1

PRELIMINARY (Ch. I : Ss. 1-4)

Application of the Act

As originally enacted, the Transfer of Property Act did *not* extend to the then State of Bombay, although it could be extended to the State of Bombay by a notification in the Official Gazette by the State Government. Accordingly, it was extended to the erstwhile State of Bombay by a notification. Therefore, the Act *now* applies to the *whole* of India, including the States of Maharashtra and Gujarat.

Section 2 of the Act saves certain enactments, rights and liabilities *before* the Act came into force. This indicates that the Transfer of Property Act is *not retrospective in its effect*. Statutes affecting *substantive* (not *procedural*) rights are not retrospective. The Transfer of Property Act, being pre-eminently a codification of *substantive* rights, and *not* merely of *procedural* law, therefore, has no retrospective effect.

As stated earlier, Act does *not* apply to transfers by operation of law (e.g., succession, forfeiture, insolvency, court-sales etc.), but is limited to transfers by act of parties. All the same, some of the general provisions of the Act may be applied even to such transfers, *on principles of justice, equity and good conscience.*

DEFINITIONS (S. 3)

1. Immovable property

The Act has, *not* defined this term. S. 3 merely lays down that immovable property does *not* include standing timber, growing crops or grass.

S. 3(25) of the General Clauses Act defines "immovable property" as follows :

"Immovable property" shall *include* land, benefit to arise out of land, things attached to the earth, or permanently fastened to anything attached to the earth.

A definition of immovable property is also to be found in the Indian Registration Act, where it is provided as follows :

> "Immovable property *includes* land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefits to arise out of land and things attached to earth, but not standing timber, growing crops or grass."

The following have been recognised by Courts as being immovable property :

(a) Right of way
(b) Right to collect rent of immovable property
(c) Right to collect dues from fairs held on a plot of land

(d) Right to ferry
(e) Right of fishery
(f) Office of a hereditary priest of a temple
(g) Hindu widow's life-interest of the income of the husband's property
(h) A mortgagor's right to redeem the mortgage
(i) Right to collect lac from trees
(j) A factory.

The following, however, have been *held* not to be *immovable property*.—*(a)* A right of worship; *(b)* Right of a purchaser to have the lands registered in his name; *(c)* Royalty; *(d)* A machinery which is *not* permanently attached to the earth and which can be shifted from one place to another; *(e)* A decree for the sale of immovable property on a mortgage; *(f)* A right to recover maintenance allowance, even though charged on immovable property; *(g)* Government promissory notes; *(h)* Standing timber; *(i)* Growing crops; and *(j)* Grass.

In an old Madras case, *Holloway J.* explained the distinction between *movable* and *immovable* property thus : "Movability may be defined to be a capacity in a thing of suffering alteration of the relation of place. Immovability is incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable."

The *reason* for providing that standing timber, growing crops and grass are *not* to be regarded as immovable property is to be found in the *purpose* for which such things are sold. When, for instance, timber is sold, it is to be cut and taken away. It will no more have any connection with the land, and is therefore *not* immovable property. If, on the other hand, *A* gives a right to *B* to remove all the trees which may grow in *A's* forest for the next ten years, this is *not* a transfer of movable property. The trees thrive on the land and continue to be dependent on the land for the next ten years, and therefore, it is a transfer of an interest in land, *i.e.*, immovable property.

The term "*standing timber*" refers to trees which are fit for use for building or repairing houses. In order that trees may be considered to be standing timber, they must be trees where wood is suitable for building houses, bridges, ships etc., as for instance, the oak or the elm tree in England and the *neem* or teak tree in India. However, this does *not* mean that *all* such trees are *standing timber*. They would be so *only if* they are in such a state that, if cut, they could be used as timber.

MORTGAGE-DEBT WHETHER IMMOVABLE PROPERTY.—Is a debt secured by mortgage of immovable property to be treated as *movable* or *immovable* property ? Before the amendment of the definition of 'actionable claim' in section 3 of this Act, a *debt secured by a mortgage of immovable property* was *held* to be an *actionable claim;* but *after* the amendment (made in 1900), the definition of an 'actionable claim' expressly *excludes* a debt secured by a mortgage of immovable property, and *such* a debt will *now* be treated as *immovable* property; and can be transferred only in the same way as immovable property is transferred (*viz.*, by a registered instrument): *Perumal* v. *Perumal,* 44 Mad. 196 (200, 201)

MOVABLE PROPERTY.—The Act does not define *movable property* which has been defined in the General Clauses Act as meaning "property of every description *except* immovable property."

2. Instrument

"*Instrument*" means a non-testamentary instrument.

As seen earlier, the Act does *not* deal with testamentary transfers. Therefore, the term "instrument" does *not* cover testamentary instruments like a *will*.

3. Attested (S. 3)

Write a short note on : Attestation.
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"*Attested*", in relation to an instrument, means *attested by two or more witnesses*, each of whom has—

(a) seen the executant sign or affix his mark to the instrument;

or

(a) seen some other person sign the instrument in the presence of, and by the direction of, the executant;

or

(a) received from the executant, a *personal* acknowledgement of his signature or of the signature of such other person;

and

(b) signed the instrument in the presence of the executant.

It is *not necessary* that *all* the witnesses should be present at the same time. No particular *form* of attestation is necessary.

ATTESTATION.—To *attest* means to sign and witness any *fact, viz.*, the fact of *execution* by the executant. The word "attested" in this section means that a person has signed the document by way of testimony of the fact that he saw it *executed*. The party who sees the document executed is, in fact, a *witness* to it; if he subscribes as a witness, he becomes an *attesting witness*. Now, the law does *not* require *all* documents to be attested. Thus, *mortgages* and *gifts* must not only be in *writing*, but must be *attested;* whereas documents effecting sales, *exchanges* and *leases* need *not* be attested.

Thus, for a valid attestation, there must always be *two or more* attesting witnesses, and it is ordinarily necessary that each witness must see the executant sign or affix his mark to the instrument, or see some other person sign the instrument in the presence, and by the direction, of the executant.

The following *three points* about attestation may be noted :

(1) An attesting witness need not witness the actual execution of the deed, inasmuch as he can attest on the acknowledgement of execution by the executant *himself*.

(2) All the attesting witnesses need not attest at the *same* time.

(3) Each witness must attest in the presence of the executant. The word "personal" (in the expression "personal acknowledgement") shows that the acknowledgement must be by the executant *himself*, and not vicariously or through agents. "Personal acknowledgement" does not mean *express acknowledgement*. An acknowledgement may be personal, although conveyed by means of gestures.

There is nothing in the law which lays down that the signatures of an attesting witness must appear in any particular place. Thus, even if the attesting witness signs the document against the signature of the receipt clause, instead of against the signature of the executant, where he has executed the document, it is sufficient and adequate attestation of the document. *(Kaderbhai Ismailji* v. *Fatmabai Golamhusein,* 45 Bom. LR 911)

The Supreme Court has laid down the *essential conditions of a valid attestation* under the Transfer of Property Act, as follows :

(1) Two or more witnesses should have seen the executant sign instrument, *or* should have received from him a personal acknowledgement of his signature.

(2) With a view to attest or to bear witness to this fact, each of them should have signed the instrument in the presence of the executant. It is essential that the witness should have put his signature for the purpose of attesting, *i.e.,* confirming that he has seen the executant sign, or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, for example, to certify that he is a scribe or an identifier or a Registering Officer, he is *not* an attesting witness. (*M.N. Abdul Jabbar* v. *H. Venkata Sastri & Sons,* A.I.R. 1966, SC 1147)

Animo attestandi.—As stated above, no particular form of attestation is prescribed by the Act. However, it is necessary that the attesting witness must sign *animo attestandi, i.e.,* for the purpose of certifying that he saw the executant sign the document. Therefore, if a person puts his signature on a document for any other purpose (e.g. for signifying his approval to the transaction), he is *not* an attesting witness.

Attestation does not estop the attestant.—Attestation of a deed, by itself, does *not* estop a person from denying anything whatsoever, *except* that he *witnessed* the *execution* of the deed. *The mere attestation of a document is no proof that the attesting witness is aware of the contents of the document.* The burden of proving that he had such knowledge, and was a consenting party to the transaction, lies upon the party who relies upon the document. But where an attesting witness was present at the transaction and attested the deed after having heard the contents, it was *held* that he was estopped from challenging the right of the transferee. (*Bhagwat* v. *Gorakh,* A.I.R. 1934 Pat. 93)

Effect of invalid attestation.—If the attestation is invalid, the document *cannot* be enforced in a Court of law. If the deed is a mortgage, it can *neither* operate as a mortgage, *nor* as a charge under S. 100.

ENGLISH LAW.—Under English law, the attesting witness should be

present at the time of execution, and should be able to testify that the deed was *voluntarily* executed by the proper person. This requirement is *not necessary* under Indian law.

4. "Attached to the earth"

The expression "attached to the earth" means—anything

(a) *rooted* in the earth, as in the case of *trees* and shrubs; *or*

(b) *imbedded* in the earth, as in the case of *walls* or *buildings; or*

(c) attached to what is so imbedded, for the *permanent* beneficial enjoyment of that to which it is attached (*e.g., doors, windows* etc.)

"ATTACHED TO THE EARTH."—This expression occurs at two places in the Act, *viz.*, in sections 8 and 108 of the Act. These words are apparently used to denote what are termed '*fixtures*' in England.

FIXTURES.— In England, the law as to fixtures is based on the maxim "*quicquid plantatur solo, solo cedit*" (whatever is planted on the soil belongs to the soil). Regarding fixtures, it may be noted that if a thing is imbedded in the earth (or attached to what is embedded), for the *permanent* beneficial enjoyment of that to which it is attached, then it is a part of the *immovable* property. But, if the attachment is merely for the beneficial enjoyment of the *chattel itself*, then it remains a chattel, *i.e.*, movable property, even though fixed for the time being so that it may be enjoyed.

Thus, where the tenants installed an oil engine as part of a cinema in the leased premises, not with the intention of making a permanent improvement to the premises, but with the object of utilising the machinery for their own profit so long as they had the use of the premises and *selling* it if and when their lease terminated, a security bond pledging the oil engine was *held not* to be a transaction relating to *immovable* property.

5. Actionable Claim

[The whole law as to actionable claim (including its definition) is discussed in Chapter IX.]

6. Notice (S. 3)

A person is said to have *"notice"* of a fact—

(a) when he actually knows that fact (*actual* or *express* notice); *or*

(b) when, but for—

(i) *wilful abstention* from an enquiry or search which he ought to have made, *or*

(ii) *gross negligence,*

he *would* have known it (*constructive* or *implied* notice).

NOTICE : ITS ESSENTIALS.—Notice, to be *binding*, must be *definite* information given by a person *interested* in the thing in respect of which the notice is issued. It is a settled rule that a person is *not* bound to attend to *vague rumours* or statements by strangers, and that a notice, to be binding, must proceed from some person *interested* in the thing. A mere *casual conversation*, in which knowledge of a certain thing is implied, is *not* notice, *unless* the mind of the person has, in some way, been brought to an *intelligent apprehension of the nature of the thing*, so that a reasonable man or any man of ordinary prudence would act upon the information, and would regulate his conduct by it. In other words, the party imputing notice must show that the other party had *knowledge* which would operate upon the mind of any rational man, or a man of business, and make him act with reference to the knowledge he has so acquired. A vague or general report, or the mere existence of suspicious circumstances, is *not* in itself notice of the matter to which it relates.

What is meant by a notice ? Explain the applicability of the Doctrine of Notice under the provisions of the Transfer of Property Act.

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KINDS OF NOTICE.—Notice is of two kinds.—1. Actual (express) notice; and 2. Constructive (implied) notice.

1. A person is said to have actual (or express) notice of a fact when he *actually knows* it. An actual notice, to constitute a binding notice, must be *definite* information given by a person *interested* in the thing in respect of which the notice is issued, and it must be given in the *same* transaction. Thus, as seen above, vague reports or rumours, or suspicion of the existence of a fact will *not* amount to express notice.

2. The legal presumption of knowledge (constructive notice) can arise in the following *five* cases :

Write a short note on : Constructive notice.

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(1) Wilful abstention from an inquiry or search.
(2) Gross negligence.
(3) Registration.
(4) Actual possession.
(5) Notice to agent.

(1) *Wilful abstention* from an inquiry or search, and (2) *Gross negligence*

If a person *would* have known a fact, but for his gross negligence, *or* but for the fact that he had not made an inquiry (or search) which he ought to have made, *he is deemed to have notice of such fact.*

Define "Notice". Explain fully the applicability of the doctrine of notice under the Transfer of Property Act.

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Thus, a person refusing a registered letter sent by post is deemed to have constructive notice of its contents, and he cannot afterwards plead ignorance of its contents, because he had wilfully abstained from receiving it and acquainting himself with its contents. (*Jogendra* v. *Dwarkar*, 15 Cal. 681)

So also, a prudent purchaser should not rest content with merely seeing a mutation entry (in the land records), if it does not cover the whole of the land he is purchasing. He ought to ascertain what are the entries in the Record of Rights, and whether the vendor has got full proprietary rights. If he fails to do so, there is a want of care or wilful abstention from enquiry or search.

Lloyds Bank Ltd. v. *P.E. Guzdar & Co.*, 56 Cal. 686.—*A* deposited title-deeds of his property with Bank *N* to secure an overdraft. *A* then asked for a return of the deeds saying that he wished to sell property and clear the overdraft. The usual practice is for the prospective purchaser to inspect the title-deeds in the office of *N's* solicitors. But, *A* said that he would not get a good price if the purchaser came to know that the bank had the deeds, whereupon the bank returned the deeds to *A*. *A* then borrowed money from Bank *L* on the deposit of the same deeds, falsely representing that there was no encumbrance on the property. In these circumstances, Bank *N* is guilty of gross negligence in surrendering the title-deeds to *A*, and therefore, the mortgage to *L* would have priority over the mortgage to *N*.

Alwar Chetty v. *Jagannatha*, (54 Mad. L.J. 109).—*B* borrowed money from *C*, and by way of an equitable mortgage, deposited with *C*, the sale-deed by which he had purchased his property from *X*. There was a recital in this deed that part of the purchase money had been retained by *B* to meet *X's* debts, which *B* had *not* paid, and of which *C* made no inquiries. Upon these facts, the Court *held* that *C* had constructive notice of *X's* lien for the unpaid purchase money, and that the mortgage was subject to *X's* lien.

As pointed out by Romer J., the real difference between *gross negligence* and *ordinary negligence* is to be found in the extent of the duty to take care imposed in either case. Thus, when a purchaser is told that the title-deeds are with a bank for safe custody, and such a person omits to make inquiries at the bank, it is a case of *gross negligence* which will amount to notice, if it later turns out that the deeds were actually pledged with the bank.

However, notice to a purchaser by his title documents in one transaction will *not* be notice to him in a subsequent and independent transaction in which the instruments containing the recitals are *not necessary* to his title, as illustrated in the following example :

B buys two properties X and Y from *A*, and leaves part of the purchase-money unpaid. He then sells X to *C* and informs *C* of *A's* charge for the unpaid purchase-money. In these circumstances, *C's* purchase of X will be subject to *A's* charge. *But*, if in the following year, *C* also purchases Y from *B*, and *B* does not inform *C* of *A's* charge, the information which *C* received whilst purchasing X will *not* operate as a notice, so as to make his purchase of Y subject to *A's* charge.

(3) How far *registration* amounts to notice (S. 3, Explanation I)

In order that registration of an instrument may operate as a *notice* of its contents, the following *three conditions* must be satisfied :

(1) The instrument must be *compulsorily registrable*.

Registration is notice only where the instrument is *required to be registered*. In cases where registration is *not compulsory*,

but it is only *optional*, the mere fact of registration does *not* constitute notice.

(2) The registration of the document must be completed in the manner prescribed by the Indian Registration Act.

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(3) The instrument (or its memorandum, as the case may be) and the particulars regarding the transaction to which it relates must be *correctly entered* in the registers and indices kept under the Registration Act.

However, registration of a *sub-mortgage* does *not* operate as a notice to the *mortgagor*. Thus, *A* mortgages property to *B*, who creates a sub-mortgage in favour of *C*. *A*, in ignorance of the sub-mortgage, pays the mortgage-debt to *B*. Here, the fact that the sub-mortgage is registered does *not* amount to notice of the sub-mortgage to A, so as to vitiate the payment. (*Sahadev* v. *Shekh Papa*, 1905 29 Bom. 119)

(4) When *actual possession* amounts to notice (S. 3, Explanation II)

Actual possession, *i.e. de facto* possession, of property by another must put the purchaser of such property on his guard. Possession, therefore, amounts to *notice* of *title in another*. It is, therefore, laid down that any person acquiring any immovable property (or any *share* or *interest* in any such property) is *deemed* to have notice of the *title* (if any) of any person who is, for the time *being*, in *actual* possession thereof.

It will be seen that this provision makes the *factum* of possession operate as notice. Therefore, an intending purchaser of a piece of land will be said to have *constructive* notice of a third party's claim to that land when that third party is in *actual possession* thereof. instead of the vendor.

The *reason* behind the rule is that it is considered unreasonable that a person entering into a transaction involving immovable property should be allowed to *ignore* the question of possession, or should *neglect* to inquire into the nature of the possession or the title of the person who is in fact occupying such property, if he is not the person with whom he is dealing.

It should be noted that notice here is *not* extended to possession which is merely of a *constructive* nature, as it would be too much to expect a man to find out every possible person who, though not on the spot, is operating on it from behind. Therefore, possession, to operate as notice, must be *actual*, and *not constructive* possession.

(5) When *notice to agent* amounts to constructive (also called 'Imputed') notice to principal (S. 3, Explanation III)

A person *is deemed* to have had notice of any fact *if his agent acquires notice* thereof :

(i) whilst acting on *his behalf*,

(ii) *in the course* of business,

(iii) to which business, that fact is *material.*

However, if the agent *fraudulently conceals the* facts, the principal *cannot* be charged with notice thereof as against any person who was (i) a *party* to *or* (ii) otherwise *cognizant* of, the fraud.

TO AFFECT THE PRINCIPAL WITH NOTICE, *FIVE CONDITIONS MUST BE FULFILLED, VIZ. :*

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(i) The agent must have received the notice *during* the agency.

(ii) The knowledge must come to him as agent.

(iii) It must be *in the same transaction.*

(iv) It must be *material* to the transaction.

(v) It must not have been *fraudulently withheld* from the principal.

On this principle, it has been *held* that knowledge or information obtained by a *Solicitor* or *Muktear* in any case will bind his client : *Raja Gokul Das* v. *Eastern Mortgage & Agency Co.*, (1905-6) 10 C.W.N. 216.

NOTICE THROUGH AGENT AS CONSTRUCTIVE NOTICE : THE DOCTRINE OF IMPUTED NOTICE.—Explanation III makes *notice to an agent* operate as *constructive* notice to the *principal.* The principle of this rule is based on the maxim *'Qui facit per alium facit per se', i.e.*, he who does by *another,* does by *himself.*

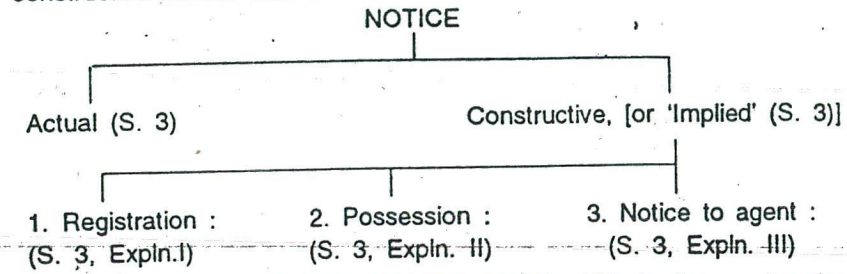
It will be seen that the above rule imposes certain *limitations* on the general rule that the knowledge of the agent is the knowledge of the principal. In the first place, such knowledge should be acquired by the agent while he is acting on *behalf of* the principal and *in the course* of business he is employed in, and the fact brought to his knowledge must be *material* to the business in hand. If the notice is obtained while the agent is *not* acting on *behalf* of the principal, and *not* in *course of the business* in question and the factum of notice is not *material* to the business in hand, his knowledge will *not* bind the principal.

Moreover, the agent's knowledge will *not* operate as knowledge of the principal, where the agent *fraudulently* conceals the fact in question from the principal, and the other side, imputing notice to the principal, acts in *collusion* with the agent or *knows* of the agent's *fraud,* and stands by. The case of *Raja Gokul Das* v. *Eastern Mortgage Agency & Co.*, is a good illustration of the above rule. The Mortgage Agency Company, who were the subsequent mortgagees, employed an articled clerk of a solicitor to complete a mortgage transaction. The articled clerk had previously taken part in proceedings which ought to have put him on an enquiry with respect to the claims of a prior mortgagee, Gokul Das. This was construed as notice to the principal company.

PROBLEM.— Without *B's* authority, *A* purchases, as agent of *B,* immovable property with notice of an encumbrance. Later, *B* pays the price and ratifies the purchase. In these circumstances the law considers *A* to

be *B's* agent *ab initio* and the agent's knowledge is imputed to *B.* (*Coote* v. *Mammon,* 1724 5 Bro.P.C. 355)

Registration, possession and notice to an agent are all different kinds of *constructive* notice. This can be summarised as follows :



LIS PENDENS AS CONSTRUCTIVE NOTICE.—This is discussed under S. 52 in a later Chapter.

2

TRANSFER OF PROPERTY, WHETHER MOVABLE OR IMMOVABLE (Ss. 5-37)

This Chapter is discussed in the following *nine* sub-heads :

A. General : Ss. 5-9.

B. Illegal Restrictions on Certain Alienations : Ss. 10-12 & Ss. 17-18.

C. Transfers for the benefit of Unborn Persons : Ss. 13-14 & S. 18.

D. Transfers to a Class : Ss. 15-16 & S. 22.

E. Vested Interest : Ss. 19-22.

F. Contingent Interest : Ss. 21-24.

G. Conditional Transfers : Ss. 25-34.

H. Election : S. 35.

I. Apportionment : Ss. 36-37.

APPLICATION OF Ss. 5 TO 53A OF THE ACT TO MOHAMMADANS.— S. 2 of the Act provides that the provisions of this and the next Chapter, i.e. Ss. 5 to 53A, shall *not* affect any rule of Mohammadan Law. In other words, if there is a rule of Mohammadan Law which conflicts with a rule contained in these sections, *the rule of Mohammadan Law will prevail.* The *reason for this provision* is that some of the rules of that law differ from the general rules as to transfer of property enacted in these Ss. of the Act. Thus, a Mohammadan may settle property in perpetuity for the benefit of his descedants, *provided* there is an ultimate gift to charity, whereas, under Ss. 13 and 14 of the Transfer of Property Act, property *cannot* be tied up for perpetuity. Such a rule of Mohammadan Law is thus *not* affected by Ss. 13 and 14 of the Act.

A. GENERAL (Ss. 5-9)

"Transfer of Property" defined (S. 5)

The expression "*transfer of property*" is defined to mean any act by which a living person (which includes a *company* or *association* or body of individuals, whether incorporated or not) conveys property, in *present* or in *future,* to—

(i) one or more other *living* persons; or

(ii) himself (as for instance, when a person vests property in trust and himself becomes the sole trustee, *or* when a man transfers property in *one* capacity, to himself in *another* capacity, as when a man makes a transfer in his capacity as an executor, to himself in his private capacity); or

(iii) himself and one or more other living persons.

It may be noted that the word "person" includes, *not only* human beings, *but also* a company or an association or a body of persons, whether incorporated or not.

TRANSFER.—The definition of the term "*transfer*" in S. 5 (above) does *not* require that the person who conveys property should necessarily be the *owner* thereof. All that is required is that there should be an act of conveyance by some living person. Thus, a *deed of appointment* amounts to a *transfer.*

Moreover, the term "*transfer*" does *not* mean conveyance of *all* the interest of the transferor in the property. Thus, a *mortgage* or a lease is treated as a transfer under the Act, although it does not exhaust the *whole interest* which the transferor is capable of passing.

The above definition of "transfer of property" does *not* exclude *property situated outside India* or in territories where the Act does *not* apply. If the transfer is effected at a place where the Act is in force, the rights and liabilities of the parties will be determined by the provisions of the Act, and it is immaterial that the property is situated outside India. (*Prethi Singh* v. *Ganesh*, A.I.R. 1951, All. 462)

KINDS OF TRANSFER.— *The Act contemplates the following kinds of transfers*— (i) Sale, (ii) Mortgage, (iii) Lease, (iv) Exchange, and (v) Gift. *Sale* is an out-and-out transfer of ownership in a property. *Exchange* and *gift* resemble a sale in this respect, but differ from it as regards the consideration for the transfer. In a *sale*, the consideration is a *price* (in money) paid or promised, or partly paid and partly promised. In an *exchange*, the consideration is not money, but another thing. In a *gift*, there is no consideration. *Mortgage* is a transfer of a limited interest in property. *A lease* is the transfer of a right to enjoy immovable property for a certain time or in perpetuity. (All these forms of transfer are discussed in later Chapters.)

LIVING PERSON.—The expression "living person" in the section includes *corporated* and *incorporated* companies, *registered* and *unregistered* associations and partnership firms. So, all these bodies can effect transfer of property in their business collectively or in firm names. An *idol* is a juristic person, capable of owning property, but is not a *living person,* and therefore, a dedication of property to an idol is *not* a transfer, and need not be made in writing or by a registered instrument under S. 123 of the Act.

PROPERTY.—The word "property" has *not* been defined in the Act, but has been used in its widest and most generic sense. It includes an actionable claim and a right to a reconveyance of land, but *not* a power of appointment.

TRANSFER OF FUTURE PROPERTY, HOW FAR VALID.— As pointed out by the Supreme Court, the words "in present or in future" in S. 5 qualify the word "conveys", and *not* the word "property". (*Jugalkishore* v. *Raw Cotton Co.* (1955), S.C.R. 1369)

The expression "property of any kind" does *not* include *future*, non-

existent property. Therefore, a transfer of future property is not, as such, valid in India. But a conveyance of such property may be valid as a contract to assign, and when the property comes into existence, equity fastens upon the property, and the contract to assign becomes a complete assignment. (*Purna* v. *Birma*, I.L.R. (1939) 2 Cal. 341)

It will be noticed that the words used in Section 5 are "in present or in future". If property is to come into existence *in future*, this can only be a contract to transfer such property when it does come into existence, and such a contract will, of course, have to be supported by consideration. If the transfer is for consideration, equity will allow specific performance of the agreement. But, if the transfer is gratuitous (i.e., a gift) there will be no enforceable contract. Thus, a *gift of future property is void*. This is known as the *rule* in *Holroyd* v. *Marshall*.

Whether certain transactions amount to a "*transfer of property*" for the purposes of the Act will now be examined.

PARTITION.—There was a *conflict of judicial decisions* on whether a partition amounts to a "transfer" as defined in S. 5.

In *Soniram* v. *Dwarkabai* (53 B.L.R. 325), *the Bombay High Court held* that a partition amounted to a *transfer*, inasmuch as it involved a conveyance by the co-sharers of their respective right, title and interest in the property. The same view was reiterated by the *Bombay High Court* in two later decisions, *Jagannath Puri* v. *Godabai* (A.I.R. 1968 Bom. 25) and *Dahyabhai* v. *State of Bombay* (62 B.L.R. 348).

The *Lahore High Court* has also accepted the view that a partition is a "transfer" within the meaning of S. 5 of the Act. (*Sadhu Ram* v. *Pirthi Singh*. A.I.R. 1936 Lah. 220)

The *Kerala High Court* had earlier *held* the view that a partition amounted to a transfer. However, a Full Bench of that Court overruled the earlier decisions, and *held* that a partition did *not* amount to a *transfer* as defined in S. 5 of the Act. (*Panchali* v. *Panniyodan Manri*, A.I.R. 1963 Ker. 66)

The *Madras High Court* has also *held* that a partition is *not* a transfer either for the purposes of S. 53A of the Act (*Radhakrishnayya* v. *Sarasamma*, — I.L.R. 1951 Mad. 607) or within the meaning of 16(3)(a)(iv) of the Income-tax Act, 1922. (*Stremann* v. *C.I.T.*, A.I.R. 1962 Mad. 26)

This question then came up before the *Supreme Court* (though not directly under S. 5 of the Act), and the Supreme Court has, in *C.I.T.* v. *Keshavlal*, (A.I.R. 1965 S.C. 866) expressed its approval of the two decisions of the Madras High Court, cited above, to the effect that *in a partition, there is no transfer of assets.*

COMPROMISE.— The *Bombay High Court* and the *Nagpur High Court* have *held* that a compromise of a doubtful claim does *not* amount to a transfer.

However, the *Madras High Court* has *held* (in *Sonepalli Mutyaly* v. *Veerayya*, A.I.R. 1946 Mad. 452) that where one of the parties to a settlement gives up a claim to receive a certain sum of money from the other, in consideration of the latter's giving up the right to certain property claimed by him, it would amount to a transfer.

Following this decision, the *High Court of Madhya Pradesh* has *held*, on similar facts, that a compromise arrangement between the parties amounted to a transfer. However, the Court rightly added that this is a question of fact to be answered with due regard to the facts and circumstances of each case. (*Hussiaa Banu* v. *Shivnarayan*, A.I.R. 1968 M.P. 307)

FAMILY ARRANGEMENT.— In *Sudhu Madho Das* v. *Pandit Mukand Ram*, (1955) 2 S.C.R 22, the Supreme Court has observed that, in the case of a family arrangement, there is an antecedent title of some sort in the parties, and the agreement acknowledges and defines what that title is, each party relinquishing all claims to a property other than that falling to his share and recognising the right of the others as they had previously asserted it, to the portions allotted to them respectively. Therefore, a family arrangement is *not a transfer.*

RELINQUISHMENT.— A relinquishment necessarily involves the *extinguishment of a right*, and therefore, it cannot amount to a *transfer* within the meaning of S. 5 of the Act, as there is nothing left to transfer. (*Provident Investment Co.* v. *C.I.T.*, A.I.R. 1954 Bom. 95). Thus, a relinquishment by a reversioner of his reversionary interest does *not* amount to a *transfer.* (*Barati Lal* v. *Salik Ram*, 38 All. 107)

However, if the person in whose favour the "release" is executed, gets certain rights by virtue of such release, the transaction *may* amount to a "transfer". (*Muniappa Pillai* v. *Periasami*, (1975) I.M.L.J. 236)

SURRENDER.— The *Calcutta High Court* has *held* that the surrender of a lease is not a transfer within the meaning of S. 5 of the Act, as it is the merger of a lesser estate with a greater one. (*Makhanlal* v. *Nagendranath*, 60 Cal. 379)

On the question as to whether surrender of a life-estate by a Hindu widow amounts to a "transfer", the *High Court of Bombay and Allahabad* have *held* that it does. However, the Supreme Court has now *held* that such a surrender is *not* a *transfer*, since it amounts only to an act to self-effacement by the widow, and accelerates the succession to her husband's estate. *(Natvarlal* v. *Dadubhai*, 56 B.L.R. 447)

EASEMENT.— The *Calcutta High Court* has *held* that the creation of an easement does *not* amount to a transfer. (*Sital Chandra* v. *Delanney*, 20 C.W.N. 1158). This view is the same as taken by the *Patna High Court* in *Traders Miners Ltd.* v. *Dhirendra* (23 Pat. 115).

CHARGE.— A charge on property is *not a "transfer"* within the meaning of S. 5 of the Act, as the only right created by such a charge is the right to payment out of the property subject to the charge. (*Gobinda* v. *Dwarkanath*, 35 Cal. 837)

WILL.— A will does not fall within the definition of *"transfer"*, as a will operates from the death of the person making it, whereas the definition contemplates a transfer by a *"living person"*.

WHAT PROPERTY *CAN* AND WHAT PROPERTY *CANNOT* BE TRANSFERRED

(S. 6)

Analyse the concept of property. Discuss fully the types of property that cannot be transferred.
B.U. Oct. 99

S. 6 of the Act enumerates *nine kinds of property which cannot be transferred.* They form *exceptions* to the *general rule that property of any kind may be transferred.*

Property of *any* kind may be transferred *except* as otherwise provided by—(i) this Act [Clauses 1 to 9 below] or by (ii) any other law for the time being in force.

The following *nine* rights *or* interests *cannot*, however, be transferred :

1. (i) The *chance of an heir–apparent* succeeding to an estate (called *spes successionis, i.e.*, hope of succession);
   (ii) the chance of a relation obtaining a legacy on the death of a kinsman (*spes successionis*); *or*
   (iii) any other mere possibility of a like nature, *cannot* be transferred.

Define "immovable property". Can property of any kind be transferred?
B.U. Oct. 96

SPES SUCCESSIONIS.— This clause excludes the *chance* of an heir-apparent succeeding to an estate from the category of *transferable* property. The technical expression for such chance is *'spes successionis'*, meaning 'hope of succession'. Now, such a chance is *not property* as contemplated by the Act. If, therefore, such a chance or expectancy is transferred, the transfer is *wholly void.*

Write a short note on : Spes succesionis.
B.U. Nov. 95
June 96
Oct. 98

The right of a presumptive reversionary heir under the Hindu Law, or the bare chance of surviving another and succeeding to his inheritance, is just a *spes successionis* (hope of succession) or expectancy. "A Hindu reversioner has', observed their Lordships of the Privy Council, "no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then, it is a mere *spes successionis" — Amrit Narayan* v. *Gaya Singh,* 45 Cal. 590 (P.C.).

A good *illustration* of a "mere possibility of a like nature" is the *next cast in a fisherman's net.* No one can guarantee that any fish will be caught, and the fisherman himself has no interest in the fish until they are caught in his net.

CAN A RIGHT TO RECEIVE FUTURE OFFERINGS AT A TEMPLE BE ASSIGNED ?— There is a conflict of decisions on whether a right to receive future offerings at a temple is a "mere possibility". Some cases have held that this is a mere possibility which cannot be transferred, while others have *held* that the right is not uncertain and variable, and hence, may lawfully be transferred.

The *Calcutta High Court* has *held* that if a *pujari* transfers the right

Analyse the concept of "property". Enumerate fully the types of property that cannot be transferred.

B.U. Apr. 97

of receiving the offerings that *might* be made in a temple on future holy days, such a transfer will *not* be effective, because the chance that future worshippers will give such offerings is a *mere possibility* within the meaning of this clause. However, the *Allahabad High Court* has taken an opposite view on the ground that "the fact that offerings, large or small, are bound to be made is a certainty, and not a mere possibility." It is submitted, with respect, that there appears to be no basis for the observation that offerings are bound to be made, and the view of the Allahabad High Court does not, therefore, seem to be very sound.

The Allahabad High Court has *held* that the future wages of a servant, before they are earned, are a *mere expectancy,* and therefore, *cannot* be attached or sold. (*Devi Prasad* v. *Lewis,* (1909) 31 All. 304)

"Property of any kind can be transferred." Discuss fully the aforesaid statement, commenting on the exceptions, if any.

P.U. Apr. 96

ENGLISH LAW.— Under the English Law also, an expectancy *cannot* be assigned. But under that law, such an assignment is not expressly prohibited, and if made for value, it will operate in a contract to assign when the expectancy becomes an interest.

PROBLEM.— *A* has a wife *B*, and a daughter *C*. In consideration of Rs. 500 paid to her by *A*, *C* executes a release of her right to share in the inheritance to *A's* property. *A* dies, but *C* claims her share in the inheritance. *B* resists the claim, and sets up as a defence, the release signed by *C*. Will *B* succeed ?

Ans.— *B* will *not* succeed, as the release is no defence, as it is a transfer of a *spes successionis*, and *C* is entitled to her share in *A's* property. However, *C* is bound to bring into account the five hundred rupees received by her from her father, *A*. (*Samsuddin* v. *Abdul Husein.* 1906 31 Bom. 165)

2. *A mere right of re-entry* for breach of a condition subsequent *cannot* be transferred to any one, except the *owner* of the property affected thereby.

The right of re-entry is a right which the lessor has against the lessee for breach of an express condition which provides that on its breach, the lessor may re-enter. This is the right which a transferor reserves to himself after having parted with the whole estate. Such a right *cannot* be transferred to any one *except the owner.*

3. *An easement* apart from the dominant heritage, *cannot* be transferred.

Section 4 of the Easements Act, 1882, defines an easement as a right which the owner or occupier of a certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and to continue to prevent something being done, in or upon or in respect of, certain other land which is not his own. *There is no such thing as an easement in gross,* which can exist in *its own right,* and not as an *appendage* to property for whose benefit it exists. It follows, therefore, that an easement *cannot* be transferred by itself, unless it accompanies the transfer of the property to which it is attached.

An easement necessarily involves the existence of a *dominant* heritage and a *servient* heritage. It is a right over one property for the benefit of another property, and therefore, *it cannot exist apart from the property to which it is attached.* It is, of course, one of the legal incidents of the property to which it is attached, and will pass on to the transferee, if the property is transferred. But it is no property *by itself.*

4. An *interest* in the property *restricted* in its enjoyment to the *owner personally* [*e.g.*, religious offices, services tenures, an inalienable *raj, etc.*] *cannot* also be transferred.

Most of the cases falling under this clause deal with attempted transfers of maintenance rights, service tenure rights, pre-emption rights etc., all of which are restricted to the person to whom such rights belong. Thus, the right to pre-emption *cannot* be transferred, because strangers should *not* be allowed to be introduced as co-sharers in the property, and because such a right is a personal privilege given to the pre-emptor. Similarly, a trustee cannot alienate his office, because it is based on personal confidence.

5. A right to *future maintenance*, in whatsoever manner arising, secured or determined, *cannot* be transferred.

A right to *future maintenance is altogether inalienable.* A right to receive maintenance is a *personal* right, although any particular property or the income thereof may be charged with it. It is in accordance with public policy that those rights which are generally created for the maintenance or personal enjoyment of a qualified owner (e.g., a Hindu female) ought *not* to be alienable.

However, in some old cases, it has been *held* that if the amount of maintenance is fixed by an agreement or by a decree, it can be assigned [see 5 Bom. 99, 38 Cal. 13 (22)]. Although an agreement or a decree would make such right definite, it is nevertheless a right created for the personal benefit of the qualified owner, and is now not alienable. It will be seen that Sec. 60 of the Civil Procedure Code, which protects a right of maintenance from attachment and sale, does *not* make any exception in the case of maintenance fixed by agreement or decree.

The above reasoning, however, does not apply to *arrears* of maintenance which have accrued. Therefore, *arrears of* maintenance are excluded from this clause, which is restricted to *future* maintenance only.

6. A *mere right to sue* is not capable of being transferred.

Claims for— (i) *past mesne* profits, (ii) for damages for breach of a contract, *after* breach, (iii) for suing an agent for accounts, and (iv) for pre-emption, are all *"mere rights to sue", and cannot be transferred.* Thus, the *Calcutta High Court* has *held* that a bare right to sue for *mesne profits* cannot be assigned, as mesne profits are unliquidated damages, and not a debt. (*Durga Chunder* v. *Kailas Chunder*, 1897 2 Cal. W.N. 43)

But where the right to sue has *merged in a decree,* the right *under* the *decree* is assignable. Thus, a right to mesne profits under a decree is assignable.

EXAMPLES.— (1) *B* publishes a libel of *A*. Here, *A* has a right in law to sue *B*, and he assigns this right to recover damages to *C*. This assignment is invalid, as it is an assignment of mere right to sue, and *C* will not be able to recover damages from *B*.

(2) *A* has maliciously procured the attachment of *B's* property. *B* assigns his right to recover damages to *C*. The assignment is invalid, as it is one of a mere right to sue.

(3) *X* agrees to sell to *Y*, a certain quantity of gunny bags deliverable on a future day. The contract is not of a personal character. Before the date of delivery, *Y* assigns his beneficial interest in the contract to *Z*. Thereafter, *X* commits a breach of the contract. Here *Z* can sue *X* for damages for not delivering the gunny bags, because this is not an assignment of a mere right to sue, but of an actionable claim, and is therefore valid.

PROBLEMS.— 1. *A* is the owner of land of which *B* is wrongfully in possession. *A* is entitled to mesne profits from *B*. *A* transfers his right to *C* to recover the same from *B*. Will *C* succeed ?

Ans.— *C* will *not* succeed as a right to past mesne profits, being a mere right to sue, is *not* transferable.

2. *A* assigns to *B*, his right to sue *A's* tenant *C*, for recovering arrears of rent due to *A*. If *B* files the suit, will he succeed against *C* ?

Ans.— No. As a mere right to sue *cannot* be transferred under the Act, *B's* suit against *C* will *not* succeed.

7. A *public* office, or the *salary* of a *public* officer, whether before or after it has become payable, *cannot* be transferred.

Public policy frowns on the transfer of the salary of a public officer, for the salary is given for upholding the dignity of the office and the proper performance of its duties. Such salary cannot, therefore, be transferred.

As observed in *Corporation of Liverpool* v. *Wright*, (28 L.J. (Ch.) 868)—

"Where the law assigns fees to any office, it is for the purpose of upholding the dignity and performing properly the duties of that office, and the policy of the law will not allow the Officer to bargain away those fees to the appointor or anyone else."

8. *Stipends* allowed to military, naval, air-force and civil *pensioners* of Government, as well as *political pensions, cannot* also be transferred.

Thus, civil and military pensions are not transferable, and they are also exempt from attachment under the Civil Procedure Code. Similar provisions are to be found in the Pensions Act, 1871.

9. *Lastly,* no transfer can be made—

(i) which is *opposed to the nature of the interest affected thereby,* [*e.g.*, transfer of a service *inam* by the *inamdar* or transfer of a *res nullius,* like 'air', 'water' etc.]; *or*

(ii) for an *unlawful* object or consideration within the meaning of S. 23, Indian Contract Act; or

(iii) to a person who is legally *disqualified* to be a transferee. [See S. 136, which forbids a judge, a legal practitioner or an officer connected with any Court of Justice from purchasing an actionable claim.]

As seen above, an interest restricted to an individual personally [described in cl. (4)] is such an interest that cannot possibly be transferred. So also, there are other things, which from their very nature are *not* transferable. Thus, things commonly called *res communes*, i.e., things of which no one in particular is the owner, and which all men may use are not property, and therefore cannot be transferred. *Res nullius* (things belonging to nobody), such as air and water, being incapable to appropriation, are excluded from the category of transferable property. *Res extra commercium* (things *thrown out of commerce*), *e.g.*, property dedicated to a deity, though originally ranking with transferable property, also cannot be transferred.

Persons competent to transfer (S. 7)

Every person competent to contract [under S. 11, Indian Contract Act] and *entitled* to transferable property, or *authorised* to dispose of transferable property which is not his own, is competent to transfer such property, either *wholly* or *partly*, and either *absolutely* or *conditionally.*

TRANSFER IN FAVOUR OF MINOR OR LUNATIC.—S. 7 lays down as to *who* is competent to *transfer.* It does not say who is competent to be a *transferee.* It may be noted that under S. 7, the *transferor* should be competent to contract. Thus, the disability which attends the making of a transfer does *not* attach to the *acceptance* thereof. All that is said in clause 9 of Section 6 (above) is that a transfer *cannot* be made to a person legally disqualified to be a *transferee.* A minor (or lunatic) being incompetent to contract, cannot be a *transferor* at all. But there is nothing in the Transfer of Property Act to nullify a transfer to a minor (or a lunatic). Thus, a minor can be—(i) a *mortgagee, — provided* there is no covenant for him to perform; (ii) a *purchaser, — provided* the sale does not impose any obligation upon him; (iii) *a donee* of a gift, — provided the gift is not onerous.

Write a short note on : Persons competent to transfer property.
B.U. Oct. 95

It may be noted that the Section also covers persons who may *not* be *entitled* to the property, but who are authorised to dispose of such property, as for instance, a *Karta* of a Hindu joint family, a guardian, an executor or administrator, a trustee, and so on.

It may also be noted that Sec. 136 of the Act prescribes that certain officers connected with Courts of Justice cannot trade in actionable claims.

Persons who *cannot* assign their interest (S. 6)

S. 6 enumerates the *three types of persons* who *cannot* assign their interest. Thus,—

(i) A *tenant having* an *untransferable right of occupancy cannot* assign his interest as such tenant.

(ii) The *farmer* of an estate in respect of which *default* has been made in paying revenue, *cannot* assign his interest as such farmer.

(iii) The lessee of an estate under the management of a *Court of Wards cannot* assign his interest as such lessee.

Explain : "Transfer passes all the interest of the transferor to the transferee under the Transfer of Property Act."
B.U. June 96
Oct. 97

Operation of transfer (Effects of transfer) (S. 8)

Section 8 of the Act deals with the *effects* of a transfer. It lays down that unless a different intention is expressed or necessarily implied, a *transfer* of property *passes* forthwith to the transferee *all* the *interest* which the transferor is *then* capable of passing in the property and in the legal *incidents* thereof.

Thus, under S. 8 :

Where property transferred is—	Legal incidents (of the property) which pass to the transferee are—
1. Land—	1. (i) The *easements* annexed thereto; (ii) the *rent* and *profits* accruing *after* the transfer; *and* (iii) all things *attached* to the earth.
2. Machinery attached to the earth—	2. The movable parts thereof.
3. House—	3. (i) The *easements* annexed thereto; (ii) the *rents* thereof accruing *after* the transfer; *and* (iii) the *locks, keys, bars, doors, windows,* and all other things provided for *permanent* use therewith.
4. Money or other property yielding income—	4. The *interest* (or income thereof) accruing *after* the transfer takes effect.

Write a short note on : Operation of transfer.
P.U. Apr. 96

5. Debt or other actionable claim—	5. The *securities* therefor (*except* where they are also for other debts or claims *not* transferred to the transferee) but, *not arrears of interest* accrued before the transfer.

"ACCESSORY FOLLOWS THE PRINCIPAL".—Section 8 is a legislative recognition of the legal maxim *"accessory follows the principal"*. It signifies that when a man acquires property, he becomes the owner also of *all that appertains* to it as *accessory*. As the section does not apply to transfers by operation of law, the rules laid down in this section do *not* apply to Court sales.

To take a simple illustration, pictures put on the wall will *not* be regarded as part of the house, the *reason* being that they can be easily removed. On the other hand, a window or a door, which has been fitted into the wall, *cannot* be taken out easily, and will therefore form part of the house.

With regard to rights to underground strata (as for example, mines and minerals), everything will depend on the terms of the transfer-deed. Although an absolute sale would also pass such things to the transferee, in the case of a lease or a mortgage, in the absence of an express provision, the right to work minerals, will *not* pass to the lessee or the mortgagee.

Oral transfer (S. 9)

A transfer of property may be effected *without writing*, where writing is not *expressly* required by law.

There are some instruments which are required to be in *writing*, though they may *not* be registered; whereas there are some instruments which *must* be in writing, and *must* also be registered.

Writing is necessary in the case of the following instruments :

(1) Sale of immovable property of the value of Rs.100 or upwards—Sec. 54.
(2) Sale of a reversion or other intangible thing—Sec. 54.
(3) Simple mortgage, irrespective of the amount secured—Sec. 59.
(4) All other mortgages for securing Rs.100 or more.
(5) Leases of immovable property,—
  (i) from year to year; *or*
  (ii) for any term exceeding one year; *or*
  (iii) reserving a yearly rent.—Sec. 107.
(6) Exchange—Sec. 118.

(7) Gift of immovable property—Sec. 123.

(8) Transfer of an actionable claim—Sec. 130.

(9) Notice of transfer of actionable claim—Sec. 131.

The following transfers under the Act must be effected by a registered instrument, viz.—

(i) Sale of a tangible immovable property of the value of Rs.100 or more: S. 54.

(ii) Sale of a reversion or an intangible thing : S. 54.

(iii) Mortgage (other than a mortgage by deposit of title-deeds), where the principal money secured is Rs.100 or more: S. 59.

(iv) Charge created by act of parties.

(v) A lease of immovable property,—

(i) from year to year; *or*

(ii) for any term exceeding one year; *or*

(iii) reserving a yearly rent: S. 107.

(vi) Gift of immovable property: S. 123.

ESSENTIALS OF A VALID TRANSFER OF PROPERTY.—

The following may thus be said to be *the eight essentials of valid transfer of property* :

1. The transfer must be between two or more *living* persons : S. 5. Therefore, the transferor and the transferee cannot be exactly identical.
2. The property transferred must be *transferable* : S. 6.
3. The transfer must not be—
   (i) opposed to the *nature of* the interest affected thereby : S. 6(h)(1).
   (ii) for an *unlawful object or consideration* : S. 6.
   (iii) to a person legally disqualified to be a transferee : S. 6.
4. The transferor must be (i) competent to contract *and* entitled to transferable property, *or* (ii) authorised to dispose of transferable property not his own : S. 7.
5. The transfer must be made in the mode prescribed by the Act : S. 9. Thus, all necessary formalities (like attestation, registration etc.) must be complied with.
6. If, on a transfer, an interest is created in favour of an unborn person, subject to a prior interest created by the same transfer, it must exhaust the *whole of the remaining interest* of the transferor : S. 13. (This is discussed below.)
7. The transfer must not offend the *rule against perpetuity* : S. 14. (This is also discussed below.)
8. If the transfer is conditional, the condition must not be illegal, impossible, immoral or opposed to public policy : S. 25. (This is discussed later in this Chapter.)

B. ILLEGAL RESTRICTIONS ON CERTAIN ALIENATIONS (Ss. 10-12 and 17-18)

Ss. 10, 11, 12, 17 and 18 declare as void certain restrictions on transfer of property. The cumulative effect of these Sections is that the following *four restrictions* are *void*, and therefore, of no effect.

1. Condition restraining alienation (S. 10)

The power of alienation is a legal incident of property. In the words of *Dart*, "a right of alienation is incidental to, and inseparable from, the beneficial ownership of property." Consequently, any restriction on such power or right must naturally be repugnant to the every notions of property, and therefore, not allowed by the law.

Section 10, therefore, provides that if any property is transferred subject to a condition or limitation which absolutely restrains the transferee (or any person claiming under him) from *parting with or disposing of* his interest in the property,—such *condition* or *limitation* (and *not* the *transfer* itself) is *void*, except as stated below.

Write an explanatory note on : Condition restraining alienation.
B.U. Oct. 95
Oct. 95

Such a condition is, however, *valid* in the following two cases, *viz.*—

(a) In the case of a *lease*, where the condition is for the *benefit of the lessor* (or those claiming under him).

(b) A transfer *to*, or for the benefit *of, a woman* (not being a Hindu, Muhammadan or Buddhist), which provides that she would not have the power, *during her marriage*, to transfer or charge the same or her beneficial interest therein.

SCOPE.—Cls. (a) and (b) are *exceptions* to the general rule declared in S. 10. Now, a restraint *absolutely* prohibiting the transferee from alienating the property is *void*. Thus, if *A* gives property to *B* and his heirs, and adds a condition that if the property is alienated, it should revert back to *A*, such a condition is void.

But, when a restrictive condition does not amount to an *absolute* prohibition under this section, it may be *upheld*. In other words, though one cannot *absolutely* restrain a transferee from alienating his interest, still one can impose *partial* restraints on his power of free disposition, *provided* one does not thereby materially interfere with his freedom of enjoying his property according to his will.

For example, *A* sells a piece of immovable property to *B*. One of the conditions of the sale is that should *B* wish to part with the property, he would sell it to *A*. The question then arises as to whether *B* would be entitled to sell the property, to *C* without any reference to *A* ? Now, it will be seen that this is merely a covenant to secure *A* the right of

pre-emption, *i.e.*, to give him an opportunity for buying the property, and is therefore, *valid*, as it does *not* amount to an absolute prohibition. Therefore, *B* should first make a reference to *A*. But, such a covenant cannot have effect for an indefinite period. If the covenant for pre-emption prejudicially affects the power of free disposal, it would be *void*.

In *Rosher* v. *Rosher*, (26 Ch. *D*. 801), where a condition was imposed on the transferee that he should first offer the property to the transferor's wife at a *fixed price*, much below the real market price, the condition was *held* to constitute an *absolute restraint on alienation*.

Similarly, a stipulation in a sale deed that the vendee could sell back the property to the vendor only, and to no one else, is more than a mere partial restraint, and therefore, invalid. But a condition that the purchaser should *not* alienate the property in favour of a particular person, who is the vendor's enemy, is only a *partial restraint*, and may, therefore, be allowed.

PROBLEM.—*A* devised his estate to his son with a *proviso* that if the son should desire to sell the estate or any part of it during the life-time of his wife, she would have the option to purchase the same at Rs.3,000, and the same should be offered to her at such price. On the death of the testator, when the market value of the property was at least Rs.15,000, the question arose whether the son was entitled to sell, lease or mortgage the property without offering it to the widow. Advise the son.

Ans.—The condition is *void*. *Rosher* v. *Rosher*, (1884) 26 Ch. 801 followed in Re *Cackerill*, (1929) 2 Ch. 131. [But in *Ratanlal* v. *Ramanujadas*, (1944) AIR Nag. 187 the Napgur High Court *held* the condition to be a partial restraint.]

This section is based on the *principle* that a right of transfer is incidental to, and inseparable from, the beneficial ownership of property.

Under this Section, *absolute* restraints are declared void; however, *partial* restraints may be allowed. In one English case, *Jessel M.R.* observed : "You may restrict alienation in many ways:....you may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time."

Thus, in *Mohammad Raza* v. *Abbas Bandi*, the Privy Council *held* that if the only condition was one of restraining the transferee from transferring the property outside the family, it would *not* be an *absolute* restraint, but only a *partial* one.

Needless to say, if an apparently partial restraint *in fact* amounts to an absolute restriction (as in *Rosher* v. *Rosher* above), it will be *invalid*.

PROBLEM.—*A*, *B*, *C* and *D* effected a partition of joint family property, and agreed that if any one of them should have no issue, he would have no power to sell his share, but should leave it for the other sharers. *A* sold his share and died without issue. Can *B*, *C* and *D* sue to recover the share ?

Ans.—*B*, *C* and *D cannot* sue to recover the share, as the condition is *void*, as it amounts to an absolute restraint within the meaning of S. 10. (*Venkatasammanna Brammanna*, 1986 4 Mad. H.C. 345)

EXCEPTIONS.—There are *two exceptions* to the above general rule. The *first exception* is in favour of a lessor, when the condition is for his (lessor's) benefit *or* for the benefit of those claiming under him. The lessor can always fetter his lessee's liberty of alienation. The *logical reason* for this exception is that a landlord should be free to choose the person who shall be in possession of his land. *X*, the landlord, may have leased his land to *Y*, the tenant, because he has confidence in *Y*. He may not have the same confidence in *Y's* friend, *Z*. Therefore, as long as *X* is the owner of the land, he should be allowed to pick and choose his own tenants.

The *second exception* is for the benefit of a married woman, not being a Hindu, Muhammadan or Buddhist, so that she shall have no power, during her marriage, to transfer or charge the same or her beneficial interest therein. So, it is quite possible to restrain a transferee, who is a Parsi, Jew or Christian married woman, from transferring her interest during her coverture.

The second exception embodies the doctrine of *restraint in anticipation*, and is borrowed from *English Law*, where such a restraint is recognised to protect a woman against her husband. *In India*, it is intended that this exception should apply only to those communities which follow the English Law. Therefore, Hindus, Muhammedans and Buddhists are not covered by this exception.

Amiruddaula v. *Nateri*, 6 M.H.C.R. 356.—A Muhammedan father, during his son's minority, gave certain property to him, and on delivery of possession, the son signed a document that he would not alienate the property. The Court *held* that, by the Muhammadan Law, as well as by the general principles of law, such a restriction on alienation, especially *after* the gift had become complete, is absolutely *void*.

2. Restriction on free enjoyment of property (S. 11)

Section 10 (discussed above) invalidates any *general* restraint against alienation. Section 11 invalidates restrictions imposed on the free enjoyment of the interest created by the transfer *after* it has become *absolute*, and lays down that when, on a transfer of property, an interest in the property is created *absolutely* in favour of any person, but the *terms* direct that such interest is to be *applied* or *enjoyed* by him *in a particular manner*,—the transferee is entitled to receive and dispose of the *property as if there was no such direction*.

However, there is *one exception* to the above rule. If any such direction has been made *in respect* of one piece of immovable property *for the purpose of securing the beneficial enjoyment of another piece of such property*, such a direction *can* be enforced.

SCOPE.—Section 10 applies to *all transfers*, whereas section 11 will *not* apply *unless* the transfer is *absolute*, and the condition or restriction

is imposed by the *terms of the transfer.* Thus, where a man transfers his land to another, reserving a right of residence to himself, and the *terms of the transfer* enjoin on the transferee that he shall not have the right to drive away the transferor—will the condition be valid ? Yes, it will be, because the transfer is *not* made *absolutely.*

Again, where the property transferred is already under a charge, which is but a condition, section 11 will *not* apply, as in that case, the condition is *not imposed by the terms of the transfer.* If an absolute interest is created by a deed of transfer, it takes effect, notwithstanding subsequent words in the deed restricting the right of full ownership. This, however, does not mean that the transferor *cannot* reserve some right in his own favour during his lifetime. It is to be remembered that under Sec. 10, an *absolute* restraint is void, whereas under Sec. 11, only a *restriction repugnant to the interest created by the transfer is void.*

It follows that an agreement *not* to partition property will also be hit by S. 11. A right of partition is a natural incident of joint property, and any condition purporting to deprive a joint-owner of this right would be void. Thus, in one case decided by the Bombay High Court, it was *held* that a direction *not* to partition property until all the sons attained majority would be *invalid,* even if, the restriction is for a limited time.

EXCEPTION.—The exception to the general rule (given above), allows a transferor to give a direction to the transferee that for the beneficial enjoyment by the transferor of another property, the transferee is to enjoy the transferred property in a particular manner. Such a direction would be *valid* and *enforceable.*

Thus, if *A* makes an absolute gift of a house to *B,* and directs that *B* shall *not* raise it higher, so as to obstruct the passage of light and air to *A's adjoining house,* the direction will be *valid.*

Again, where *A* grants a lease of his *zamindari* to *B,* reserving to himself all the minerals and a few plots of land in the middle of his *zamindari* for working the mines and storing minerals, and directs *B* to allow passage to his miners to and from the reserved plots, the direction is binding.

Similarly, an owner of two adjoining houses with a common drainage route can, while selling one of them, impose a condition on the transferee that he must keep his portion of the drain in proper order, because the direction is "in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property." A condition imposing on the lessee the obligation to clear up jungles, and erect houses, may, on the same ground, be justified.

The most common instance of the exception is to be found in those cases where a person who owns a house and an adjoining land, sells the land and enters into a covenant with the purchaser that the latter shall keep a portion of the transferred land vacant and free from buildings, so as *not* to obstruct the air and light of the vendor's house. Such a covenant, being one intended for the *beneficial enjoyment* of the vendor's house, is enforceable as against the purchaser.

Jafri Begum v. *Seyd Ali*, 28 I.A. 111.—An arbitrator made an award between two sisters giving each a half-share of partible estate and appointing the husband of one sister the manager, but directed that neither sister would have a right to claim partition. One sister died and her son sued for partition.

The Court *held* that the arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of the sister's son's personal law, in the absence of a special custom prevailing in his family. He had no power to make property which was divisible by law, indivisible forever.

ILLUSTRATIONS.—(1) *X* makes an absolute gift of a house to *Y*, with a direction that *Y* shall reside in it. Here, the gift is absolute and the direction is *void*; *Y* may or may not live in the house.

(2) *A* makes a gift of a house to *B* and stipulates that if *B* does not reside in it, the gift will be forfeited. This condition is *valid*, because the gift is *not* an absolute gift.

(3) *A* conveys an absolute interest in a farm to *B*, by way of a sale. The sale deed contains a direction that *B* shall not cut down the trees. The direction is *invalid*, and *B can* cut the trees.

(4) *A* assigns a *life-interest* in a farm to *B* for her maintenance. The deed contains a direction that *B* shall not cut down the trees. Here, the direction is *valid*, *as there is no absolute transfer* in favour of *B*.

3. Condition making interest determinable on insolvency or attempted alienation (S. 12)

Under S. 12, when property is transferred, it is *not* open to the transferor to provide that if the transferee (i) becomes insolvent, or (ii) endeavours to transfer or dispose of such property, — his (i.e. the transferee's) interest therein would cease. Such a condition or limitation in a transfer is, therefore, *void*.

However, this rule does *not* apply to a *lease*, if such a condition is for the benefit of *either* the lessor himself *or* persons claiming under him.

Thus, *A* settles property in trust for himself until his death or bankruptcy, and then, on the occurrence of either of these events, on his wife. *A* is then adjudged insolvent. *A's* interest in the property vests in the Official Assignee or Official Receiver, and *not* in his wife.

This section may be regarded as an exception to the rule contained in Sec. 31, which permits a condition in a transfer making the transferee's interest determinable on the happening of a contingency. Though one can agree that the transferee's interest should come to an end if a certain event happens, still one *cannot* say that the transferee will forfeit his

interest in the property. It may be noted here that on insolvency, the property of the insolvent vests by operation of law in his assignee in bankruptcy; so, if the transferor could determine the transferee's interest on insolvency, the provisions of the laws of insolvency would be defeated.

There is yet *another reason* for this rule. If *X* gives property to *Y* subject to such a condition, such condition would not be known to third parties, who would be induced to give credit to *Y* in the belief that such property is sufficient security. It would, therefore, not be fair to such persons if, at the time of *Y's* insolvency, the property is suddenly withdrawn from *Y's* assets, and is given back to *X*. The law, therefore, provides that such a condition is not to be recognised.

PROBLEM.—*A* transfers property to *B* subject to a condition that if *B* becomes insolvent, the property is to go to *C*. If *B* becomes insolvent, can *C* claim the property ?

Ans.—The condition is hit by S. 12 (above), and is therefore, *void*. Thus, on *B's* insolvency, *C cannot* claim the property.

EXCEPTION IN CASE OF A LEASE.—The principle enunciated in this section is made subject to an *exception* in the case of a lease. A restraint as regards alienation will be void where property is granted in absolute right (sec. 10); but where land is merely granted for use of cultivation, either free of rent or at a favourable rate of rent, any condition restraining alienation would *not* be inconsistent with the rights conferred. Hereditary rent-free tenancies of a perpetual character may exist without any right of alienation attaching to them.

Write a short note on : Direction for accumulation of income.

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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 direct that the *income* arising from the property is to be accumulated (either wholly or in part) during a period longer than—

[a] the *life* of the transferor, *or*

[b] a period of 18 *years from the date of the transfer,*—

such a direction is void to *the extent* to which the period during which the accumulation is directed *exceeds the longer of the* periods mentioned above, and at the end of such period, the *property* and the *income* thereof are to be disposed of, *as if* the period during which the accumulation has been directed to be made, has elapsed.

DIRECTION FOR ACCUMULATION OF INCOME.—It is well-known that land is to be enjoyed by the profits that arise out of such land, and just as the law frowns upon attempts at restraint on alienation, so also, it dislikes any attempt to prevent the income being enjoyed by the owner of the land for the time being. The law, therefore, says that a direction to

accumulate either the *whole, or even a part,* of the income, would be regarded as *void,* if it is beyond the period prescribed by S. 17.

Where the terms of a transfer of property direct that the income arising from the property is to be accumulated either wholly or in part, such a direction will be good for the *longer* of the following periods, *viz,*—

(1) the life of the transferor, *or*

(2) a period of 18 years from the date of the transfer.

If, however, the direction is for a period longer than the two mentioned above, the direction is to be modified, so as to reduce it to the aforesaid period. At the end of the said period, the accumulated income and the property will be disposed of, *as if* the entire period for which accumulation was directed by the transferor has expired.

ENGLISH LAW.—S. 17 is based on an English Act, popularly known as the *Thellusion Act* (so called because it was passed after the Court had decided a case where Mr. Thellusion was the transferor of certain property). The Act contained provisions which are now to be found in the Law of Property (Amendment) Act, 1925, under which income may be accumulated during any of the following periods, *viz.* :-

(i) the life or lives of the transferor or transferors; *or*

(ii) twenty-one years from the death of the transferor; *or*

(iii) during the minority of any person living at the death of the transferor; or

(iv) during the minority of any person, who would be entitled to the property, if he was of full age.

(B) When such direction is *valid* and allowed [Ss. 17(2) & 18]

However, such a direction for accumulation of income (even beyond the periods stated above) is valid, if such direction is for the purpose of—

(i) the *payment of the debts of the transferor* (or any other person taking any interest under the transfer); *or*

(ii) the provision of *portions* for children or remoter *issue of the transferor* (or of any other person taking any interest under the transfer); *or*

(iii) the preservation or maintenance of the property transferred; *or*

(iv) when property is transferred for the *benefit of the public* or for the advancement of *religion, knowledge, commerce, health, safety,* or *any other object beneficial to mankind.*

Exceptions (i) and (ii) are taken from the English Act, while exception (iii) is based on the English case, *Vine* v. *Raleigh.*

C. TRANSFER FOR BENEFIT OF UNBORN PERSONS (Ss. 13-14 & 18)

Sections 13, 14 and 18 of the Act deal with the law relating to transfers to *unborn* persons. Now, one of the essentials of a valid transfer is that the transferee must be a *living* person. Therefore, a transfer *cannot* be made *directly* to an unborn person. But, on a transfer of property, an *interest* therein may be created *for the benefit* of such a person, subject to certain restrictions set out in Ss. 13 and 14. The conditions to be complied with are as under :

1. The interest of the unborn person must be preceded by a prior interest.

2. The unborn person must be in existence when the prior interest comes to an end *and* he must have the interest at the latest when he attains majority.

3. The interest created for the benefit of such unborn person must comprise the *whole* of the remaining interest of the transferor in the property; in other words, a life-estate cannot be conferred on an unborn person.

The phrase 'the whole of the remaining interest of the transferor' has been a subject of judicial discussion. Though the decisions are not directly under the Transfer of Property Act, they are under a similar provision of the Indian Succession Act, and therefore deserve careful attention.

1. *Putlibai* v. *Sorabji Naoroji* [(1923) 25 Bom. L.R.1099].—In this case, a Parsee testator had bequeathed a life interest to his children, and after them, to his grand-children, with a condition that if any of the legatees ceased to profess the Zoroastrian faith, *or* married a person *not* belonging to the Zoroastrian faith, then the interest in his favour would come to an end. The Privy Council had to decide whether the legacy given, coupled with such condition for the benefit of grand-children, some of whom were not in existence on the date of the death of the testator, would amount to the *whole* of the remaining interest of the testator. The Privy Council decided that as the interest given to such unborn person was subject to a condition subsequent, it was *less than the whole of the remaining interest* of the testator, and therefore, *void*.

2. *Sopher* v. *Administrator General of Bengal* (71 I.A. 93).—In this case, *S* died, leaving a widow and two sons. In his will, he had directed the trustees to pay his wife a monthly sum for her own use for her life, and to his children and his grand-children on the happening of certain contingencies. The Privy Council *held* that such a contingent interest given to an unborn person was void. [However, it may be noted that this decision seems to be inconsistent with illustration 3 to Section 114 of the Indian Succession Act. It has always been considered that contingent interests given to unborn persons are valid.]

Write an explanatory note on : Unborn person.
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3. *Ardeshir* v. *Dadabhai*, AIR 1945 Bom. 395.—The point that the decision of *Sopher* v. *Administrator General of Bengal* was inconsistent with illustration 3 of Sec. 114 of the Indian Succession Act was raised by Blagden J. in *Ardeshir* v. *Dadabhai* (above).

4. *Phramroze Dadabhai Madan* v. *Tehmina* (49 Bom. LR 882).—In this

case, there was a settlement under which a contingent interest in favour of an unborn person was created. The Bombay High Court *held* that the decision in *Sopher's* case could *not* be applicable to the Transfer of Property Act, and therefore, the settlement was valid. Their Lordships came to the conclusion that the words "extends to the whole of the remaining interest of the transferor in the property" in sec. 13 of the Transfer of Property Act were directed to the *extent* of the subject-matter and to the *absolute nature* of the estate conferred, and *not* to the *certainty of vesting.*

How can an unborn person be benefitted under the Transfer of Property Act ? When can a benefit conferred upon him be legally effective ?

B.U. Oct. 97
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The provisions of Ss. 13 and 14 will now be discussed in detail.

Under S. 13, when on a transfer of property, an interest in such property is created for the benefit of a person who is *not* in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such unborn person will *not* take effect, *unless it extends to the whole of the remaining interest of the transferor in the property.*

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

S. 13 of the Transfer of Property Act is an attempt to import into, and adapt for use in India, what used to be known in England as "the rule in *Whitby* v. *Mitchell*" or "the rule against double possibilities". According to this rule, a remainder limited to the child of an unborn person, after a life-estate to the unborn parent, is *void.*

The *principle underlying the rule* is that a person disposing of property to another should *not* be allowed to fetter the free disposition of that property in the hands of more generations than one. *The rule is quite distinct from the rule against perpetuities,* although these two rules have the same effect.

In other words, the section provides that there should never be such a person as an unborn one who takes only for life, because, it is an obvious contingency, (as in the above example), that *A* might never have a son. Besides, there is another possibility also. *A* might not have a second son, or the second son might predecease the eldest one.

Suppose *A* gives property to *B* for life, and afterwards to his son, (who is unborn at the date of the transfer), subject to the condition that if the son changes his religion, the property should be forfeited. Here, the

condition regarding change of religion fetters the estate, and does not therefore comply with S. 13, which speaks of the *whole of the estate.*

Rule against perpetuity (Ss. 14 & 18)

Discuss the doctrine of rule against perpetuity.
B.U. Apr. 95
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Perpetuity is an interest which will not vest till a remote period. One cannot postpone the vesting of property in a transferee beyond a certain limit. The period for which vesting may lawfully be postponed is called the *perpetuity period.* The *rule against perpetuity* defines the perpetuity period, and is to be found in S. 14 of the Transfer of Property Act.

Suppose, for instance, that *X* gives a piece of land to his friend *A* for life, and afterwards to his friend *B* for life, then to his friend *C* for life, and then to the son that may be born to *A* for his (the son's) life, then to the son that may be born to *B* for life, and then ultimately to the son that may be born to *C for ever.* If such is the disposition of the land, *A* cannot alienate the property, because he has only a life interest. For the same reason, neither *B* nor *C,* nor the sons of *A* or *B* can alienate the property. Only when the property finally vests in *C's* son, will it be alienable by him. This would certainly act as a restraint on the free alienation of land, and to prevent this, the law provides that one cannot tie up property and prevent its being taken absolutely by a person beyond a certain limit. The law says that one can tie up property and prevent its free alienation only for one generation, because all friends now living must die within that time, as they are all "candles lighted together", (in the words of Lord Nottingham).

S. 14 of the Act makes a provision for such contingencies, and provides that no transfer of property can operate to create an interest which is to take effect, *after* the lifetime of one or more persons living at the date of such transfer, and the minority of some person who should be in existence at the expiry of that period, and to whom, the interest created is to belong if he attains the age of majority.

This section may be compared with Sec. 114 of the Indian Succession Act, 1925. The two illustrations to that section are cited below as elucidating the meaning of the section :

Illustration (a)—A fund is bequeathed to *A* for his life, and after his death, to *B* for his life, and after *B's* death, to such of the sons of *B* as shall first attain the age of 25. *A and B survive the testator.* Here, the son of *B* who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of *A* and *B,* and the minority of the sons of *B.* The bequest after *B's* death is *void.*

[Note:—In this illustration, the interest created in favour of the son of *B* is void, because it is intended to be postponed beyond the minority of a person not in existence on the date of the transfer. The illustration, however, states that such interest is void because such son may not attain 25 until more than 18 years have elapsed from the date of the longer

liver of *A* and *B*. It, however, appears that this reasoning is not consistent with the Indian Law as contained either in Sec. 14 of the Transfer of Property Act or in Sec. 114 of the Indian Succession Act.]

Illustration (b)—A fund is bequeathed to *A* for his life, and after his death, to *B* for his life, and after *B's* death, to such of *B's* sons as shall first attain the age of 25. *B dies in the lifetime of the testator,* leaving one or more sons. In this case, the sons of *B* are persons living at the time of the testator's decease, and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is *valid.*

RULE EXPLAINED.—When it is intended to benefit *living persons by* a transfer, there is *no limit* to the number of *successive* interests that may be created in their favour. Thus, *A, B, C* and *D* are all *living* when a transfer is made by a man in favour of *A* for *life*, afterwards in favour of *B, C* and *D,* successively for their *lives.* Here, all the successive interests are *valid,* as the persons benefited are *all in existence at the date of the transfer.* But when *unborn* persons are intended to be benefited, a *three-fold restriction* is put on the power of the transferor :

1. The unborn person must be given *all that remains after the termination of the intermediate interests.* (S. 13)

2. Such interest *must* vest *within* the maximum period provided by S. 14. Ordinarily, an estate *ought* to vest in the remainderman *immediately* upon the termination of the life-estate, but this section makes a concession, and allows the delaying of the vesting *during* the *minority* period of a person who is not *born at the date of the transfer.*

3. The unborn person must come into existence *on or before* the expiry of the *existing life or lives.* This third condition is intended to prevent the property from remaining *in abeyance* indefinitely. Moreover, regard is to be had to *possible* and *not* to *actual,* events. For example, a transfer is made to *A* (a bachelor) for life, and then to his wife for life, and the remainder to other persons. The gift is invalid, because it is *possible* that *A* should marry a wife who was *not born at the transferor's* death. In other words, it is *possible* that an *unborn* person will take a merely life-interest, and not *all that remains.* This *mere possibility* will vitiate the whole transfer, though in reality, in a particular case, *A's* wife may *not* be an unborn person at the transferor's death. In other words, a transfer is invalid, even if there is a *sheer possibility* that a unborn person would take a life-interest.

Examples

1. *A's* property is transferred to *B* for life, and after his death, to such son of *B* as shall first attain the age of 25 years, *B* having no son on the date of transfer. Here the life-estate in favour of *B,* a person in existence at the time of transfer, is perfectly *valid,* but the interest created in favour of *B's* son, who was *not* in existence on the date of transfer is *void,* as the vesting of the interest is intended to be postponed beyond the minority of an unborn person.
2. Property is transferred to *A* for life, and then to *B* for life. Both *A* and *B* are living at the date of the transfer. The transfer is *valid.*
3. Property is transferred to *A* for life, then to *B* for life, and then to

such of *B's* sons as shall first attain the age of 18 years. The transfer is *valid.*

4. Property is transferred to *A* for life, then to *B* for life, and then to such of *B's* sons as shall first attain the age of 18 years and one day. The transfer is *void.*

PROBLEM.—The *Shebaits* of a temple agreed to appoint the family of *A* as *Pujaris* from generation to generation, to perform services of the temple and make provisions for the expenses and remuneration of the office. Discuss the validity of the agreement.

Ans.—The rule against perpetuity does *not* apply to personal agreements, *i.e.,* agreements which do not create any interest in property. Therefore, the agreement under consideration is valid and *not* affected by the rule against perpetuity. (*Nafar Chandra* v. *Kailash*), 1921 25 C.W.N. 201)

As seen above, the interest created *must* vest within the prescribed limits. It is not quite sufficient that it *may* vest within such limits. If at the time of its creation, the limitation is so framed, that it may or may not so vest, the whole devise is bad, and *it cannot be validated by subsequent events.* In other words, as stated earlier, in determining whether a gift is good or bad according to the Rule against Perpetuity, regards is to be had to *possible*, and *not actual*, events. So, where a transfer is made to take effect in favour of an unborn person at a particular age in excess of the age of minority, the gift may *possibly* fail, *and* therefore, the law will *not* allow such a transfer.

It may be emphasized that, in deciding whether a limitation offends this rule or not, one does *not* have to *wait and see* what actually happens, but one must be able to say with certainty, at *the date of the transfer,* that the limitation will not be void. To quote *Rivington* (Law of Property in Land), "It is not a case of 'wait and see'. What does in fact happen is immaterial. The limitation is either good or bad from the start. If there is any chance, however small, that it *may not* vest in due time, the limitation is bad."

Applying the above rule, a person can say: "I give to *A for life*, after his death to *B for life* and then to a son of *B to be born* thereafter *when he attains* 17," but if he said that the son of *B* was to *get when he became* 19, *i.e., after* attaining majority, the transfer would be *void.* At the latest, the time for division must arrive *at the expiry of* 18 *years* from the death of the *last* person living at the testator's death.

PRINCIPLE UNDERLYING THE RULE. — It is a well-established policy of English law to discourage the creation of perpetuities. Property *cannot* be tied up longer than for a life in being and twenty-one years (in England) thereafter. This is called the *rule against perpetuities.* The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in, or domination over, property will be obvious if one considers, for a moment, what would be the state of a community in which a considerable portion of the land and capital was locked up. The free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed, the capital of country withdrawn from trade, and the incentives to exertion in every

branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, originated in more exceptional motives, would be baneful to all.

English and Indian law compared

ENGLISH LAW.—The corresponding rule in English law was, at one time, known as the *double possibility rule*. Thus, if *A* gives property to *B* on *B's* marriage, and adds that he should enjoy it during his *(B's)* life-time, and then give it to his first (unborn) son for life and then to his second (unborn) son, there are *two contingencies* to be got over before *A's* wishes are fulfilled. First of all, *A* should have a son and that should be followed by another son. The law regards this as going too far, and therefore frowns upon such a transfer. This rule is now known in England as the rule in *Whitby v. Mitchell*, because it was in that case that the question was fully discussed for the first time in England.

According to the English law, the vesting of property can be postponed for any number of lives in being and *an additional term of 21 years afterwards*, and for as many months in addition as are equal to the ordinary period of gestation, should gestation exist. Further, the additional term of 21 years might be independent of the minority of any person to be entitled, *i.e.*, irrespective of the fact whether such person is a minor or not.

The Indian law, however, allows the vesting to be delayed beyond the lifetime of persons in being for the period only of the minority of some person born in their lifetime, and *the addition of an absolute period of 21 years has not been adopted by S. 14*. So, whereas under the English law, the additional period allowed after lives in being is a term of twenty-one years *in gross*, without reference to the infancy of any person, under the Indian law, the term is the period of minority of the person to whom, if he attains full age, the thing bequeathed is to belong at 18 in all cases.

In short, under English law, the additional period allowed after lives in being is a term of *21 years in gross, without* any reference to the infancy of any person. In India, the additional period is confined to the *minority* of the person concerned, and is *not* to be taken *in gross*.

S. 14 deals only with interests arising *in futuro*, whereas the corresponding rule in English law deals with interests created both *in futuro* and *in praesenti*. Under our Act, there is no express prohibition regarding interests *in praesenti*, which are sought to be made of indefinite duration.

As regards the age *of majority under Indian law*, the Privy Council in the case of *Soundar Rajan* v. *Natarajan*, (52 IA. 310) has held that the age of majority, *for the purpose of the rule against perpetuity is, in all cases* 18, and it cannot be contended that where a guardian of an infant has been appointed by a Court, the age of majority will be reached at 21, for the simple reason, that at the testator's death (*or* on the date of the transfer, as the case may be), it is *not* certain that a guardian would definitely be appointed for any of the children.

Exceptions to the rule against perpetuities

The following are the *eight exceptions to the rule against perpetuity* :

1. *Vested interests* are *not* effected by the rule. for when an interest has once vested, it *cannot* be bad for remoteness.

2. The rule has no application where land is purchased, or property is held, by a *Corporation.*

3. *Gifts to charities* do *not* fall within the rule; thus, in case of a *transfer for the benefit of the public* in the advancement of *religion, knowledge, commerce, health, safety,* or any other object beneficial to mankind, the rule does *not* apply. (S. 18)

4. Property settled upon individuals for *memorable public services* may, by express legislation, be exempted from the operation of this rule.

5. The rule against perpetuity applies when *interest in property* is created, and has no application to *personal contracts.*

As seen above, in one case, the *shebaits* of a temple agreed to appoint the family of *X* as *pujaris* from generation to generation to perform the services of the temple, and make provision for the expenses and remuneration of the office. The Court *held* that such an agreement *is valid,* and is not affected by the rule against perpetuity. *(Nafar Chandra* v. *Kailash* referred to eariler).

6. A *covenant of redemption in a mortgage* does *not* offend the rule.

7. The rule does *not* apply to *contracts for perpetual renewal of leases.*

8. The rule also does *not* apply where only a *charge* is created, which does *not* amount to a transfer of any interest.

9. *Covenants for pre-emption* in respect of land. unrestricted in point of time and expressed to be binding on the parties, as well as upon their heirs and successors, also do *not* offend the rule against perpetuities.

Summary of the law relating to transfers to unborn persons

When interest in property is sought to be created for the benefit of *unborn persons,* regard must be had to the following *three rules, viz.* :

1. The unborn person must be given the *entire* interest of the transferor in the property. Whatever *intermediate* interests may be created in favour of *living persons*, the person *then* unborn must ultimately take *all that remains.*

2. No interest in the property sought to be transferred should reach any unborn person *after* the lifetime of one or more intermediate persons *living* at the date of transfer *and* the *minority* of that *unborn* person.

3. The beneficiary who is *not* in existence at the date of the transfer must come into existence *on* or *before* the expiry of the existing life or lives named by the transferor.

D. TRANSFERS TO A CLASS (Ss. 15-16 & 22)

The law as to transfers to a *class* of persons is laid down in Ss. 15, 16 and 22 of the Act. A gift is said to be to a *"class"* of persons, when it is to all those who come within a certain category or description defined

by a general or collective formula. A number of persons are popularly said to form a class when they can be designated by some general name, as for instance, "children", "grand-children", "nephews" etc.

1. Transfer to a class, some of whom come under Ss. 13 & 14 (S. 15)

If, on a transfer of property, any interest therein is created for the benefit of a class of persons, with regard to *some* of whom such interest fails by reason of any of the rules contained in Ss. 13 and 14, such interest fails in regard to *those persons only*, and *not* in regard to the *whole class*.

The *principle underlying this section* can be explained with the following illustration :

If *A* transfers property to *B* for life and then to his children for life. Now, if on the date of the transfer, *B* has two children, a third being born after the date of the transfer, the question may arise regarding the validity of the transfer to the children of *B* for life. Under section 13, if the transferor does *not* give the whole of the remaining interest for the benefit of an unborn person, the transfer is *void*. The problem here is, amongst the children of *B*, there being a person not in existence on the date of the transfer, whether the transfer in favour of *all* the children is void under Sec. 13, or whether the transfer in favour of the unborn child only is void.

According to the English rule of law laid down in Leake v. Robinson, the transfer for the benefit of all the children of *B* would fail. *However, S. 15 of the Act abrogates this rule*, and provides that the two children of *B* in existence on the date of the transfer would be entitled to benefit under the transfer, and only the unborn child would not be entitled to it. Thus, the rule in *Leake* v. *Robinson* does *not* apply in India.

2. Transfer to take effect on failure of prior interest (S. 16)

Where, by reason of any of the rules contained in Ss. 13 and 14, an interest *created for the benefit of a person, or of a class of persons*, fails *in regard to such person, or the whole of such class*, any interest created in the same transaction and intended to take effect after or upon *failure* of such prior interest, *also fails.*

LIMITATION UPON LIMITATION.—The rule embodied in this section is a rule of English law that a limitation following upon a limitation void for remoteness, is itself void, *even though it may not itself transgress the rule against perpetuity.* For instance, if *A* settles property in trust for *B* and his intended wife successively for their lives and then on their eldest son for life, and then to the eldest son of such eldest son for his life, and then on *C*, the prior interest in favour of the son of *B* fails in the first instance under S. 13, and therefore, the subsequent interests, both in favour of the grandson of *B* and in favour of *C*, also fail.

It must, however, be noted that the prior interest must fail *only* by reason

of either S. 13 or 14 before S. 16 can be invoked. If the prior interest is invalid, or fails *for some other reason*, the subsequent interest does *not* fail.

The restrictions contained in Ss. 14, 16 *and* 17 do *not*, however, apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind. (S. 18)

3. Transfer to members of a class who attain a particular age (S. 22)

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

Thus, if a gift is made to such of the children of *A*, who shall attain the age of 18, no child of *A* has a vested interest until he has attained that age, as till then, he does *not* answer the description of the transferee.

E. VESTED INTEREST (Ss. 19-22)

The Transfer of Property Act deals with *two* kinds of interests—*vested* and *contingent*. Ss. 19 to 22 deal with the *former*, while Ss. 21 to 24 deal with the *latter*. (Ss. 21 and 22 deal with *both* kinds of interests.)

1. 'Vested interest' (S. 19)

Where on a transfer of property, an interest therein is created in favour of a person—

(i) without specifying the time when it is to take effect, *or*

(ii) in terms specifying that it is to take effect—

(a) forthwith, *or*

(b) on the happening of an event which *must* happen,—

such interest is *vested*, — unless a contrary intention appears from the terms of the transfer.

Moreover, a vested interest is *not* defeated by the *death* of the *transferee before* he obtains *possession*.

It may also be noted that an intention that an interest shall *not* be vested is *not* to be inferred *merely* from a provision whereby—

(i) the enjoyment thereof is *postponed, or*

(ii) a *prior interest* in the same property is given or reserved to some *other person, or*

(iii) *income* arising from the property is directed to be *accumulated* until the time of enjoyment arrives, *or*

(iv) from a provision that, if a particular event happens, the interest is to pass to another person.

VESTED INTEREST.—An interest is said to be *vested* when it is not subject to any condition precedent—i.e., when it is to take effect immediately, or on the happening of an event which is *certain*. A person takes a vested interest in property when he acquires a proprietary right in it, but the right of enjoyment is deferred till a future event happens, which is certain to happen.

Thus, if a Hindu widow adopts a son, but there is an agreement postponing the son's estate during the lifetime of the widow, the interest created in favour of the adopted son is a *vested right;* it does *not* depend upon a condition precedent (*e.g.*, the performance of an act); it is to take effect on the happening of an event which is certain *(viz.*, the widow's death); the adopted son has a present proprietary right in the estate, the right of possession and enjoyment being deferred: and therefore, he can transfer the property even during widow's lifetime.

Similarly, where under a deed of gift, a donee is not to take possession of the gifted property until after the death of the donor and his wife, the donee is given a *vested interest*, subject only to the life-interest of the donor and his wife; and the donee can transfer the property during the lifetime of the donor or of his wife.

So also, where under a compromise decree, it was settled that *A* was to hold an estate till his death, after which it was to go to *B*, the Court *held* that the interest acquired by *B* under the decree was a *vested interest*, because the interest which was created in favour of *B* was bound to take effect from the death of A, which is a *certain event*. (*Sunder Bibi* v. *Rajendra*, 47 All. 496)

Similarly, a transfer of a property in favour of a person simply confers a vested interest with an immediate right to the possession and enjoyment of the property. And such vested interest is *not* defeated by the death of the transferee even before getting possession of the property. *The Act thus regards a vested interest as property which is divisible, transferable and heritable.* (*Elokasee* v. *Darponarain*, 5 Cal. 59)

In a vested interest, the interest is complete, but on the happening of a specified event, it may be divested. The *true criterion* is the certainty or uncertainty of the event on the happening of which the gift is to take effect. Where the event is *certain* though future, and the payment or enjoyment is postponed by reason of the circumstances connected with the estate or for the convenience of the estate, as for instance, where there are prior life or other estates or interests, the ulterior interest to take effect after them will be *vested*. Thus, if *A* makes a will, under which certain property is bequeathed to *B*, when *A's* wife dies, *B's* interest vests on the death of *A* (and *not* the death of *A's* wife).

A will provided as follows:—"When I die, my wife named Suraj is owner of the property. And my wife has powers to do the same way as I have absolute powers to do when I am present, and in case of my wife's death, my daughter Mahalaxmi is owner of the said property after that death." The Court *held* that the gift to Mahalaxmi was *not contingent* on her surviving

Suraj, but depended upon the death of Suraj, which was a certain event, and that Mahalaxmi took a *vested interest* in the property subject to the life-interest given to Suraj. *(Lallu* v. *Jagmohan,* 22 Bom. 409)

PROBLEM : *A* transfers property to *B* in trust for *C* and directs *B* to give possession of the property to *C* when he attains the age of 25. What interest does *C* take and when ?

Ans.—A condition postponing enjoyment does *not* prevent the interest from vesting immediately; but it is itself void for repugnancy after the transferee has attained majority. Therefore, *C* has a vested interest and is entitled to possession at the age of 18.

The following are the *three main characteristics* of a vested interest :

1. A *vested interest* does *not* depend upon the fulfilment of a condition; it creates a present and immediate right, though the enjoyment may be postponed to a future date. It may, therefore, be vested *in possession*, or vested and *yet not in possession.*
2. A vested interest is *not* defeated by the death of the transferee before obtaining possession; it will pass on to his heirs.
3. A vested interest is *transferable* as well as *heritable.*

RIGHT VESTED 'IN INTEREST' AND 'IN POSSESSION'.—There are *two stages* of a vested interest. It may be an interest vested *in possession*, as where a transfer is made in general terms, without specifying the time when it is to take effect, or is expressed to take effect forthwith; *or* it may be an interest vested and yet *not in possession*, which means that there is a present indefeasible right to future possession or enjoyment, as when enjoyment is postponed by some prior interest created by the same transfer.

An interest is said to be "vested in possession or enjoyment" when it gives a *present* right to *immediate* possession of property, as when the property is transferred to *A* without specifying the time when it is to take effect.

An interest is said to be "vested and yet not in possession" or "vested in interest only", when it gives a *present* right to the *future* possession of property.

An interest may be vested and not yet in possession—

(a) by a provision *postponing enjoyment*, or

(b) by the *intervention of a prior interest*, or

(c) by a provision for *accumulation* of income.

Examples

(1) *A* transfers property to *B* in trust for *C*, and directs *B* to give possession of the property to *C* when *C* attains the age of 25. *C* has a *vested interest* in the property, and is entitled to its possession at the age of 18.

(2) *A* executes a deed of gift in favour of *B*, but directs that *B* is *not* to take possession of a portion of the property until after the death of both *A* and *A's* wife. *B* has a vested *interest* in the property; only the enjoyment is postponed.

(3) Property is settled in trust for *A* for life, with a direction to the trustees to pay *A* Rs.1,000 a year out of the rents and profits, and to apply the balance to the discharge of a mortgage, and after *A*'s death, to convey the land to *B*. Even if *B* does *not* survive *A*, *B*'s interest is vested in *A*'s lifetime.

2. When unborn person acquires vested interest (S. 20)

S. 20 enacts as to when an unborn person takes a vested interest in property transferred to him. It lays down as follows :

Where, on a transfer of property, an interest therein is created for the benefit of an *unborn* person, he acquires, *upon his birth, a vested interest,* although he may *not* be entitled to the *enjoyment thereof immediately on his birth.*

3. S. 21, Exception

The *Exception* to S. 21 gives one more *instance* of a vested interest. It runs as follows :

Where, under a transfer of property, a person becomes entitled to an interest upon attaining a particular age, and the transferor also gives to him absolutely the *income* to arise from such interest *before* he reaches that age, or directs the income to be applied for his benefit, such interest is *not contingent* (*i.e.* it is *vested*).

4. Transfer to members of a class who attain a particular age (S. 22)

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

This section may be compared with S. 121 of the Indian Succession Act. So long as the donees are below the specified age, they possess only a *contingent interest,* which will mature into a vested interest as soon as they attain the specified age.

F. CONTINGENT INTEREST (Ss. 21-24)

'Contingent interest' (S. 21)

Explain what is vested interest. Distinguish it from a contingent interest.

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Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the *happening or not happening* of a specified *uncertain event,*—such a person acquires a *contingent* interest in the property.

Such interest becomes a vested interest on the happening of the event in the first case, and when the happening of the event becomes *impossible* in the second case.

A *contingent interest* is one in which neither any proprietary interest nor a right of enjoyment is given at present, but both depend upon *future uncertain events*.

An estate is *contingent* when the right to enjoyment depends upon the happening of an *uncertain* event which may or may not happen.

Thus, where an estate is bequeathed to *A* until he gets married, and after that event to *B*, *B's* interest in the bequest is contingent, because it depends upon a condition precedent *viz.*, the marriage of *A*, an event which may or may not happen. *B* has, at present, no proprietary interest in the estate, and he cannot alienate it. But as soon as *A* marries, the contingent interest of *B* becomes a vested interest because of the happening of the event (*A's* marriage) on which it was contingent till then. In a contingent interest, the transfer is *not* complete until the specified event happens or does not happen, as the case may be.

ITS CHARACTERISTICS.—The following are the three main features of a contingent interest :

1. A contingent interest is solely dependent upon the fulfilment of a condition, so that in case of non-fulfilment of the condition, the interest falls through.
2. If the transferee dies before obtaining possession, the contingent interest fails, and the property reverts to the transferor.
3. It is transferable. It is quite different from a mere chance : *Ma Yait* v. *Official Assignee*, 57 I. A. 10. Whether it is heritable or not depends on the nature of the contingency.

DIFFERENCE BETWEEN VESTED AND CONTINGENT INTEREST.—There are *five* points of distinction between the two :

VESTED INTEREST 19	CONTINGENT INTEREST 21
1. Definition— Where, on a transfer of property, an interest therein is created in favour of a person—	
(i) without specifying the *time* when it is to take effect; *or*	(i) to take effect only on the happening of a specified *uncertain* event; or
(ii) specifying that it is to take effect *forthwith*, or on the happening of an event which *must* happen,—	(ii) if a specified uncertain event shall *not* happen,
such interest is vested,—	— such person thereby acquires a *contingent* interest in the property.
2. Fulfilment of condition—	
Does *not* depend upon the fulfilment of any condition; it creates an *immediate* right, though the *enjoyment* may be postponed to a future date.	Is solely dependent upon the *fulfilment* of the *condition*, so that if the condition is *not* fulfilled, the interest may *fall through*.

Define and distinguish between a vested interest and a contingent interest.

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3. Effect of transferee's death—	
Not defeated by death of transferee *before* he obtains possession.	Whether it passes on the death of the transferee or not depends on the nature of the contingency.
4. Whether transferable and heritable—	
(a) It is *both* transferable as well as heritable.	(a) It is transferable. Whether it is heritable or not depends on the nature of the contingency.
(b) If the transferee of a vested interest dies *before* actual enjoyment, it *passes on to his heirs.*	(b) If the transferee of a contingent interest dies before obtaining possession, the contingent interest *fails,* and does *not* pass on to his heirs.
5. Present right of enjoyment—	
In a vested interest, there is a present *immediate right,* even when its *enjoyment* is postponed.	There is *no present right* of enjoyment; there is a *mere promise* for giving such right; and such promise may be nullified by the failure of the condition.

Transfer contingent on happening of specified uncertain event (S. 23)

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

Under S. 23, when a contingent interest is created in favour of a *specified person,* and *no time is mentioned for the happening of the contingency,* the contingency *must* happen before the determination of the prior interest. In other words, the occurrence of the event on which the vesting depends must take place before the prior interest ceases; otherwise, there will be an interval between the cessation of the prior interest and the vesting of the subsequent interest, during which the property will remain in abeyance, which is contrary to law.

For example, a gift is made to *A* for life, and afterwards to *B* if *B* returns from England. Here, *B's* returning from England is a contingency and no time is mentioned for its happening; so this contingency must happen before the determination of *A's* interest, if *B* were to take anything; otherwise after termination of *A's* interest, the property will remain in abeyance.

But this rule does *not* cover the case *where a fixed time is mentioned for the occurrence of the event.* When a time is specified for the occurrence of the contingency, (*e.g.*, where it is provided that if *B* returns from England within 10 years), and such time extends beyond the cessation of the prior interest, there must be some trustee to hold the property during the period intervening between such cessation and the

happening of the contingency; otherwise, the property will lapse into abeyance or the interest will fail.

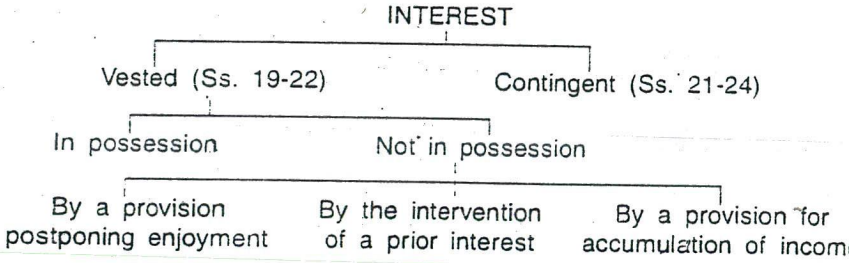
Transfer to such of certain persons as survive at some period not specified (S. 24)

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

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

SUMMARY

The following is a short, tabular summary of the law as to interests in the Transfer of Property Act —



G. CONDITIONAL TRANSFERS (Ss. 25-34)

Transfers may be *absolute* (as when a father gives a car to his son as a gift), or *conditional* (as when a father agrees to give a car to his son, *provided* the son passes his law examination). Conditions, in turn, may be *precedent or subsequent.*

Conditional transfers mean transfers to which conditions are attached. Ss. 25 to 34 of the Transfer of Property Act deal with conditions, their fulfilment, and the effects of their fulfilment or non-fulfilment.

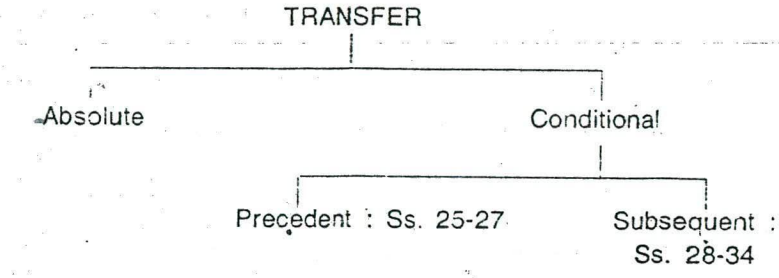
A *condition* is a provision which makes the existence of a right dependent on the happening or non-happening of a thing. Conditions are of *three kinds, viz.,* (i) conditions precedent, (ii) conditions subsequent, and (iii) conditional limitations.

(i) A *condition precedent* is one which delays the vesting of a right until the happening of an event, as when *B* promises to give a house to his daughter *B*, provided she marries a young man with his approval.

(ii) A *condition subsequent*, also called a *condition of defeasance*, is one which destroys, or divests the right upon the happening of an event, as when *A* gives a house to his daughter *B*, with a condition that if she marries a person *not* approved by him, the house would revert back to *A*.

(iii) A *conditional limitation* is a combination of a condition precedent and a condition subsequent; it is one containing a condition which (i) divests an estate that has vested, and (ii) vests it in another person. As regards the prior interest, it is a *condition subsequent*, but as regards the ulterior interest, it is a *condition precedent*. This would happen when, for instance, *A* gives a house to his daughter *B*, with a condition that if she marries a person *not* approved by him, the house would go to his son, *C*. Here, as far as *B* is concerned, it is a *condition subsequent;* but as far as *C* is concerned, it is a *condition precedent*.

This can be expressed in a tabular form thus :



CONDITION PRECEDENT AND CONDITION SUBSEQUENT.—When an interest is created on a transfer of property and is made to depend on a condition, the transfer is said to be a *conditional transfer*. When the interest is made to accrue on the *fulfilment* of the contingency, the condition is said to be a *condition precedent;* but if the interest already created is to cease to exist or is to *pass on* to another on the happening of the condition *superadded*, it is called a *condition subsequent*.

Thus, a gift is made to *A* on condition that she marries *B*. This is a condition *precedent*, as the condition *has* to be fulfilled *before* the transfer can take effect. Again, a property is transferred to *A*, but if *A* digs any excavation, so as to diminish the value of the property *or* to affect the buildings adjoining the property, he is to forfeit his interest. This is a condition *subsequent*, as the transfer takes effect, but *A* can be subsequently *divested* of his interest because of the breach of the condition.

Characteristics of a condition precedent.—The following are the *four main characteristics of a condition precedent* :

1. A condition *precedent* is one which *must* happen before the estate can vest.
2. Where the condition is precedent, the estate does *not* vest in the transferee until the condition is performed.
3. In the case of a condition precedent being or becoming impossible to be performed, or being immoral or opposed to public policy, the transfer will be *void*.
4. A condition precedent is fulfilled if it is *substantially* complied with. (This is discussed later.)

Characteristics of a condition subsequent.—The characteristics of a *condition subsequent* are also *four*, namely :

1. A condition subsequent is one, by the happening of which, an existing estate will be defeated.
2. Where the condition is subsequent, the estate immediately vests in the transferee, and remains in him till the condition is broken.
3. In the case of an impossible or immoral condition subsequent, the estate becomes absolute and the condition will be ignored. Thus, where a gift was made with a condition superadded that the donee should marry a particular person on or before she attained the age of 21, and the person named died before she attained that age, it was *held* that the fulfilment of the condition subsequent having become impossible, the estate became absolute. In other words, the gift became absolute, and the condition was to be ignored. A gift to which an immoral condition is subsequently attached remains a good gift, though the condition is void. [*Ram Sarup* v. *Bela*, 6 All. 313 (P.C.)]
4. *A* condition subsequent must be *strictly fulfilled*. (This is discussed later.)

(The points of distinction between a condition precedent and a condition subsequent are given later in a tabular form.)

TRANSFER ON IMPOSSIBLE, ILLEGAL OR FRAUDULENT CONDITIONS (S. 25)

S. 25 enunciates a *general* rule regarding *all* kinds of conditional transfers.

An interest created on a transfer of property and dependent upon a condition fails, if the fulfilment of the condition is :

(i) Impossible.

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

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

(ii) Forbidden by law.

Illus.—*A* transfers Rs. 500 to *B* on condition that she shall murder *C*. The transfer is *void*.

(iii) Of such a nature that, if permitted, it would *defeat* the provisions of *any law*, or

(iv) *Fraudulent*, or involves or *implies injury* to the person or property of another; or

(v) Such as the Court regards it as *immoral* or *opposed to public policy*.

Illus.—*A* transfers Rs. 500 to his niece *C* if she will desert her husband. The transfer is *void*.

VOID TRANSFER AND VOID CONDITION DISTINGUISHED.—Care is to be taken not to confuse a void *transfer* with a void *condition*, whether *precedent* or *subsequent*. There is a clear distinction between an immoral consideration for a gift, and an immoral condition which is subsequently

attached to a gift. If the consideration itself is immoral, the transfer cannot take effect. On the other hand, if a subsequent condition is tried to be attached to a perfectly valid gift, then the condition, if immoral, is void, but the gift remains unaffected. Thus, a transfer for the benefit of an unborn person which—(i) is not subject to a prior interest created by the same transfer, *and* (ii) which does *not* exhaust the whole of the remaining interest of the transfer (S. 13), *or a* transfer that tends to create an interest in perpetuity (S. 14), is itself void.

But the following are instances of *void conditions*. Here, the *transfer* remains *good*, but the condition, being void, is to be ignored :

1. A condition or limitation *absolutely* restraining the transferee or the person claiming under him from parting with or disposing of his interest in the property transferred : S. 10.
2. Restrictions repugnant to the interest created, *except* restrictive covenants for the beneficial enjoyment of the transferor's property : S. 11.
3. Except in the case of a lease, a condition making the transferee's interest determinable on insolvency or attempted alienation : S. 12.
4. A direction for accumulation of interest exceeding the limits prescribed by S. 17.

These are all void conditions. In such cases, the *transfer* stands good, though the *condition* is *void*. The transfer, in such cases, is considered to be *unconditional*.

CONDITIONS PRECEDENT (Ss. 26-27)

1. Fulfilment of condition precedent (S. 26)

Write a short note on : Condition precedent.
B.U. June 96
Oct. 97

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

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

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

THE DOCTRINE OF CY-PRES.—S. 26 lays down the *important* English doctrine of Cy-pres. It enacts that when there is a condition *precedent* to the accrual of an interest, the condition is deemed to have been fulfilled if it has been *substantially complied with.* In case of a condition precedent, subsequent fulfilment of the condition is *not* sufficient compliance. Thus, in the second example, where *B* takes the consent of

C, D and *E* (assuming, of course, that *E* does not die) after his marriage and *not before*—the condition is *not* fulfilled, and he *cannot* take any interest.

Under the doctrine of Cy-pres, when the literal performance of the antecedent condition is rendered impossible for some reason or the other, *substantial performance in conformity with the original intentions of the transferor will suffice.* Where a literal execution of the intention of the transferor becomes inexpedient or impracticable, the Court will execute it, as nearly as it can, according to the original purpose. Thus, where the consent of several persons is necessary for the marriage of the transferee, and some of the persons become insane or die, the consent of the rest will do. Where time is not the essence of the condition, fulfilment of the condition in a *reasonable time* is sufficient compliance. Silence on the part of the man whose consent is necessary *may* be equivalent to his consent.

CASES.—1. *X* made a gift to "my nephew *Y* if he shall be living and able duly to discharge my executors". *Y* was a minor and therefore unable to give a discharge. The *Court* held that he could fulfil the condition and duly discharge the executors by a suit in Chancery. (*Leward* v. *Hassels,* 1856 2 K. & J. 370)

2. *X* made a gift to nieces who should then be living in England. It was *held* that nieces settled in the U.S.A. were excluded, but not so a niece who was living in Ireland where her husband's regiment was quartered, or a niece who was staying with her. (*Woods* v. *Townely,* 1853 11 Hare. 314)

2. Conditional transfer to one person coupled with transfer to another on failure of prior disposition [S. 27] (*Doctrine of Acceleration*)

Sometimes, a prior disposition is made to depend on a condition, and it is provided that, on the failure of the prior disposition for non-fulfilment of the condition, the property is to go to another person. In such a case, the ulterior disposition, instead of failing on the failure of the prior disposition is, on the contrary, *accelerated and takes effect forthwith.*

This principle is enacted in S. 27, which lays down that, when on a transfer of property, an interest therein is created in favour of one person, and by the *same transaction,* an *ulterior disposition* of the same interest is made in favour of another,—if the prior disposition under the transfer fails, the ulterior disposition *takes* effect upon the failure of the prior disposition, *although the failure may not have occurred in the manner contemplated by the transferor.*

Illustration.—*A* transfers Rs. 500 to *B* on condition that he shall execute a certain lease within 3 months after *A's* death, and if he should neglect to do so, to *C. B* dies in *A's* lifetime. The disposition in favour of *C* takes effect.

But, where the intention of the parties to the transaction

is that the ulterior disposition is to take effect *only* in the event of the prior disposition failing *in a particular manner*,—the ulterior disposition will *not* take effect, *unless* the prior disposition fails *in that manner*.

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

ULTERIOR TRANSFERS (Ss. 27-30).—The earlier discussion dealt only with transfers with conditions precedent and conditions subsequent attacned to *one* particular transfer of property. What follows is a discussion of cases where, with these conditional transfers, *further transfers* in respect of the same property are created *as a part of the same transaction*.

For instance, *A* transfers Rs. 1,000 to *B* on condition that *B* resides with *A*, otherwise to *C*. It will be seen that the condition attached to the transfer to *B* is a condition precedent, with the result that if *B* does *not* reside with *A*, he will not get Rs. 1,000 and the transfer to him will fail, and *C* will thereupon get that amount. Here, the transfer in favour of *C* is an ulterior transfer, and it takes effect on the failure of the prior transfer. This is the case contemplated by S. 27, which also provides that the failure of the prior disposition may take place in any manner whatsoever, *unless* the parties have agreed that the failure should take effect in a particular manner.

It may be observed that the condition on which the prior interest depends must be valid under S. 25. If *not*, the subsequent disposition will also fail together with the first. If it is invalid as offending against the rule against perpetuity, then also the ulterior disposition becomes invalid. It is only when the prior disposition is valid in its inception, and fails because the condition is *not* fulfilled, that the ulterior disposition is accelerated.

DOCTRINE OF ACCELERATION.—The section enunciates the *doctrine of acceleration*. Where, in a series of successive limitations, a particular estate is *void*, the remainder, which is immediately expectant upon such estates, accelerates. In other words, when a prior disposition is made to depend on a condition, *and* it is provided that on the failure of the prior disposition for non-fulfilment of the condition, the property is to go to another person, the ulterior disposition, instead of failing on the failure of the first disposition, is *accelerated*, and takes effect at once.

Thus, where there is a gift in remainder, expectant on the termination of an estate for life, and the prior life-estate becomes void for some reason, the gift does *not* fail, but is accelerated. (*Adjudhia* v. *Rakhman*, 10 Cal. 482)

As seen above, for the purposes of S. 27, it does *not* matter whether or not the prior disposition fails in the manner contemplated by the transferor. But, where the intention of the parties to a transaction is that the ulterior disposition is to take effect only in the event of the prior disposition *failing in a particular manner*, the ulterior disposition does not take effect unless the prior disposition fails in that manner.

Thus, in *Underwood* v. *Wing* (4 De G.M., and G. 633), property was given to a wife with a condition that in the case of her death before the husband, the property was to go over to *X*. Both the husband and wife died in the *same shipwreck*, leaving it unascertained as to who died first. Here, the disposition in favour of *X* will *not* take effect.

It should be remembered that *the principle of acceleration does not apply when the prior disposition fails by reason of Ss. 13 and 14.* In that case, the ulterior disposition also *fails.*

CONDITIONS SUBSEQUENT (Ss. 28-34)

1. Ulterior transfer conditional on happening or not happening of specified events (Ss. 28-30)

(a) On a transfer of property, an interest therein may be created to accrue to any person, with the *condition superadded* that in case a specified uncertain *event* happens *or* does not happen, such interest is to pass to another person. (S. 28)

Illustrations.—(1) A sum of money is transferred to *A*, to be paid to him at the age of 18; if he shall die before he attains that age, to *B*. *A* takes a *vested interest* in the transfer, *subject to be divested* and to go to *B*, in case *A* shall die under 18.

(2) A sum of money is transferred to *A* for life, and after his death to *B*, but if *B* shall then be dead leaving a son, such son is to stand in the place of *B*. *B* takes a *vested interest* in the transfer, *subject to be divested if* he dies leaving a son during *A's* lifetime.

This section speaks of an "ulterior transfer" or an "ulterior disposition": Such a transfer or disposition is effected by a conditional limitation. In such a limitation, there is a condition which divests an estate from one person and vests it in another. It is a *condition subsequent* as far as the first estate is concerned, but as regards the second interest, it is a *condition precedent.* A conditional limitation is thus *both* a condition precedent and a condition subsequent, depending on the angle from which it is viewed.

(b) Secondly, an ulterior disposition mentioned in S. 28 does *not* take effect, *unless the condition is strictly* fulfilled. (S. 29)

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

The *reason* for this rule is very obvious. The law does *not* favour the divesting of an estate which has vested as much as it favours vesting of

an estate; therefore, before any property can be divested, the condition producing that effect must be strictly fulfilled.

(c) Moreover, if such ulterior disposition is *not valid*, the prior disposition is *not* affected by it. (S. 30)

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

Although a condition subsequent must be strictly complied with, in such cases, if such a condition is invalid, the result is that the prior interest becomes absolute, and the ulterior disposition, which depends upon such condition, fails. This is provided by S. 30. The *principle* of this rule is that if the prior transfers are good in themselves, they *cannot* be invalidated by a subsequent illegal disposition of the residue or remainder. *Tagore* v. *Tagore*, (1872) I.A. Supp. Vol. 47; *Kristoromani* v. *Narendra*, (1888) 16 I.A. 20)

In *Tagore's case (above)*, there was a gift to *A* for life, and after him to his heirs in tail male. The subsequent disposition was *held* to be invalid by reason of its being opposed to the principles of inheritance and transfer recognised by Hindu law, but *A's* life estate was not affected.

PROBLEM.—*X* transfers his field to *Y*, with a *proviso* that if *Y* does not set fire to *Z's* house within 60 days, the field would belong to *A*. Are the transfers to *Y* and *A* valid ?

Ans.—The disposition to *A* is *not valid*, but the interest of *Y* is *not* affected.

2. Condition that transfer will cease to have effect in case a specified uncertain event happens *or* does not happen (Ss. 31, 32)

On a transfer of property, an interest therein may be created with the condition superadded that it will cease to exist in case a specified uncertain event *happens*, *or* in case a specified uncertain event *does not happen*. (S. 31). Such a condition however, must not be invalid. (S. 32)

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

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

PROBLEMS.—1. *A* who is under a sentence of transportation for life, transfers his field to *B*, with a *proviso* that in case he returns from Port Blair, *B's* interest shall cease. *A* returns from Port Blair. Can he claim back his field ?

Ans.—When *A* returns from Port Blair, *B's* interest in the field ceases. Therefore, he can claim back his field. (*Venkatarama* v. *Aiyasami*, 1922 43 Mad. L.J. 340)

2. *A* transfers his field to *B* with a *proviso* that if *B* becomes insolvent, *B's* interest in the field shall cease. When *B* is adjudged insolvent, what happens to the field ?

Ans.—When *B* is adjudged insolvent, the field will vest in the Official Receiver or the Official Assignee, as the case may be.

3. Transfer conditional on performance of act, no time being specified for performance (S. 33)

Where, on a transfer of property, an interest therein is created subject to a condition that the persons taking it must perform a certain act, but no time is specified for the performance of the act, the condition is *broken* when he renders the performance of the act *impossible*, either permanently or for an indefinite period. (S. 33)

4. Effect of fraud preventing fulfilment or non-fulfilment of an imposed condition (S. 34)

Where a transfer is made in favour of a person, with a condition (precedent or subsequent) imposed on him, and a *time is specified* for the performance of the act,—if such performance within such time is prevented by the fraud of a person, who would be directly benefited by non-fulfilment of the condition, such *further time* is to be allowed to him for performing the act, as is required to make up for the delay caused by such fraud. But, if in such cases, *if no time is specified* for the performance of the act, then, such conditions are to be *deemed* to have been *fulfilled*. (S. 34)

Define, explain and distinguish between condition precedent and condition subsequent subject to which transfer of property can be effected.

B.U. Apr. 99

This section is based on the principle that no man can take advantage of his own fraud.

DIFFERENCE BETWEEN

CONDITION PRECEDENT	CONDITION SUBSEQUENT
1. As to vesting of estate—	
(a) *Precedes* the vesting, *i.e.*, the condition comes before the creation of the interest.	(a) *Follows* the vesting, *i.e.*, interest is created *before* the condition can operate to determine it.
(b) Vesting of estate is *postponed* till the performance of the condition.	(b) Vesting is *complete* and not postponed.
(c) Interest once vested can *never* be divested by reason of non-fulfilment of the condition.	(c) Interest, even though vested, is *liable* to be *divested* by reason of the non-fulfilment of the condition.

(d) Estate is not vested in the grantee until the condition is performed.	(d) Estate *immediately vests* in the grantee and remains in him *till* the condition is broken.
(e) Affects the *acquisition* of an estate.	(e) Affects the *retention* of the estate.

2. *Where the condition is (i) impossible of performance, or (ii) immoral, or (iii) opposed to public policy—*

Transfer will be *void*.	Transfer becomes *absolute*, and the condition will be *ignored*.

3. *Validity of condition—*

Must be valid in law.	Need *not* be so, invalidity of the condition being *ignored*.

4. *Applicability of the doctrine of Cy-pres—*

A condition precedent is fulfilled if it is *substantially* complied with (S. 26), *i.e.*, the doctrine of *Cy-pres* applies.	A condition subsequent must be *strictly* fulfilled (S. 26), *i.e.*, the *Cy-pres* doctrine does *not* apply.

H. ELECTION (S. 35)

Where a person—

—professes to transfer property *which he has no right to transfer*,

and

—as part of the same transaction, confers any benefit on the owner of the property, such owner must *elect* either to *confirm* the transfer *or* to *dissent* from it.

If he *dissents from it*,—

(i) he must relinquish the benefit so conferred;

and

(ii) the benefit so relinquished reverts to the transferor (or his representative) as if it had not been disposed of.

However, when such benefit reverts to the transferor, it is subject 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) 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*.

Illustration.—The farm of Sultanpur is the property of *C* and worth Rs. 800. *A*, by an instrument of gift, professes to transfer it to *B*, giving by the same instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1000. In the same case, *A* dies before the election. His representatives must, out of the Rs. 1,000, pay Rs. 800 to *B*.

In other words, under the circumstances mentioned in (a) and (b) above, the benefit relinquished by the elector-owner (also known as *'refractory transferee'*) will not fully revert to the transferor, but *compensation* will be paid out of it to the disappointed transferee to the extent of the value of the property sought to be transferred to him.

Elaborate the doctrine of Election under the Transfer of Property Act.

B.U. Dec. 96
Apr. 97
Oct. 99

BELIEF OF TRANSFEROR, 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.

WHO NEED NOT ELECT.—A person taking no benefit *directly* under a transaction, but deriving a benefit under it *indirectly*, need *not* elect. Moreover, a person who, in *one* capacity, *takes* a benefit under the transaction, may, *in another* capacity, dissent therefrom.

Thus, an estate is settled upon *A* for life, and after his death, upon *B*. *A* leaves the estate to *D*, and Rs. 10,000 to *B*, and Rs. 5,000 to *C*, who is *B's* only child. *B* dies intestate shortly after the testator, without having made an election. *C* takes out administration to *B's* estate, and *as administrator*, elects to keep the estate in opposition to the will, and to relinquish the legacy of Rs. 10,000. *C* may do this, and yet claim his legacy of Rs. 5,000 under the will.

EXCEPTION TO THE ABOVE RULES.—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner 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.

WHAT CONSTITUTES ELECTION.—If a person accepts such benefit for *two years*, it is to be assumed that he has elected in favour of the transfer.

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

KNOWLEDGE OR WAIVER WHEN INFERRED.—Knowledge or waiver may be inferred from any act of such person which renders it *impossible* to place the persons interested in the property professed to be transferred in the same condition *as if* such act had *not* been done.

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

PERIOD FOR ELECTION.—If the owner does not within *one year* after the date of the transfer, signify to the transferor (or his representative), his intention to confirm *or* to dissent from the transfer, the transferor or his representative may, upon the expiry of that period, require him to make his election; and if he does not comply with such requisition, he is to be *deemed* to have *elected to confirm* the transfer.

In case of disability (as for instance, in the case of a minor), the election is *postponed* until the disability ceases *or* until the election is made by some *competent* authority.

RULE OF ELECTION.—In the context of transfer of property, election may be defined as "the choosing between two rights, where there is a clear intention that *both were not intended to be enjoyed*".

The principle of the doctrine is that "a donee shall not be allowed to *approbate* and *reprobate*, and that if he approbates, he shall do all in his power to *confirm* the instrument which he approbates." *(Cavendish* v. *Dacre*, 31 Ch. D. 466)

The rule of election has thus been stated by Lord Justice Lopez in *Dalton* v. *Figerald*, (1897) 2 Ch. 86 : "A person having no title to land settles it on *A* for life, with remainder to *B*. If *A* enters and takes possession, and deals with the property as tenant for life, that person is estopped from telling the truth—his mouth is shut; he has availed himself of the settlement for the purpose of obtaining possession of the land, and he cannot afterwards seek to invalidate that which enabled him to obtain possession, and this though subsequently he may have acquired a good title."

Thus, it is an essential condition of the doctrine, that the person sought to be estopped must have obtained possession of the property under the deed. It is also clear that the party estopped does *not* have any title to the property other than the title derived from the deed.

The principle underlying S. 35 is that a person taking the *benefit* of an instrument must also bear the *burden*. In other words, one cannot *eat* the cake, and *have* it too. One cannot blow *hot* and *cold* at the same time.

The doctrine of election was first applied to *wills*. Later, it was extended in England to *conveyances* and *settlements* also.

The doctrine *cannot*, however, be used to cure an illegality. Thus, a gift which infringes the rules against perpetuities *cannot* be sheltered by raising a case for election. Nor can the doctrine be applied to lead to inequitable results.

PROBLEM.—*X*, a Hindu widow, died, making a will in respect of property inherited by her from her husband. She bequeathed Rs. 2,000 as a legacy to the plaintiff, and the immovable property to *K*, the defendant's father. The plainitiff and *K* were the heirs of her hushand. The plaintiff sued for the legacy under the will, and for one-half of the immovable property as an heir. Will he succeed ?

Ans.—The plaintiff will be put to his election. He has to elect whether to take the legacy under the will or one-half of the property as heir of the testator's husband. (*Mangaldas* v. *Ranchhoddas*, 14 Bom. 438)

ENGLISH LAW.—English law applies the *principle of compensation*, and *not* that of *forfeiture* adopted by Indian law. Thus, in the first illustration to S. 35 (regarding the farm of Sultanpur), if *C* elects to retain the farm, after paying Rs. 800 to *B*, the balance Rs. 200 would go to *A* or his representative. *Under English law*, the remaining Rs. 200 would go to *C*.

Secondly, English law does *not* specify any time within which election is to be made (corresponding to the one-year period laid down by S. 35).

DIFFERENCE BETWEEN

ENGLISH LAW	INDIAN LAW
1. *Compensation.*—Under English law, a transferee, by electing *against* the transfer, does *not* incur a forfeiture of the benefit conferred on him, but is merely bound to make *compensation* out of it to the person disappointed by his election. In England, the doctrine of *compensation* is applied; *i.e.*, the person electing against the transfer gets what remains after compensating the disappointed transferee. The English doctrine of election rests on *compensation*, and *not* on *forfeiture*. Thus, a farm is the property of *C* and worth Rs. 800. *A*, by an instrument of gift, professes to transfer it to *B*, giving by the *same* instrument Rs. 1,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 1,000. On *C's* election to retain the farm, the gift of Rs. 1,000 would under the English law *not* revert to *A*, but would be taken by *C*, subject to a charge in favour of *B* for Rs. 800.	1. *Forfeiture.*—Under the T.P. Act (S. 35), the rule is that the refractory donee *forfeits* the thing transferred. In India, the doctrine of *forfeiture* is applied.
2. *Period of election.*—There is *no time* fixed by English law for making an election, *except* when time is limited by the instrument itself.	2. *Period of election.*—S. 35 has laid down a period of one year for making an election.

I. APPORTIONMENT (Ss. 36-37)

Story, in his Equity Jurisprudence, points out that the term 'apportionment' is used in *two senses* : (1) to denote the distribution of a common fund among the several claimants; and (2) to denote contribution made by several persons

having distinct rights to discharge a common burden. In the present context, the word *apportionment* is used only in the first sense.

Apportionment means *division*. S. 36 deals with apportionment of periodical payments as between the transferor and the transferee. S. 37 deals with apportionment of an obligation in the event of the division of the property to which it relates. Thus, S. 36 deals with *apportionment* by *time*, whilst S. 37 deals with apportionment by *estate*.

1. Apportionment of periodical payments on determination of interest of person entitled (S. 36)

Write an explanatory note on : Apportionment.
B.U. Dec 9
Apr 9
Apr 9
Apr 9
B.U. Apr 9

When property is transferred, all rents, annuities, pensions, dividends and other periodical payments in the nature of income are deemed, as between the transferor and the transferee, *to accrue* due from *day to day*, and to be apportionable accordingly. However, the actual payments are to be made only on the days appointed for the payment thereof.

This rule can, however, be excluded by a local usage or a contract to the contrary.

APPORTIONMENT.—Sec. 36 embodies a *rule of justice, equity and good conscience*, and can be applied to apportion the rent as between the lessee and the purchaser of his right in execution, though execution sales are not covered by the Transfer of Property Act by Sec. 2(d).

Apportionment by time.—Several properties yield income. The division of this income between the transferor and the transferee is called its apportionment. S. 36 lays down that all periodical payments in the nature of rents, annuities, pensions and dividends are *deemed to accrue from day to day* and be apportioned between the transferor and the transferee on that basis. Thus, *A* has let his house at a rent of Rs.100 payable on the last day of each month. *A* sells the house to *B* on the 15th of June. On the 30th June, *A* is entitled to rent of Rs. 50 from the 1st to the 15th, and *B* is entitled to Rs. 50 from the 15th to 30th. It is to be noted, however, that the tenant holds under a *monthly* contract, and he cannot be made to pay the rent of 15 days to *A* on the 15th June. He will pay the rent as usual on the 30th of June; only he will pay it in the proportion indicated above.

The *essence of the rule of apportionment by time* is that, although rents, annuities, dividends or payment of any other kind by way of income are to be made at fixed periods or intervals of time, they will be *deemed to accrue* from day to day as between the transferor and the transferee, and to be apportionable by time accordingly. Nonetheless, they will be *payable* only on the days fixed for the purpose.

The expression 'other periodical payments' must be construed *ejusdem generis* (*i.e.*, of the same type) with rents, annuities, pensions and dividends. The profits of partnership which accrue only after the adjustment of accounts, or the profits in a share of a village, are *not* 'periodical payments in the nature of income'.

This rule, however, can be excluded by a local usage or a contract to the contrary. Thus, *A* selling a house to *B* in the middle of a month, may agree that *B* should have the *whole* rent for that month which might be payable at the end of the month under a contract of tenancy. Similarly, there may be a local usage or custom which would debar the operation of this rule in the locality where that usage or custom prevails. Agricultural leases are not excluded under this section, though they are excepted under S. 37, which deals with apportionment by estate.

S. 36 does not apply to transfers by operation of law [S. 2(d)]. A person who buys property at an *execution* sale acquires title by operation of law, and the rule in S. 36 does *not* apply to him. Similarly, it has been *held* that the section does *not* apply to cases of *partition*.

2. Apportionment of benefit of obligation on severance (S. 37)

If, in consequence of a transfer, property is divided and held in several shares, and thereupon, the benefit of any obligation relating to the property as a whole passes from one to several owners, in the absence of a contract to the contrary, the corresponding duty is to be performed in favour of each of such owners in proportion to the value of his share in the property.

This rule would, however, apply only if the duty can be severed, and the severance does *not* substantially increase the burden of the obligation. But, if the duty *cannot* be severed, or if the severance would substantially increase the burden of the obligation, the duty is to be performed for the benefit of such one of the several owners as they jointly designate.

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

This section does *not* (unless the State Government so directs) apply to *leases for agricultural purposes*.

Illustrations.—(a) *A* sells to *B*, *C* and *D*, a house situated in a village and leased to *E* at an annual rent of Rs. 30 and delivery of one fat sheep, *B* having provided half the purchase-money, and *C* and *D* one quarter each. E, having notice of this, must pay Rs. 15 to *B*, Rs. 7½ to *A* and Rs. 7½ to *D*, and must deliver the sheep according to the joint direction of *B*, *C* and *D*.

(b) In the same case, if each house in the village being bound to provide 10 days' labour each year on a dyke to prevent inundation, and *E* had agreed as a term of his lease to perform this work for *A*,

then, *B*, *C* and *D*, may severally require *E* to perform the ten days' work due on account of the house of each. But *E* is *not* bound to do more than ten days' work *in all*, according to such direction as B, *C* and *D* may join in giving.

Apportionment by estate.—Where a property is given on a transfer to several persons by portions, *each* transferee is entitled to all the advantages, accruing from the property in proportion to his interest in it; *provided that* the person who has to perform the corresponding duty must have information that the original single owner has divided his property, and that the payment is to be made and the duty has to be performed to several owners. Thus, *A* has let his house at a rent of Rs. 100. *A* sells half the house to *B*. A tenant having notice of the sale must pay, from the date of the sale, rent at the rate of Rs. 50 to *A* and Rs. 50 to *B*.

Like the previous section, this section is subject to S. 2(d), and therefore, does *not* apply to involuntary transfers *or* to cases of succession. It has been *held* that the heirs of a deceased creditor can only jointly enforce the right which the deceased, if alive, could singly enforce. (*Kanahiya Lal* v. *Chandar*, 7 All. 313)