy & interest upon him even if U.B. come into existence).

\* Only absolute interest may be given

- > Limited / life interest cannot be given to an unborn person
- > T.O.P for life of an U.B. person is void.
- > The interest created for the benefit of such unborn person must comprise the whole of the remaining interval of the transferor in the property.



(Absolute Interest) = (Prior life interest) + (Remaining interest of transferor)

\* Under Hindu law:

A gift or bequest in favor of an U.B. is void. But after TP Act, it is valid subject to provision of s.13 of TP Act.

\* Under Muslim Law

Not applicable as per sec. 2. General rule in Mohammedan law "gift in favour of U.B. is void"

\* Sec. 14 :- Rule against Perpetuity & s.18

Perpetuity means indefinite period.

> This rule is against a transfer making the property inalienable for an indefinite period.

Perpetuity may arise in two ways

- @ by taking away from transferee power of alienation
- by creating future remote interest

s.10

s.14

Object :- Ensure free & active circulation of property for Trade & commerce & Betterment of property

\* Essentials of s.14

- i) There is a T.O.P.
- ii) Transfer for ultimate benefit of U.B. person who is given absolute interest.
- iii) Vesting of interest in favour of ultimate beneficiary is preceded by life or limited interest of living person.
- iv) ultimate beneficiary must come into existence before death of last preceding living person
- v) can be postponed

§ General rule :- After death of last prior interest -

vesting of interest cannot be postponed even for moment

But s.14 is relaxation to this rule till minority of ultimate beneficiary

\* 1/3rd minimum reversion of vesting

$$= \left( \text{Life of (last preceding)} \right) + \left( \text{minority of ultimate beneficiary} \right)$$

\* Saundarya Rajan v. Nadarajan.

Patry Council held that at the date of transfer it is known whether or not guardian would be appointed by court for the minor in future for purpose of s.14 the normal period of minority would be 18 years.

s.15 :- Transfer to a class some of how come under

Leake v. Robinson [English Court]

Class of person An interest created for benefit of class, fails by reason of

rules of s.13. & s.14

such interest fail in regards to those person & not in regard to whole class

Explain

S.16 :- Transfer to take effect on failure of prior interest

By reason of rule contained in s.13 & s.14 an interest created for benefit of any person or of a class of a person fails in regard to such person

↓  
 than any interest created in same transaction  
 +  
 intended to take effect after or upon failure  
 of such prior interest also fails

→ If prior interest is invalid, or fails for some other reason, the subsequent interest does not fail

\* S.22 :- Transfer to members of a class who after a particular age

\* Vested interest [S.19]

→ In T.O.P, when the interest transferred is vested, the transferee gets that interest immediately.

↓  
 Transferee's title is complete

\* ~~Case~~ Vested interest occurs due to - when/where  
 i) no time has been specified as to when it shall take effect

ii) it is specified that it shall take effect immediately

iii) it is to take effect upon the happening of an event which must happen.

→ eg :- any future date | year, particular year, death of person

death - is a certain event → thus vested interest

Explanation of s.19

> V.I. is not affected by the fact that right to enjoyment has been postponed  
 > Vested Interest is not affected by following situations

(a) Postponement of enjoyment

> In T.O.P primary thing is transfer of interest of title possession of property is secondary.  
 > Lachman v. Baldeo

A made a gift of his property to B & directed B to take possession of a portion of prop only after death of A & A's wife. It was held that interest of B wds vested one

(b) Prior Interest.

> It postpone enjoyment of property & not vesting of interest  
 > Transferee gets immediate vested interest

(c) Direction for accumulation of income.

> It is valid provided it is within period prescribed U/s. 17  
 > In this case also right to enjoyment is postponed.  
 > Kothilambal v. N. Easwar Kothilambal AIR (2005) SC 2468

(d) Conditional limitation. (S.28)

> A condn that upon the happening of a particular event the interest vested in a person shall pass on to another person is called conditional limitation.  
 > It does not prevent vesting of interest.

\* Nature of vested Interest.

① Present fixed right

② Transferable interest

③ Heritable interest

\* Spes- successor is not - transferable interest  
 > It is more possible future interest.  
 Whereas Contingent interest uncertain.

\* Time of vesting of interest.

- > Ordinarily it transfers immediately (if not mentioned).
- > However, it may take place at post-natal time (if mentioned)
  - ↳ ("unless contrary intention appears")
- \* Rajesh Kanta Roy v. Smt. Shani Devi AIR (1957) SC 255
  - intention to be gathered from comprehensive view of all the terms of a document
  - Court has to approach text of construction → (bias in favour of V.I unless contrary appears)

Sec. 20

- When unborn person acquires vested interest, on transfer of his benefit
  - Interest created in favour of an unborn person becomes vested as soon as that person is born alive
  - Even though he is not given possession immediately on his birth, the interest is vested.
  - The interest created in favor of an unborn person is always contingent subject his being born alive
  - Transfers can make any condition for the same
  - eg - property to transfer to A's son who first attain age of majority is contingent interest.

Sec. 20

Contingent Interest (on page no. 3)

\* Distinct b/w Contingent & Vested Interest

When accures?	On T.O.P it immediately accures.	Contingent Interest	On happening or non-happening of specified certain event
Nature of Title	Complete & perfect bestowed for the transferee	Vested Interest	Imperfect title

Transferability

Transferable  
 Not-hereditary  
 ↳ may be depicted by some condition

Heritability

Heritable  
 Not-hereditary

Capable of being attached or sold in execution of a decree. cannot be sold in execution of any decree

Rights

1) Present fixed right in property  
 2) future possible right in prop.

Sec. 22

Transfer to members of a class who attain a particular age. Contingent class :-

Where the transferee constitutes a class but who are to be included in this class is not certain  
 eg:- Transfer made to such children of A who shall attain the age of 18 years. Not certain who will survive or how many will thus it is a contingent class

→ Sec. 22 provides that such interest does not vest in any member of the class who does not attain that age.

→ It does not apply where class is certain & not contingent but vesting of interest is uncertain i.e. contingent.

- \* Essentials of s. 20
- i) Transfer of Prop.
  - ii) Interest created in favor of contingent class.
  - iii) Interest should not be contingent one.

This section is not applicable to exception to s. 21  
 → as there is only one contingency of attaining a particular age.

Sec. 28 Transfer contingent on happening of specified uncertain event /  
 \* Subsequent contingent interest.

→ This section is based on the principle that property cannot remain without an owner even for a moment

- \* Essentials
- i) There must be T.O.P.
  - ii) an interest therein is to accrue to a specified person if a specified uncertain event shall happen [contingent interest in favor of a specified person created]
  - iii) for (ii) creation of prior or precedent or intermediate interest.
  - iv) No time mention for occurrence of such event
- such interest fails if (a) the uncertain event happens before or at the same time as prior interest ceases to exist.

→ If subsequent contingency does not happen before termination of prior interest, the interest would have to remain in abeyance.

Sec. 23 opposes the same if it will

Thus, such interest fails!!!

Official Assignee Madan v. Madanali Phayaram  
 → a testator bequeathed his prop. to grandson who might be born within

10 years after his death.  
 → It was held to be a void disposition.

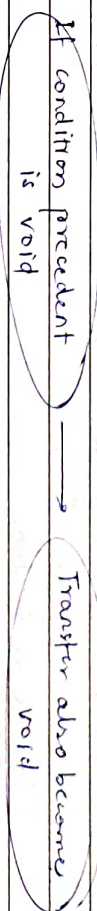
Sec. 24 Transfer to such of certain person as survive at some period not specified.

\* Essentials

- ① There must T.O.P.
- ② An interest therein is to accrue to such of certain persons as shall be surviving at some period.
- ③ No time period is provided by the transferor.
- ④ Interest shall go to them only who are alive when the prior or intermediate interest ceases to exist.
- ⑤ unless contrary intention appears from terms of contract.

Sec. 25 Conditional Transfer.

→ A T.O.P with certain conditions is called as conditional transfer.  
 → Sec. 25 deals with conditions precedent.



Condition precedent is void

⑥ Impossible to perform

- i) Unlawful
- ii) forbidden by law
- iii) against the provision of law
- iv) Fraudulent
- v) Involves any injury to person or prop.
- vi) Opposed to public policy.

### Offence against Property [ss 378-462]

- i) Damage to the property.
- ii) Re: Violate Right to peaceful enjoyment. (441-462)

#### 1) Damage to the property.

- a) occurred get something
- b) occurred get nothing (~~425~~ (425-440))
- a) occurred get something (s.379-402)
  - i) Pre dishonest (403, 404)
  - ii) post dishonest

X \_\_\_\_\_ X \_\_\_\_\_

Election :- choosing b/w two inconsistent or alternative rights

#### Doctrine of election

→ based on principle of equity

### \* Synopsis

#### Introduction

i) Essentials of s.35

- a) Transferor professes to transfer property not his own
- b) Benefit conferred on the owner of property
- c) Part of the same transaction [T.O.P & conferring of benefit]

ii) Mode of election

- a) Implied election
- b) Expressed election

iii) Requisition to elect

iv) Suspension of election

v) Rights of Disappointed Transferor

vi) Diff b/w Indian & English law

vii) Conclusion

### Doctrine of election [s.35]

#### Sec. 35

Where a person

- professes to transfer prop. which he has no right to transfer

and

- as a part of the same transaction, confers any benefit on the owner of the property

Such owner must elect either

to confirm the transfer

or to dissent from it.

If he dissents from it, the benefit so transferred

(i) he must relinquish the benefit so transferred

or his representatives as if it had not been disposed of

(ii) represent doctrine of forfeiture where as in England doctrine of compensation applies.

\* When such benefit reverts to the transferor, it is subjected to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred in two cases namely:

- a) Gratuitous transfer :- where the transfer is gratuitous, and the transferor has, before the election died or otherwise become incapable of making a fresh transfer; and
- b) where the transfer is for consideration.

\* Six rules under §.35

i) Belief of the transferor is not relevant

The doctrine of election applies whether the transferor does or does not believe that the property he professes to transfer is his own.

ii) Who elects not elects recipient of property :-

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

→ And persons who in such capacity take a benefit under the transaction may in another capacity dissent therefrom.

Owners duty to elect.

- Arises only when he accepts the instrument
- He must accept instrument wholly, or reject altogether.
- If arises only when the person acts in his sole and absolute capacity.

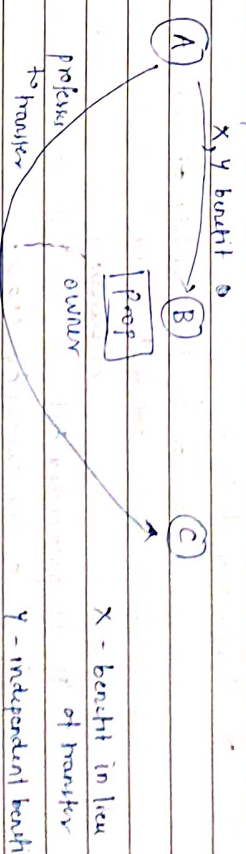
iii)

Exception

Only that particular benefit is relinquished

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

i.e. General rule :- When owner of the property dissent from election, he can claim any other benefit which is given to him independently of the transfer under the same instrument.



(B) can claim Y any time even on dissent due to transfer during election

iv) What constitutes election - (Implied Election)

- 1) Implied election owner of property (donee) elects
- 2) being aware of his duty to elect
- 3) having full knowledge of the acceptance.

A) If a person accepts such benefit for two years, it is to be assumed that he has elected in favour of the transferor

knowledge or waiver when to be inferred which renders it impossible to place the persons interested in the property to be transferred in the same condition as if such act had not been done.

iii) If he waives enquiry into the circumstances.

Rule 6: Consequences of not making an election for one year.

If owner does not assent or dissent the transfer within a year the transferor or his representative upon expiry of that period, require him to make election.

If he does not comply with requirement, he is deemed to have elected to confirm the transfer.

\* Suspension of election :-

Only on legal disability of owner

- a) Minority
- b) Lunacy

It is suspended till

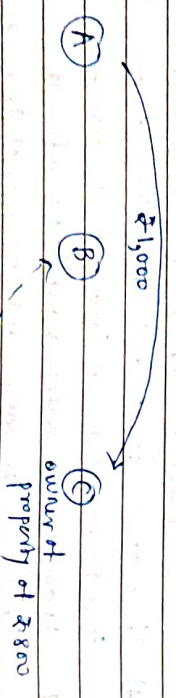
- a) the disability ceases
- b) election is made by his guardian.

Gift

Indian Law

English Law

- i) Doctrine of forfeiture
- ii) No fixed time period of one year for election
- iii) Doctrine of compensation.
- iv) No fixed time period unless specified



If C dissents to transfer, Indian Law → ₹800 to B & ₹200 to C  
English Law → ₹800 to B & ₹200 to C

\* Sec. 41 :- Ostensible owner

Where, with the consent

express or implied

of the persons interested in immovable prop. a person is the ostensible owner of such property and

transfers the same for consideration,

→ the transfer shall not be voidable on the ground that the transferor was not authorized to make it:

→ Provided that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

→ Synopsis.

i) Introduction

ii) Meaning of Transfer by ostensible owner.

iii) Essentials of s.41

iv) Express or implied consent of real owner

v) Case law :- Ramcoomar Koondoo v. Macqueen

vi) Statutory changes → Benami Transaction Act

vii) Conclusion

→ An ostensible owner is not the real owner

→ He just looks like owner

→ He is a person who has all the indicia of ownership

→ He has apparently all the characteristics of real owner

→ He may have possession and enjoyment of property, even his name entered in official record.

→ Benami transaction :- person purchases prop. in the name of other person.

→ Benami - an ostensible owner

→ It is for the court to establish whether it was ostensible owner or not?

→ Following persons are not ostensible owner

- i) person entrusted with temporary control over property.
- ii) guardian of minor or any fiduciary relationship.
- iii) Fakir      iv) agent      v) trustee or manager of idol.

Jayadayaal Poddar v. Bibi Hazara, AIR (1974) S.C. 171

Whether transferor is ostensible owner is a subjective question.

- 1) Sources set test to decide the same.
- a) Source of purchase money.
- b) Nature of possession after purchase - who had possession?
- c) Motive for giving benami colour.
- d) Relationship plus parties.
- e) Custody of title deeds.

\* Transfer by ostensible owner

- Such transfer is binding upon owner
- Real owner is estopped from denying the transfer. [S. 115 IEA]

\* Essentials of S. 41

- i) T.O. irrevocable prop. by ostensible owner with consent of real owner.
- ii) Transfer is for consideration.
- iii) Transferee has acted in good faith.
- iv) Transferee has exercised reasonable care in finding out the transferor's power to make transfer.

i) Implied or Expressed consent of real owner.

- free consent      → not applied consent obtained by fraud M, M
- No consent of minor & minor
- Real owner's acquiescence (or inaction) implies his consent

Anoda Mohan v. Nilphaman

A purchased prop. in the name of B (wife). Her name was entered in revenue record & mortgaged same to N. Court held as A entered B's name in revenue, it was implied consent of A. Attestation of document by real owner does not by itself imply consent. (provided that it be backed by knowledge & consent).

ii) Transfer is for consideration

- It does not apply to gift or gratuitous transfers
- Applies to sale, exchange, mortgage or lease

iii) Transferee act in good faith

→ Bonafide intention

→ This section protects interest of only bona fide purchaser

→ Principle of equity :- He who seeks equity must do equity. Gurubhask Singh v. Nitya AIR (1963)

→ Absence of good faith on part of purchaser cannot vitiate benefit of S. 41. Good faith + Due enquiry = Essential of S. 41

iv) Reasonable care

- in ascertaining the title and authority of the transferor
- It means care which man of ordinary prudence could take
- It must be diligent and not superficial.

\* What amount to reasonable & due enquiry

- i) Inspection of records at least for 12 years in the Registrar's office

\* following does not amount to due enquiry

- i) Inspection of revenue records.
- ii) Inspection of municipal registration

\* Every subsequent transferee is entitled to protectn u/s 41.

\* Benami Transaction Act

Features.

- It made benami transaction punishable
- Person entering in such transact<sup>ns</sup> are also punished.
- No punishment if property is purchased in the name of wife or unmarried daughter.
- This Act is prohibitory in nature.
- It has no retrospective app operation.
- After this Act no person is allowed to take plea u/s. 41 [5<sup>th</sup> Sept. 1987]
- Benamidar has become the real owner after it.
- Excep<sup>t</sup>ions

i) Coparcener of H.U.F.

ii) benamidar is a trustee or person standing in fiduciary rel<sup>n</sup>.

> Sec. 43 :- Transfer by unauthorised person who subsequently acquires interest in the property

> Sec. 51 :- Doctrine of Acquiescence

> Sec. 52 :- Doctrine of Lis pendens

> Sec. 53 :- Doctrine of Fraudulent transfer

> Sec. 53-A :- Doctrine of Part Performance

LEASE

Ss. 105 - 117

M	S.105 :- Meaning
D	S.106 :- Duration
H	S.107 :- How made

S.105 :- Definition

" Lease is transfer of a right to enjoy such property, made for certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, services or any other thing of value, to be rendered periodically or on specified occasion to the transferor by transferee, who accepts the transfer on such term

Transferor - lessor or Lessor → Transferee - lessee or Lessee \*

\* S.106 :- Duration of certain leases in absence of local usage or written contract

for agricultural or manufacturing purposes → 6 month notice → Year to year

for any other purpose → 15 days notice → month to month

> Every notice must be in writing, signed by or on behalf of the person giving it and be delivered by to such party, by post, or personally, sent to his residence or affixed to conspicuous part of property

5.107 Leases how made

(1) For any term exceeding one year /  $\rightarrow$  Registered / only by  
 Registering yearly rent / instrument  
 from year to year

(2) All other leases  $\Rightarrow$  Registered instrument or

Oral agreement by delivery of possession

for (2) state Govt. may from time to time provide which leases could be made by oral agreement or unregistered instrument

\* Rights & Liabilities of Lessor & Lessee [5.108]

(A) Rights and Liabilities of Lessor.

\* Rights of Lessor  
 Sec. 108 does not provide for the same

- (1) Right to enjoy rent, share, premium
- (2) Right to enjoy rent, share, premium

Abandonment of property with lease

\* Liabilities of Lessor

- (1) Duty to disclose latent material defect
- (2) Duty to give possession of good premises and to have
- (3) Covenant for quiet enjoyment to tenant

(B) Rights of Lessee or & Liabilities too!

\* Rights of Lessee  
 (1) Right to accretions

(2) Right to avoid lease on destruction of property

(3) Right to deduct cost of repairs.

(4) Right to deduct outgoings

(5) Right to remove fixtures

(6) Right to remove crops

(7) Right to assign his interest.

\* Liabilities of Lessee

- (1) Duty to disclose facts
- (2) Duty to pay rent
- (3) Duty to maintain the property
- (4) Duty to give notice of encroachment
- (5) Duty to use the property reasonably
- (6) Duty not to erect permanent structure
- (7) Duty to restore possession

How to determine the nature of the lease

Intention of parties at the time of making the lease

Sec. 116

\* kinds of leases

- ① Tenancy at will.
- ② Tenancy by holding over.
- ③ Tenancy at sufferance.

Tenancy by holding over      Tenancy at sufferance

> After determination of lease if the lessee continues to hold possession with the consent of lessor, the lease is called tenancy by holding over.

> A lessee who continues possession after determination of lease is called tenant-at sufferance.

> ~~Without~~ the consent of landlord      without the consent of landlord

> Lessee is presumed to hold the property under a contract. [cannot be ejected w/o notice] (possession without legal right)

Lessee has no better title than that of trespasser. (possession without legal right)

> Purpose of such possession is deemed to be the same purpose for which original lease was granted. without giving notice to quit.

Such possession is not legal. Landlord can sue him anytime.

> It is hurtable

\* Tenancy at will      It is not-hurtable. arising from implication of law & sometimes by agreement.

> A tenant by holding over is a tenant-at-will because it arises by implication of law in case of permissive occupation.

> If it is a tenancy which terminable at the will

- 1) landlord
- 2) tenant

> It may arise from following circumstances

a) No agreed period for which tenant should hold the property which he is in already possession of.

b) by an agreement to let, for an indefinite term,  
 c) when person enters into possession under void agreement.

\* Duties / Rights of such tenant  
 ① Right not to pay rent.  
 ② Duty to pay compensation for use & occupation.

\* Determination of tenancy at will.  
 → By the death of either tenant or landlord.

\* Determination of lease / Termination of lease  
 By-Fact

→ Legal estate b/w lessor & lessee comes to an end.

→ 8 ways of determination of lease

- 1) By lapse of time / By efflux of time
- 2) By happening of specified event
- 3) By termination of lessor's interest
- 4) By merger of title of lessor & lessee
- 5) By express surrender.
- 6) By implied surrender.
- 7) By forfeiture.
- 8) By expiry of notice to quit.

i) By efflux of time.

→ If comes to end automatically.  
 → does not require notice for determination.

iv) By merger

→ interest of the lessee and the lessor in the whole of property become vested at the same time in one person

*Handwritten signature*

→ limited interest becomes absolute interest

→ Same man cannot be the landlord & the tenant

→ It takes place

i). by act of parties (lessor transfers residuary interest to the lessee)

ii). by operation of law (e.g. lessee takes lessor's interest by succession)

5) by express surrender

→ It is opposite of merger

→ Surrender is yielding up the lessee's interest in lease & putting end to the contract of lease.

→ Essentials of express surrender

a) relinquishment of limited interest (i.e. right to enjoy)

b) delivery of possession

6) By implied surrender

→ It takes place by operation of law

a) by creation of new lease

b) by relinquishment of possession

7) By forfeiture

→ It means loss of lessee's right to use the property by some fault on his part.

→ Grounds of forfeiture

a) Breach of express condition by lessee

b) Denial of landlord's title of lessee

9) Insolvency of the lessee.

## EXCHANGE

where two or more persons

where two persons

mutually transfers the ownership of one thing

for the ownership of another

either thing or both things being money only

the transaction is called exchange.

\* Characteristics,

① Transfer of ownership

→ It is a transfer of absolute exchange (not in case of lease)

→ Ownership of one party must be exclusive of ownership of the other

② It applies to both movable & immovable property.

→ Equal Ownership in immovable property may be transferred in return of ownership in movable property.

③ It includes barter.

→ where both properties are movable

④ Mode of Transfer

→ It can be made only in the manner in which sale is effected.

→ When both properties are movable, it may be effected by delivery of possession

→ Immovable property of value > 100 rupees → Registration is compulsory

\* Banwari Lal vs. Asst. Dir. of Consolidation

→ All H.C. held that mere intention of sale consideration did not make it a sale, this was an exchange.

→ Facts: - parties decided to transfer their respective rights in plots situated in two villages, apparently for convenience in carrying

\* All essentials of valid contract must be reflected in valid exchange deed. [Srihari Jena v. Panchamohun Jena]

5.119 Right of party deprived of thing received in exchange :-

→ It must be by reason of any defect in the title of the other party  
 → 2 rights available to such person

i) Compensation  
 He may claim compensation from other party for the loss incurred due to such defective title.

ii) He may claim return of the property transferred by him to other party provided the other party is in still possession of that property.

\* Jattu Ram v. Hakim Singh AIR (1994) 5 SC 1653  
 S.C. held that the entries made by paltanari in the official record do not create title and the opp. party was liable to return the land to extent

\* Right and liabilities of parties

→ Same as right and liabilities of buyer & seller u/s. 55  
 → Exception :- No charge for unpaid price.

\* Exchange of money

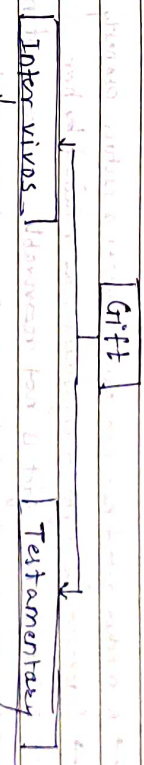
On an exchange of money, each party thereby warrants the genuineness of the money given by him.

GIFTS

5.122 :- Definition of Gift

Gift is the transfer of existing movable or immovable prop.  
 - made voluntarily &  
 - without consideration  
 - by one person called the donor to another called donee, and accepted by or on behalf of the donee

→ Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.  
 → If donee dies before acceptance the gift is void.



\* Essential Elements:

① There must be transfer of ownership.  
 → absolute ownership (nothing less than ownership can transferred)  
 → Conditional gift could be made  
 → But not against provision of S. 10 to 34

② The property must be existing property.

→ It could be movable or immovable property.  
 → It could be tangible or intangible property.

③ 2 important conditions

1) The property must be in existence at the date of making of gift.  
 2) The property must be transferable with meaning of Sec. 5

3) Transfer is without consideration (gratuitous)

- Consideration must be pecuniary one.
- (It must be valued in terms of money or property)
- Mutual love & affection could be consideration.

4) The transfer is made voluntarily i.e. with free consent

5) Gift must be accepted by donee

- It may be expressed or implied
- Where donee is incompetent to contract, gift must be accepted on his behalf by competent person (guardian)

\* K. Balakrishnan v. K. Kamalam AIR (2004) S.C. 1257

Facts  
→ A mother gifted her son aged 16 years a certain property

→ Possession & right to enjoyment was retained by her.

Held  
→ S.C. held that gift is not recoverable on account of non-acceptance

→ Apex court held that "ownership by of property by minor can be presumed by silent acceptance, particularly when minor is an educated boy of 16 years" had knowledge of execution of gift."

→ When donee is juristic person it must be accepted by a competent authority.

S.123

Gift how affected,

1) Immovable property Registered Instrument

2) Movable property Registered Instrument

Delivery in same way as goods sold

\* kinds of gifts.

- 1) Void gifts
- 2) Onerous gifts

1) Void gifts [S. 6, 122 & 124-127]

following gifts are void

- a) Gift made for an unlawful purpose [Sec. 6]
- b) Gift depending on a condition, the fulfillment of which is impossible or forbidden by law [Sec. 6]

c) Where the donor dies before acceptance [Sec. 122]

d) Gift by a person incompetent to contract e.g. a minor, lunatic etc [Sec. 7]

e) A gift comprising existing and future property is void as to the latter [S. 124]

→ Such gift is void only to the extent of future property

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

→ Gift made in favour of several persons jointly

→ The gift is void to the extent of part of that person only

Chunia Kanan v. Karunbi AIR (1973) 122 Cr. 64

Gift made to two donees jointly with the right of survivorship is valid and upon death of one the surviving donee takes the whole

g) A gift which, under an agreement b/w the parties, is revocable, wholly or in part, at the mere will of the donor, is void wholly or in part as the case may be [S. 126]

→ Conditional transfer [S. 25] applies here

\* Sec. 126 lays down 2 modes of revocation of gifts:

① Revocation by mutual agreement of donor & donee

② Revocation by rescission as in the case of contracts

③ Revocation by mutual agreement

→ It may be upon happening of an event, mutually agreed upon by both

→ Such condition must be expressed

→ It must not solely depend upon the will of donor

→ Such stipulation and gift should be made at the same time

→ Such condition is a condition subsequent

④ Revocation by Rescission as Contract

→ Gift must be made voluntarily

→ When such gift is made by coercion undue influence, fraud, mistake

misrepresentation it is voidable at the option of the party whose

consent was so obtained

→ Period of limitation - 3 years

→ Legal heirs of donor may sue on above mentioned grounds from the

date on which such facts are known to the plaintiff

\* Bona fide purchaser

→ Last paragraph of this section protects the interest of bona fide purchaser

for value without notice of donor's right of revocation

→ If property transferred was gratuitous, it could be recovered

A gift not liable to be set aside merely on the ground of mistake, provided it is not vitiated by fraud, undue influence

It is that Kumar v. Rameshchandra, 58 Bom L.R. 175

part should contain taken cannot be the consideration for an agreement

or transfer of property, such agreement or transfer is void

① Overplus Gift [S. 127]

↓

"It is a gift of such property which is heretofore with the donor"

Two conditions: Kind of prop. Acceptance

① Single gift consist of both overplus & whole gift

② Separate gift any of the above Donee at liberty to choose

↓

③ Disqualified Donee

\* Universal Donee

→ Where an overplus gift is made to a disqualified donee (eg minor) and such donee accepts the gift, he has a right to repudiate the gift on attaining the age of majority

→ Donor cannot take the property unless the minor on attaining majority accepts the gift at his option

\* Universal Donee

A universal donee is one to whom the donor's whole property is given, and who consequently becomes liable for all the debts due by

and liabilities of the donor at the time of gift to the extent of the property comprised in the gift

\* Essentials

i) All properties of donor should have been transferred to donee

ii) Consequently, all the liabilities & debts of donor are personally payable by donee

iii) Liability is only to the extent of the property comprised in the gift.

\* Shaikth Pathamma Bi V. Sri Venkata Chalapaty Income Tax.

> If donor is earning money by way of salaries but has made gift of all his movable or immovable properties, the donee is universal donee.

> S. 125 is independent of S. 55

> S. 128 even applies to movable prop.

\* S. 125 :- There two gifts on which provisions of this section are applicable

i) Mission gifts :-

ii) gift of movable properties made in contemplation of death.

Affirmable claim

S. 130 Transfer of affirmable claim

The transfer of an affirmable claim (whether with or without consideration) can be effected only by the execution of an instrument in i) in writing ii) signed by the transferor (or his duly authorised agent) and the transfer is complete and effectual upon the execution of such instrument

→ S. 130 does not require registration as one of the formalities

→ There cannot be oral assignment of any affirmable claim

S. 131 Notice to be in writing signed

\* Essentials of valid notice

i) Notice must be in writing.

ii) Signed by transferor or his duly authorised agent

S. 132 Liability of transfer of affirmable claim

→ The transferor of an affirmable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of transfer

→ All the rights & liabilities in respect of claim transfer from transferor to transferee

→ Provision of this section have been applied to court sales (Rajn Chandra v. Shankar) AIR 1944 Nag. 98

S. 133 Warranty of debtor's solvency

Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract of the contrary, applies only to his solvency at

The time of transfer, and is limited where the transfer, and is limited where the transfer is made for consideration to the amount or value of such consideration.

→ Transferor should assure that debtor is solvent.

→ Transferor is not bound to give any warranty regarding solvency of the debtor.

5.134

Mortgaged Debt :-

→ Where a debt is transferred for securing another existing or future debt it is nothing but transfer of an actionable claim by way of mortgage.

→ Sec. 134 provides following rules under which money realised out of such debt is to be appropriated.

- i) Firstly, the debt realised by transferee or recovered by transferee is to be applied in payment of the cost of such recovery.
- ii) Secondly, it is to be applied towards satisfaction of the amount secured by the transfer.
- iii) Thirdly, if any residue remains after the above-mentioned payments, the remainder is to be given to transferor.

5.135

Rights of an assignee of marine & fire policies

→ This section enacts that every assignee, of a policy of insurance against fire, in whom the property insured shall be absolutely vested at the date of assignment, shall have transferred and vested in him all rights of suit as if the contract contained in the policy had been made with himself.

5.136 :- Incapacity of officers connected with court and of Justice

→ No judge, legal practitioner, or officer connected with any court of justice can buy or traffic in, or stipulate and for or agree to receive any share of or interest in any actionable claim, and no court of justice can enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

→ They can sell their own actionable claim.

\* Saving of negotiable instruments, etc - (5.137)

→ The above provisions of this chapter do not apply to stocks, shares and debentures or to instruments which are for the time being by law or custom, negotiable or to any mercantile document of title to goods.

→ Commission of Income Tax v. Bhopal Textiles Ltd  
A.I.R. (1961) S.C. 496

The S.C. held that when it is handed over to the consignee on payment, the property in the goods is transferred.