3
General Rules Regarding Transfer of Property

Restraints on alienation

Sections 10 to 18 contain the first set of rules that have to be observed while alienating property. Since it is a principle of economics that wealth should be in free circulation to get the greatest benefit from it, these Sections provide that ordinarily there should be no restraints on alienation. Where 'wealth accumulates men decay'.

Section 10 provides:

> Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of the interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Absolute restraint

The rule in all systems of jurisprudence is *alienatio rei praefertur juri accrescendi*, that is, alienation is favoured by the law rather than accumulation. It was this attitude that made sub-infeudation make place for substitution.

The section is based on the principle that the power of alienation is one of the most important incidents of property [1] If total restraints were not prohibited, this important principle would be abrogated by private agreement. On the same principle, a provision in an agreement among the members of a joint Hindu family that they would only enjoy the income of the joint family properties and that they would not claim partition, would be void, though partition is not alienation.

This section has to be read with Section 12 as they both deal with restraints on powers of alienation. While a total restraint on the power of

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1. *CIT* v. *Ahmedabad Rana Caste Association*, (1982) 2 SCC 542: AIR 1982 SC 32.

alienation is void, partial restraints[2] may be good. For example, a condition that the transferee shall not transfer his interest for a period of 3 years, or a condition that the transferee shall not transfer the property to any member of a particular person's family. But, the determination whether a condition amounts to a total or partial restraint depends upon the substance and not the form. For example, an agreement preventing the transferee from transferring his property to any one except to the transferor or his heirs, and that too if they are willing to buy it and for a fixed price, is in substance an absolute restraint.

If *A*, *B* and *C* effect a partition of their joint property and agree among themselves that if any one of them should have no issue, he should not sell his share, but leave it to the other two, it would be an absolute restraint.

If *A* sells property to *B* and *B* executes an *independent separate* agreement that if he wanted to sell the property he would only sell it to *A*, such an agreement would be valid, because *A*, while transferring the property did not impose any condition against alienation.

The section makes two exceptions one in favour of lessors and the other in case of married women.

In the case of lessors, the condition will be good only 'if it is for the benefit of the lessors', as for example a specific statement in the conveyance that the lessor may re-enter. The effect of contravening a mere condition against assignment in a lease will not make an assignment in contravention of such a condition automatically void. Without an express provision for re-entry, the lessor will only be entitled to damages for breach of covenant.

A valid condition against alienation of the leasehold interest can be imposed both in respect of voluntary and involuntary alienations, such as, a sale in execution. But in the case of voluntary alienations, there should also be a condition for re-entry to make the condition against alienation valid.

Restraints on the power of alienation in dispositions in favour of married women, who are not Hindu, Mohammedans or Buddhists, will be valid. Under English law as once administered, a husband and wife

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2. *Md. Raza* v. *Md. Abbas*, (1932) LR 59 IA 236; *Saraju Bala Debi* v. *Jyotirmoyee Debi*, (1931) LR 58 IA 270.

were regarded as one legal entity, so that, on marriage all the property of a woman became the property of her husband, and she could not dispose of her property, except with her husband's consent and could not, even with such consent, devise the property by will. That was why Sir A.P. Herbert in one of his Misleading Cases makes the humorous remark that you can never find a reasonable woman, because, text-books on English law in dealing with a married woman's right to deal with property, class her with infants, lunatics and idiots. John Galsworthy refers to those days as "the golden age for husbands before the Married Women's Property Acts". Gradually, equity and Legislature interfered in her favour, and by the Married Women's Property Act of 1882, an English married woman was at liberty to acquire, hold and dispose of property as if she were a *femme sole* that is, unmarried woman. But though the power was given to the married woman to deal with her property, it was not an unmixed blessing, because her husband still wielded a lot of influence over her, and he could either kiss her or kick her out of the property. Therefore, in settling or conveying property in favour of a married woman, the English Courts recognised the rule that it was open to the settlor or transferor to insert a clause in the deed of settlement or transfer, by way of a restraint on anticipation, that is, to restrain her, during coverture (that is, while under a husband's protection and shelter) from anticipating the future income of the property and from encumbering it or alienating it. The proviso in the section is introduced to serve a similar purpose in India.

It must be clearly understood that what the section enacts is, that, whatever interest—full or partial—is transferred, the transferor shall not impose an absolute restraint on the power to alienate that *interest or right which was transferred to the transferee*. Therefore, a limited interest in property can be created in favour of a transferee, but a restraint on the power to alienate that limited interest—except in the cases mentioned in the section—will be invalid.

Section 12 provides:

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

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

In *Dugdale* v. *Dugdale*[3], it was observed:

> The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid.... An incident of the estate given, which cannot be directly taken away or prevented by the donor, cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory device which would cause it to shift to another person.

These observations show that creditors may have made advances on the strength of property the transferee has. They should not be deprived of their security, namely, the property against which they could have proceeded in the event of non-payment, because of a clause in the transfer of which they know nothing. Hence, this rule has been enacted as an exception to the general rule embodied in Sections 31 and 32, that an interest may be created with the condition superadded that the interest shall cease on the happening of an uncertain event.

Conditional limitation and Condition: Distinction

The observations quoted use the words 'conditional limitation' whereas Sections 10 and 12 of the Transfer of Property Act use the word 'condition'. In English law there is a difference between the two expressions, though the distinction is not material under the Indian statute. I have already explained that an estate in fee-simple is one of the two kinds of legal estates which could be created in England under the Law of Property Act, 1925. But to be a legal estate the fee-simple, must be absolute *and* in possession. Suppose a grant is made to *A* in fee-simple as long as he is unmarried, but on marriage to *B* in fee-simple. It is not a legal estate, because, though in possession, it is not absolute being subject to a defeasance clause in favour of *B*. Again, if an estate in fee-simple, which is absolute, is to commence on a future date, it is also an equitable estate, because, though absolute, it is not in possession. The former kind of equitable estates, that is estates in fee-simple, which are not absolute are known as conditional or modified fees. They can be either an estate in fee-simple on *condition* or an estate in fee-simple by way of *conditional limitation* or determinable limitation. Since limitation,

3. 39 Ch 176, 182.

as applied to estates, marks the period which puts an end to an estate; a conditional limitation arises *when the condition forms part* of the limitation by putting *a limit on the duration of the estate*. For example, to *X* in fee-simple until he marries. Here, the condition "until he marries" forms part of the original words of limitation 'in fee-simple'. But, if a grant is made to *X* in fee-simple; but if he marries *Y*, on such marriage to *Z* in fee-simple; here the condition of marriage of *X* to *Y*, *does not form part of the original words* of limitation 'in fee-simple'. Since the condition which determines the estate is collateral to the original limitation, that is, *a collateral event* it is said to be an estate in fee-simple on condition.

Now the practical difference between the two is shown by the following illustration, which is peculiar to life-estates in English Law. Suppose a grant for life provides that the interest shall be forfeited if the grantee becomes a bankrupt. The condition is obviously void under *Dugdale case* (supra). But suppose it is a conditional limitation of the form to *A* for life until he commits an act of bankruptcy. This is permissible, because it is not a conditional limitation which shifts the estate to another person, but creates an estate which ceases to exist on the bankruptcy.

Second paragraph

Though this paragraph provides that nothing contained in Section 12 shall apply to a condition in a lease for the benefit of the lessor and those claiming under him, the Legislature by way of abundant caution introduced a provision in Section 111, under which, a lease is determined when the lessee is adjudicated an insolvent and the lessor gets a right of re-entry.

Section 31 provides:

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

Illustrations

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

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

Suppose property is transferred to *A* absolutely but with the condition that it would revert to the transferor if it is attached in execution of a decree against *A*, by a creditor. Such a condition subsequent would be invalid under Section 12.

Suppose *A* who is under a sentence of imprisonment for life, transfers his property to *B*, with the condition that when he is released, *B's* interests will cease and the property would revert to *A*. Such a condition subsequent would be valid.

The corresponding section, Section 134 of the Succession Act may also be noted.

The condition referred to must be a valid condition. The difference between Section 28 and Section 31 is that in the former the condition subsequent not merely divests the interest but vests it in another, whereas, under Section 31 the interest is divested and revested in the grantor. *See also* Section 12.

And Section 32 provides:

In order that a condition that an interest shall cease to exist, may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

That is, the condition should not be invalid under Section 25, which is discussed later.

Restraint on enjoyment

Section 11 provides:

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

Where 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, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

The difference between Section 10 and Section 11 is that the former deals with a case of an *absolute prohibition against alienation* of an interest created by a transfer and the latter deals with the absolute transfer of an interest followed by a *restriction on its free enjoyment*. That is, under Section 10, whatever interest was conveyed, large or small, limited or unlimited, such interest cannot be made absolutely inalienable by the transferee. Under Section 11, when once an interest has been created absolutely in favour of a person, no fetters can be imposed on its full and free enjoyment. Where, however, the interest created is itself limited, its enjoyment must also be limited; for example, when a widow's interest under customary Hindu law is granted to a woman, a direction that she should enjoy only the usufruct without either encumbering the corpus or committing acts of waste would be valid. But a condition in a deed depriving a co-owner of his or her claim to partition in respect of the common property would be bad, because, the right to partition is an essential ingredient of co-ownership.[4] The principle is that a condition will be void, if it detracts from the completeness of the very interest created; it will be good if it is consistent with such interest. Thus, where an absolute estate is granted, but a condition is imposed on the grantee requiring him to reside in a particular place, the condition is not valid and cannot be enforced.[5]

Suppose *A* transfers property to his daughter *B* with the condition that she shall not enjoy the property till her marriage. Such a condition will be void, because, delivery of possession and enjoyment can be postponed only (*a*) if the property is given to someone else and thereafter to the transferee, or (*b*) if the transferee is a minor.

See also illustration (*a*) to section 31. The condition is valid because what was transferred was only a life interest and the condition is not repugnant to the interest created.

The second paragraph relates to the rights of a *transferor* as against the *transferee*, (1) to enforce the performance of a positive covenant, and (2) to restrain the breach of a negative covenant. After the 1929 amendment, although affirmative and negative covenants are valid as between a transferor and a transferee, only negative covenants can be

4. *Jafferi Begum* v. *Ali Raza*, 28 IA 111.

5. *Lilavati* v. *Firm R.D.S.B.*, AIR 1971 P&H 189 (case of sale with a stipulation for payment of part of profits); *Indu Kakkar* v. *Haryana State Industrial Dev. Corpn.*, (1999) 2 SCC 37. (Resumption of allotment).

enforced against a transferee from the first transferee by reason of Section 40. That is, if *A* is the owner of two properties *X* and *Y* and if *A* transfers *X* to *B* and some covenants were entered into between *A* and *B* as to the use of *X* in order to enable *A* to have the beneficial enjoyment of *Y*, then *A* can enforce them whether they are affirmative or negative covenants. But if *B* transfers *X* to *C*, then *A* can only enforce the negative covenants as against *C* because of Section 40.

The Crown had the power in British India to limit the descent of lands granted by it in any way it pleased.

Section 40, to which reference is made provides:

> Where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or
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> where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immovable property, but not amounting to an interest therein or easement thereon,
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> such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

Illustration

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

First and third paragraphs

These may be compared with the second paragraph of Section 11. While that deals with the transferor's rights against the transferee, this section deals with the right against the transferee from the first transferee. The first paragraph was amended in 1929, and before amendment, it recognised the right to compel the performance of an affirmative covenant as well as restrain the breach of a negative covenant. The effect of the amendment is to confine the section to negative or restrictive covenants. A covenant is an agreement in writing. The position therefore is that positive covenants may be enforced between the original parties and are not ordinarily binding on subsequent transferees; whereas

negative covenants are binding even on subsequent assignees of the covenantor's interest if they have notice of such covenants.

Under the English Common Law, originally, the benefit of a covenant ran with the land of the covenantee, but its burden did not run with the land of the covenantor. For example, suppose *A* sells land to *B* and there is a covenant between them that *B* would keep in good repair a road leading to another piece of land of *A*. If *A* sells his other land to *C* and *B* sells the land purchased from *A* to *D*, according to the above rule, *C* as the purchaser of the land of the covenantee, that is *A*, could enforce it against *B*; but he could not enforce it against *D*, because *D* is the purchaser of land of the covenantor and the burden did not run with it. This rule was altered in the case of *Tulk* v. *Moxhay*[6]. In that case, Tulk was the owner of a vacant land and the purchaser of the land covenanted, for himself, his heirs and assigns, to keep and maintain the said piece of ground in its then form and in sufficient and proper repair as a garden uncovered by any buildings. The land ultimately passed into the hands of Moxhay, who, though he had notice of the covenant, announced an intention to build on the ground. In an action for injunction by Tulk, it was held:

> That this Court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing part of it, that the latter 'shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed....It is said, that the covenant being one which does not run with the land, the court cannot enforce it; but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by its vendor and with notice of which he purchased....,for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

In this case the covenant though apparently positive is really negative, and though the Court was dealing with a negative covenant, used language applicable to a positive covenant also. It was on that basis, that the rule in *Tulk* v. *Moxhay* applies to both positive and negative covenants, that the Indian Section 40 was originally enacted.

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6. 41 ER 1143; *Bai Dosabai* v. *Mathuradas*, (1980) 3 SCC 545: AIR 1980 SC 1334; *Hukum Chand* v. *Jaipur J&O Mills*, AIR 1980 Raj 155; *Raj Narain* v. *Sukha*, AIR 1980 All 78 (covenant binding on a court-auction purchaser).

But in later cases, in England *Tulk* v. *Moxhay* was confined to negative covenants. For example, in *Haywood* v. *Brunswick Permanent Building Society*[7], the covenant was to erect and keep in good repair and rebuild messuages on the land; and it was held that since it was a positive covenant it was not enforceable. Similarly in *Austerberry* v. *Corporation of Oldham*[8], a piece of land was conveyed and it was bounded on both sides by the land of the vendor. The covenant was to make a road and keep it in repair at all times and to allow it to be used by the public subject to tolls. The vendee made, according to the covenant the road giving access to the vendor's land. The vendor later sold his lands to the plaintiff and the vendee sold his land to the defendants. When the plaintiff sought to enforce the covenant, it was held that it could not be enforced because, (*i*) it was a positive covenant, and (*ii*) *it did not run with the covenantor's land.* To summarise, the law in England was that in the case of a covenant between the vendor and the vendee of a land, its benefit ran with the land of the covenantee but its burden did not run with the land of covenantor ; but, if the covenant was negative or restrictive on the user of the land by the covenantor, it will be enforced against the covenantor's transferee if he had notice of the covenant or the transfer was gratuitous. And in determining whether a covenant was positive or negative it is the substance of the covenant and not its form that matters. This is the law in India also now after the 1929 amendment. The reason for the rule is this: If a person sells land with a covenant he would not get full value. Why should a purchaser from him be then allowed to ignore the covenant and sell it free of the covenant and get better value? Incidentally, a purchaser with notice from a transferee without notice is not bound by the covenant.

These restrictive covenants apply in the case of a building scheme. In such a scheme, there is a common vendor, who is the owner of a large area, which he sells as plots for buildings. He imposes a number of restrictions which are for the benefit of all the owners of the plots. Therefore, any purchaser from the common vendor can enforce the covenants against purchasers of other plots and against their purchasers also, who are deemed to have notice of the scheme.

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7. (1881) 8 QBD 403.
8. (1885) 29 Ch D 750.

Covenants running with the land

Covenants running with the land, under the second paragraph must have the following characteristics: (*i*) they must be made with a covenantee who has an interest in the land to which they refer, and (*ii*) they must concern or touch the land, that is, they must affect the nature, quality or value of the land. For example, the covenants to pay rent and the right to have quiet enjoyment in the case of leases. [*See* Sections 108 and 109]. Suppose again that *A*, the owner of land, grants sub-soil rights to a coal-mining company and the company agrees to pay damages if the surface land caves in or subsides. This is a covenant running with the surface land. If the covenants do not touch the land, then they will be merely, personal covenants.

Suppose *A*, sells a vacant site to *B* with the condition that *B* should not build on his portion in such a way as to obstruct *A's* enjoyment of his house. This is a negative covenant and can be enforced not only against *B* but also against a transferee from *B*, if such transferee had notice of the covenant, even if the transfer was for consideration.

Suppose *A* conveys an absolute interest in land to *B* and *B* covenants not to cut any trees on the land. This covenant is certainly enforceable against *B*. It would be enforceable even against a transferee from *B* for consideration, if such transferee had notice of the covenant. In these two illustrations, it is assumed that the covenant is for the more beneficial enjoyment of the transferor's property. But suppose, the transferee agrees not to build a hotel on the land transferred to him, he will certainly be bound by the covenant but his transferee, even if he had noticed, will not be bound, because, it may not be for the more beneficial enjoyment of the transferor's land.

Suppose *A* is the owner of two buildings *X* and *Y*, contiguous to one another *A* sells *X* to *B* who covenants, to pull down a room on a passage between *X* and *Y* whenever *A* requires *B* to do so. This is a positive or affirmative covenant. *A* can certainly enforce it against *B*, but if *B* transfers *X* for consideration to *C*, who has notice of the covenant, *A* can enforce the covenant against *C* only if it is annexed to the ownership of *Y i.e.* if it touches or concerns the nature, quality or value of *Y*.

Substance and not form

The owner of a plot permitted another to enjoy it and build on it. The licensee covenanted that if he should sell any building erected by him on the land, he would pay 1/4 of the sale price to the owner. The licensee sold a house which he built on the land and the transferee had notice of the covenant. It was held that the covenant was negative and restrictive it being in substance a restriction on the licensee selling any building. Therefore, the covenant to pay 1/4 of the sale price would be enforceable against the transferee also, if the covenant was proved to be for the beneficial enjoyment of the property of the original owner. For the application of the section the condition of beneficial enjoyment must also be satisfied.

Summarising the effect of Sections 11 and 40, the law in India may be stated in the form of propositions as follows:—

(1) If *A* has only one piece of land and he sells it to *B*. A positive or a negative covenant relating to the use of that land would not be binding on *B*.

(2) If *A* has two lands and he sells one land to *B* with a covenant for the benefit of the other land. The covenant binds *B* irrespective of whether the covenant is positive or negative.

(3) Suppose in the above illustrations *B* sells the land purchased by him to *C*. *C* would be bound by the covenant with *A*, if the covenant is *negative and if he had notice of the covenant.*

(4) If in the same illustration the covenant is positive *C* would not be bound, unless it is annexed to the ownership of the other land.

(5) If in the same illustrations *A* sells the land retained by him to *D*, *D* will have all the rights of *A* and can enforce the *negative* covenant against *B*.

(6) If the transferees are transferees who have not paid any valuable consideration the question of notice does not arise.

These rules may be contrasted with rules obtaining between a landlord and tenant:

(1) Under Section 11, a covenant between vendor and purchaser, whether positive or negative , will be binding if it is for the benefit of another piece of land which the vendor has. But,

between a landlord and tenant, if a lessor has only one piece of land and he leases it out, the covenant entered into by the lessee would be binding on the lessee.

(2) Positive covenants between vendor and purchaser never pass, that is, even though they are binding on the original purchaser they would not bind a purchaser from the purchaser even with notice of the covenant, unless the covenant is annexed to the ownership of the other land. But as between a lessor and a lessee, even positive covenants bind a transferee from the lessee.

(3) A negative covenant between a vendor and his purchaser, is binding on subsequent purchasers except when they are transferees for valuable consideration without notice of the covenant. But as between a lessor and a lessee, negative covenants and positive covenants which concern the land would be binding on the subsequent transferees from the lessee whether or not they had notice.

Transfers in favour of unborn persons

The next four sections, namely, Sections 13 to 16, and Section 20 deal with rules which have to be observed when creating future interests.

Section 13 provides:

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

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.

Not in existence

A child *en ventre de sa mere*, that is, a child in the mother's womb is deemed to be in existence, as also a child adopted by the mother after her

husband's death. A transfer cannot be made directly in favour of an unborn person. It must be preceded by a prior interest in favour of a living person.

Scope of the section and the rule against Double Possibility

In English law when a tenant was in possession of land, that is, when the tenant had *seisin* of the freehold, he was naturally anxious to keep it in the family. In order to effectuate this family prudence, which was calculated to preserve the family estate, the owner (tenant in fee-simple) would grant it to, say his son *A* and the heirs of his body. But courts interpreted such an estate, before 1285, as an estate in fee-simple conditional that is, an estate which became an estate in fee-simple with respect to the grantee, on the happening of the condition, namely, the grantee begetting an issue or issues. Since the grantor lost his reversion and the grantee's descendants did not get any rights, the rich and influential holders of land got passed the statute known as *De Donis Conditionalibus* in 1285. It declared that the grantor's intention must be respected, so that, in grants similar to those considered above, *A* got only a life estate and the remainder went to his descendants. On failure of such descendants the estate reverted to the grantor or his representatives. But the lawyers and judges discovered two methods by which the tenant in possession either *suffered a recovery* or *levied a fine* the effect of which was to bar the entail and the tenant in possession enlarged his estate to a fee-simple. To get over this, the grantors thought of what are known as future estates, that is, a series of life interests one following another. Where the owner in fee-simple granted an estate to *A* for life, he carved out a *particular estate* in favour of *A* and on its termination it reverted to the grantor or his heirs and is known as a *reversion.* Where the grant was in the form to *A* for life and the *remainder* to *B* in fee-simple, it was a case of a remainder. A series of such remainders could be created as to *A* for life, to *B* for life, to *C* for life and to *D* in fee-simple. If a grant was in the form to *A* for life, remainder to *B* for life, remainder to *C* for life and remainder to *D* in tail, the owner has a reversion expectant upon the particular estate in favour of *A*, *B*, *C* and *D* failing, because if *D* has no issue the estate reverts to the grantor. One such series of future interests was created in favour of a person, who was a bachelor, for his life, remainder to his eldest son for life, and the

remainder to the eldest son of such eldest son in fee-simple. The last limitation was held to be void in *Whitby* v. *Mitchell*[9], on the ground that there was a double possibility: (*i*) the bachelor begetting a son, and (*ii*) such son begetting a son in his turn. The court therefore again foiled the attempt of the owner in fee-simple creating a series of future interests. As explained under Section 10, the courts foiled all such attempts because the law favours the free circulation of property.

As Lord Mansfield put it:

At last the people having groaned for two hundred years under the inconveniences of so much property being unalienable, and the great men, to raise the pride of their families, and (in those turbulent times) to preserve their estates from forfeitures, preventing any alteration by the Legislature, the judges and lawyers adopted various modes of evading the statute *De Donis*.

This rule against double possibility is enacted in this section in a more stringent form. Thus, if a grant is in the form to *A* for life, to *B*, an unborn person, for life and then to *C*, whereas under English law, by virtue of the rule in *Whitby* v. *Mitchell*[10], the last limitation in favour of *C* would be void, under this section, even the grant in favour of *B* would be void. For a grant to an unborn person, to be valid, must exhaust the whole of the grantor's remaining interest, that is, it should be of the form to *A* for life and to *B* (an unborn person) absolutely.

Under the rule in the *Tagore* case, under the Hindu law, before 1916, bequest or a transfer in favour of an unborn son was deemed to be void n the principle that a person not in existence at the material date was *ncapable* of taking. In that year, the Hindu Disposition of Property Act 15 of 1916) was enacted, as a result of which, it is possible for a Hindu to transfer or bequeath property in favour of unborn persons, but such dispositions are subject to Sections 13 and 14 of the Transfer of Property Act which deal with limitations in favour of unborn persons and the rule against perpetuity.

Suppose a person *A* settles property on himself for life and then on his son and then on his son's son etc. in succession for their respective lives, and, if the line of his lineal descendants becomes extinct, for

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9. 44 Ch D 85.
10. *Ibid.*

feeding of the poor in his town. The succession of life estates in favour of *A*'s descendants is invalid under the *Tagore case* because it is an estate unknown to Hindu law. If the son of *A* was unborn even the first settlement is invalid because of *Tagore case*. After the 1916 Act mentioned above, this part of the decision in *Tagore case* is altered, but even so, the settlement in favour of *A*'s unborn son would be invalid because, even under that Act, the transfer in favour of an unborn son is subject to Sections 13 and 14, T.P. Act; and under Section 13, the transfer must extend to the whole of the remaining interest of the transferor, whereas, in the instant case it is only a life-interest that is transferred to him.

The conditions to be complied with under this section or, (*a*) the interest of the unborn person must be preceded by a prior interest; (*b*) the unborn person must be in existence when the prior interest comes to an end; and (*c*) the interest created in favour of the unborn person must be the whole of the remaining interest of the transferor that is, a life-interest cannot be created in favour of the unborn person.

For example if property is given subject to the condition that there should not be any change in faith, it would be a case of giving less than the whole of the interest of the transferor.

A gift to a person not in existence is void under Mohammadan law and therefore Section 13 does not apply to Mohammadans.[11]

In the illustration discussed above, if *A* is a Muslim the wakf in favour of the poor would also have been invalid before the passing of the Mussalman Wakf Validating Act, 1913. But under this Act, so long as the ultimate wakf is valid, it does not matter if it is postponed till after the extinction of all the lineal descendants of the transferor. Therefore, under Muslim Law as it now stands, the transfer would be valid.

These rules continue in Indian law, though the original rule against double possibility enunciated in *Whitby* v. *Mitchell*[12] has been abolished in England by the Law of Property Act, 1925, so that, under the present English law, any number of life estates could be created in succession as a series of remainders in favour of persons either born or unborn, subject only to the rule against perpetuity.

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11. *See* S. 2, *Trustees of Sahebzadi Oalia Kulsum Trust* v. *CED*, (1998) 6 SCC 267: AIR 1998 SC 2986.
12. 44 Ch D 85.

The rule in Section 13 of the Transfer of Property Act is similar to the rule in Section 113 of the Indian Succession Act, 1925.

The case of *Sopher* v. *Administrator General of Bengal*[13], arose under Section 113, Succession Act. The facts were that the testator directed his trustees to divide his property into shares equal to number of his children and grandchildren and to pay the income of those properties to his sons for life and then to his grandchildren who survive their respective fathers, till they attained the age of 18. The grandchildren were then entitled to the property absolutely. The Judicial Committee of the Privy Council held that the unborn grandsons had to survive a double contingency, namely they must reach 18 years *and* also survive their respective fathers, and that therefore the bequest was void. The Privy Council observed that the exception in Section 120, Succession Act (corresponding to Section 21, T.P. Act), does not apply because, that exception does not refer to the contingency of the grandson surviving his father. The Privy Council also observed that if a bequest is capable of being defeated either by a contingency or by a clause of defeasance, the bequest does not comprise the whole of the remaining interest of the transferor. But the Bombay High Court in *Famroz Dadabhoy Madan* v. *Tahmina*[14] held that *Sopher case* cannot apply to transfers *inter vivos*, because, Section 13 only provides that, 'unless it extends to the whole of the remaining interest of the transferor', and not to the certainty of its vesting in the transferee. Perhaps this decision may require reconsideration in view of illustration (b) to Section 114, Indian Succession Act.

The Rule against Perpetuities

Section 14 deals with what is known as the rule against perpetuity. It provides:

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

According to Blackstone, by perpetuities, estates are made incapable of answering those ends of social commerce and providing

13. AIR 1944 PC 67.
14. (1947) 49 Bom LR 765; *Venkata* v. *Manikyam*, AIR 1983 AP 139.

for the sudden contingencies of private life for which property was at first established. Perpetuity or creation of remote interests in future is the result of the desire of many men of property to rule beyond their lifetime from their graves by regulating the succession to their property. The rule against perpetuity, or as it is also known, the rule against remoteness, prohibits the non-vesting of interests beyond a certain period which is not unreasonable. It prescribes the maximum period within which a future interest must vest, and if the vesting is postponed beyond such maximum period the limitation would be void for remoteness. Such maximum period is called the perpetuity period. In *Cadell* v. *Palmer*[15], the rule in its modern form in English law is stated as follows:

> Where the vesting of any interest in property, whether legal or equitable, is postponed for a period exceeding a life or lives in being at the date of the instrument creating it, or where the disposition is a will, at the death of the testator, and twenty-one years after the expiration of such life or lives such interest is void.

This is to say, you can prevent alienation only for one generation, because, all the lives in being must die within the period of one generation, since they are all in Lord Nottingham's apt phrase, 'Candles which are all lighted together and must expire'.[16]

A child *en ventre de sa mere* is considered for this rule, to be in existence. In such a case the period of gestation is added, that is, the perpetuity period is 21 years plus the period of gestation.

The 'life or lives in being' are human lives, but they need not be of persons taking under the limitation. The vesting can be postponed for the life or lives of persons who are strangers to the transaction, but they must be ascertained and in existence on the date of the conveyance or when the will may take effect.

Difference between Indian and English laws

. The period of 21 years specified as an absolute period, that is, it is to be taken *in gross* and no question of the minority of the donee arises. Under Section 14 of the Transfer of Property Act, only the period of

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15. 131 ER 859.
16. *Howard* v. *Duke of Norfolk*, 22 ER 1066.

minority is to be counted. Further, under the Indian rule, the interest is to vest in the beneficiary on his attaining majority and he should be in existence on the expiry of the life or lives in being. The age of majority in India is 18, but if a guardian is appointed by court, the age is 21. The difference between the English and Indian rule is exemplified by the following illustration:

> Suppose a grant is made to *A* for life in a deed, and the remainder is given to *A*'s eldest son 3 years after the death of *A*. Suppose further that on the date of *A*'s death his eldest son had become a major. In this case the vesting is postponed for 3 years *in gross*. Such a limitation would be valid in English law, because, an absolute period of 21 years is allowed after the life or lives in being. But the limitation would be void under the Indian rule since the beneficiary was not a minor on the expiry of the life or lives in being.

Another difference between the two systems of law is that the period of gestation may be added to the perpetuity period both at its beginning and its end, in English law; while under Indian law it can be added only at the beginning of the perpetuity period. This can happen only in testamentary dispositions and not under this Act. An example will make clear the exact nature of the difference between the two systems.

Suppose a testator *A* bequeaths his property to his child *en ventre de sa mere* for life and 21 years thereafter to the child of *B*. If *B*'s child was *en ventre de sa mere* at the expiry of the 21 years, there is a valid bequest in English law, and the period after which the property vests in *B*'s child would be the following periods as they occur one after the other, added together: The period of gestation of *A*'s child, life of that child, 21 years, and the period of gestation of *B*'s child. In Indian law, the limitation to be valid would read, to *A*'s child, *en ventre de sa mere* for life and to *B*'s child at 18. Even if *B*'s child was only *en ventre de sa mere* at the end of the life of *A*'s child, the period after which the property vests in *B*'s child would be the following periods as they occur one after the other added together: The period of gestation of *A*'s child, the life of that child, the period of gestation of *B*'s child and 18 years. There is no period of gestation as the last item as in the case of the limitation under English law.

In considering whether the limitation is valid or offends the rule against perpetuity the question is whether there is a possibility of the

interest not vesting within the period of perpetuity. If such a possibility exists, the limitation is void irrespective of the actual course of events. This is sometimes expressed by saying, you cannot wait and see whether the vesting in fact would be within or outside the perpetuity period:

(*i*) Suppose a grant is made to *A* for life in a deed and the remainder is granted to that son of *B* who first attains the age of 18. It is possible that when *A* dies, a son may not have been born to *B* and is born only subsequently. Since, under the Indian rule the minor *must* be in existence on the expiry of the life or lives in being, the limitation in favour of *B*'s son will be void.

(*ii*) Suppose a grant is made to *A* for life and the remainder is granted to the unborn eldest son of *A* when he attains the age of 25. The limitation is void under Indian law because the vesting is postponed beyond the minority of the son. It would also be void under the English law. Because, it is possible that when *A* dies, he has a son aged 24, and so he is capable of taking the interest within one year that is, less than 21 years of *A*'s—a life in being—death, it might be argued that in English law the limitation is valid. But, equally it is possible that *A* might die immediately or very soon after the deed was executed, leaving a son *en ventre de sa mere* or an infant of one or two years. In that contingency, the vesting is postponed beyond a life in being and 21 years, and hence, since, the possibility is there, the limitation would be void.

(*iii*) Suppose the grant is to *A* and the remainder is to *A*'s son on attaining 25. The limitation would be void, because of the possibility that the vesting in *A*'s son may be more than 21 years after the death of a life in being namely, of *A*, if *A* dies leaving a son, one or two years in age.

In the case of illustration (*iii*), Section 163 of the English Law of Property Act, 1925, provides that the limitation in such cases should be read as if the age specified is 21.

Doctrine of Cypres

The above is an instance of the doctrine of *Cypres* according to which if a limitation or direction as such could not be given effect to it may be

given effect to in a manner as near to (*ci-pres*) to the direction as possible. For example, if under a will, property is given to an unborn son for life and the remainder to the children of the unborn son in tail, the last limitation was void according to the rule of double possibility. (Incidentally, this rule is also referred to as the *old* rule of perpetuity). But according to the doctrine of Cypres, the limitation was interpreted as an estate tail in favour of the unborn son who was given a life estate. But the court will not, under the guise of applying this doctrine, construe a will so as to include as an object of the testator's bounty a person whom the testator wanted to exclude, or as to exclude a person whom the testator wanted to include.

Note that if *A* transfers property to *B* during the lives of *X*, *Y* and *Z* the transfer is valid even if the limitation stops here, because, the property would revert to *A* from *B* after the death of *X*, *Y* and *Z*. If however *A* wants to transfer the property to *C*, who was not in existence at the date of transfer then, the section requires that *C* must be in existence when the last of *X*, *Y* or *Z* dies and the deed must provide that *C* takes the full estate on his attaining majority.

Exceptions to the Rule against Perpetuities

The rule against perpetuity recognises certain exceptions both in English and Indian laws. They are: (1) In favour of Charities. In English law though a gift over from one charity to another will be valid even if it is based on a remote possibility, the gift in favour of the first charity must vest within the perpetuity period. Under Indian law, the rule against perpetuities does not apply to property transferred for the benefit of charities. (*See* Section 18). (2) In favour of Estate tail, only in English law, because of recognition of the power to bar the entail and convert the estate into a fee-simple. (3) In favour of clauses of re-entry or for renewal in leases in both systems of law. (4) In favour of provisions for the discharge of the debts of the grantor, under English law. (5) In favour of agreements to convey or re-convey property. With respect to the last, *see* Section 40 below.

Origin of the Rule in English Law

Under the English law, originally, the rule against perpetuity applied only to equitable contingent remainders and executory interests. The following explains the scope of this rule.

I have already explained, under Section 13 what are remainders. They are divided into two classes, vested and contingent. Suppose a grant is made to *A* for life and the remainder to *B* in fee-simple. Then *B*'s interest is a *vested* remainder, because, it is capable of taking effect immediately on the determination of the particular estate in favour of *A*, and it is not subject to any condition precedent. But suppose the grant is to *A* for life and the remainder to *B* in fee-simple, *if C returns from the U.S.* In such a case, *B*'s interest is a contingent remainder, because, it is made to depend not on the determination of the particular estate but upon the condition of *C* returning from the U.S. Here, there is a possibility that *C* may not return at all from U.S. or, he may return some time after the determination of the life estate in favour of *A*. There were important rules in relation to creation of such future interests in law. They are: (1) An interest in freehold could not be limited by deed so as to spring up at some time in the future without any prior freehold estate, as, for example, a grant to *A* in fee-simple on his attaining the age of 21, without being proceeded by any estate. It is known as a *springing interest* and could not be created at Common Law by a deed. (2) An interest in freehold could not be limited by deed so as to take effect in defeasance of a particular estate, as, for example, a grant to *A* in fee-simple as long as he is unmarried, and to *B* in fee-simple if he marries. This is known as a *shifting interest* and could not be created at Common Law by deed. (3) Every contingent remainder of a freehold estate must have a particular estate to support it. For example, a grant to *A* for 15 years, and remainder to *B* in fee-simple if he settles down in London. The remainder in favour of *B* cannot take effect at Common Law, because, the grant for a term of years certain in favour of *A* is not a freehold. (4) The condition on which the remainder is made to depend must be fulfilled before or at the latest *eo instanti* with the determination of the particular estate. These rules were evolved, because, one of the most important rules of the English Common Law is that *seisin* must never be in abeyance. Under the 4th Rule relating to legal contingent remainders set out above, if the remainder is to vest at all the condition must be fulfilled at or before the expiration of the particular estate, which was in favour of a living person. There was thus no possibility of the limitation of an interest being too remote, and that was why, the rule against perpetuity was not applicable to legal contingent remainders.

Since, in the cases of uses (settlements in the nature of trust) and trusts, the legal estate always vests in the trustee, there is no gap in the

seisin, and therefore, the above rules are not applicable when limitations were made by means of uses and trusts. Such remainders created by uses and trusts are referred to as equitable remainders and such equitable remainders, when contingent, were subject to the rule against perpetuity. Under the modern English law, all future estates, except reversionary leases, are treated as equitable interests, and are governed by the rule against perpetuity.

Origin of the Executory Trusts in English Law

By the end of the 14th century the capacity to dispose of goods and chattels was well recognised and equally, the restriction on such a power to dispose of land became well established, because, in the latter case, the King and the great lords were anxious to retain the feudal incidents of tenure which would arise on the death of a feudal tenant. For example, if the right to devise by will is recognised in the case of land, it would rarely escheat to the feudal lord. To get over this disability the tenant would convey the land to one or more *feoffees to uses* (the modern name is trustees) *inter vivos* with a direction that the *feoffee* should convey the land to the *cestui que use* (the modern name is beneficiary). In this device to get over the want of a testamentary power, there was the danger that a dishonest *feoffee* might have kept the land himself and refused to convey it to the intended beneficiary. The Court of Chancery intervened in such a case and on the application of the beneficiary the Chancellor would issue a decree directing the trustee (*feoffee*) to transfer the land to the beneficiary. Thus arose in English law the distinction between legal and equitable rights. The *feoffee* or trustee had the legal right to land, but the *cestui que use* or beneficiary had the equitable right which was recognised by the Chancellor. In course of time, the equitable rights became enforceable against the whole world except a purchaser of the legal estate for value and without notice of the equitable right involved.

The equitable estate quickly developed and conveyances like the following were quite common. To *A* in fee-simple, to the *use* of *B* for life, with remainder to the *use of C* in fee-simple. *A* the *feoffee* got the legal estate, *B* got an equitable estate for life and *C* got an equitable vested remainder.

Again a conveyance such as 'to *A* from first of March next' would be void at common law, because at common law, the only way of creating a future interest was by way of a remainder in possession on the

termination of a prior freehold interest, for example, to *A* for life, with remainder to *B* in fee-simple. But if the conveyance was worded 'to *A* in fee-simple *to the use of B* in fee-simple from first March next', *A* would get the legal fee-simple. He would hold it, at the direction of the Chancellor, to the use of the grantor giving rise to a *resulting use* in favour of the grantor, and on first of March a use would spring up in favour of *B*, a *Springing use*. Similarly if the grant was 'to *A* in fee-simple, but if he marries a foreign national to *B* in fee-simple' it would vest, at common law, the legal fee-simple in *A* and the gift over to *B* would be void, because, the future interest was not created as a remainder after the termination of a freehold. But if the grant was worded 'to *A* in fee-simple to the use of *B* in fee-simple, but if he marries a foreign national then to the use of *C* in fee-simple' it would have vested the legal fee-simple in *A* and, in equity, he would be compelled to carry out the uses expressed, with the result that if *B* married a foreign national the equitable interest would shift to *C* giving rise to a *Shifting use*.

In 1535 the Statute of Uses was passed and its effect was to *execute* the use, that is, if a conveyance is 'to *A* in fee-simple to the use of *B* in fee-simple', it was deemed to be a conveyance direct to *B* in fee-simple and *A* dropped out of the picture. Thus the trick by which land was disposed of after the death of the feudal tenant came to an end. But lawyers and judges were equal to the King (Henry VIII) and his Parliament. They restricted the applicability of the Statute in such a way that: (1) it operated only when one person was *seised of land* to the use of another; (2) it does not apply when the trustee had some active duty to perform; and (3) it became ineffective when there was a *use upon use*.

Suppose a grant was '*A* to the use of *B* to the use of *C*'. The effect of the Statute was to execute the first use, that is *B* got the legal estate, but he held in trust for *C*. Thus, the trust reappeared.

The Statute had the effect of turning Springing and Shifting Uses into legal interest. Thus, in the grant 'to *A* in fee-simple to the use of *B* in fee-simple from first of March next', the legal fee-simple remained in the grantor and on the given date the legal fee-simple sprang up and vested in *B* as a Springing Use. Similarly in the grant 'to *A* in fee-simple to the use of *B* in fee-simple, but if he marries a foreign national then to the use of *C* in fee-simple' would vest the legal fee-simple in *B*, but would shift to *C* as a legal fee-simple if *B* marries a foreign national, giving rise to a Shifting Use.

In 1540, the Statute of Wills was passed permitting a tenant in fee-simple to devise lands by will which right became a completed right giving full freedom of testamentary disposition when Knight service was turned into Socage by the Statute of Tenures in 1660. The result was that legal interests corresponding to Springing and Shifting Uses could be also created by will. These Springing and Shifting devices were called executory devices. All these types of legal interests—Springing and Shifting Uses, and executory devices are classed as executory interests.

Under modern English law, that is after the Law of Property Act, 1925, all future interests, except a right of re-entry in the case of leases, are treated as equitable interests.

Corresponding Indian Law

Section 14 may be compared with the corresponding Section 114 of the Indian Succession Act.

In this connection, we may study the scope of the second paragraph of Section 40. (*See* p. 48)

The illustration shows the scope of the paragraph. Under the Indian Trust Act, it is an obligation in the nature of trust and the subsequent transferee was bound by the obligation as a constructive trustee.

In *London & S.W. Rly. Co.* v. *Gomm*[17], a railway company conveyed land and the transferee covenanted for himself, his heirs and assigns, to reconvey the land to the Railway Company *at any future time*, receiving back the money paid by him. It was held that the covenant created an equitable contingent interest but that the limitation was void as contravening the rule against perpetuity. That is because, in English law such an agreement to convey immovable property creates, by itself, an interest in such property. In Indian law, however, such agreements do not create any interest in property and they will be perfectly valid. Such covenants for pre-emption being valid are enforceable under the second paragraph of the section. Thus a contract in Indian law does not create any interest, legal or equitable, but only creates obligations of fiduciary character which could be enforced. Further, they are not hit by the rule against perpetuity, which may operate in some cases under the English

17. (1882) 20 Ch D 562.

law, because, under that system such covenants may create equitable interests in property. These distinctions are brought out in the following two cases:

In *Ram Baran* v. *Ram Mohit*[18], two brothers partitioned their properties reserving a right of pre-emption enforceable against even assignees. On the question whether the covenant for pre-emption offends the rule against perpetuities, it was held:

> 'A perpetuity' as defined by Lewis in his well-known book on *Perpetuities* 'is a future limitation whether executory or by way of remainder, and of either real or personal property which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests'. The rule as formulated falls within the branch of the law of property and its true object is to restrain the creation of future conditional interests in property. The rule against perpetuities is not concerned with contracts as such. Thus a contract to pay money to a person, his heirs or legal representatives upon a future contingency, which may happen beyond the period prescribed would be perfectly valid. *Walsh* v. *Secy. of State of India*[19]. It is, therefore, well established that the rule of perpetuity *concerns rights of property only and does not affect the making of contracts which do not create rights of property*.
>
> The rule does not, therefore, apply to personal contracts which do not create interests in property. *See* the decision of the Court of Appeal in *South Eastern Railway Co.* v. *Associated Portland Cement Manufacturers*[20], even though the contract may have reference to land....
>
> In English law a contract for purchase of real property is regarded as creating an equitable interest, and if, in the absence of a time-limit, it is possible that the option of repurchase might be exercised beyond prescribed period fixed by the perpetuity rule, the covenant is regarded as altogether void. It has, therefore, been held that a covenant for pre-emption unlimited in point of time is bad as

18. AIR 1967 SC 744; *Veerattalingam* v. *Ramesh*, (1991) 1 SCC 489: AIR 1990 SC 2201.
19. (1863) 10 HCL 367: 11 ER 1068.
20. (1910-11) Ch 12.

being obnoxious to the rule against perpetuities. The point was settled by the Court of Appeal in *London and S.W. Rly. Co.* v. *Gomm*[21], which is the leading English authority on the point....

In the case of an agreement for sale entered into prior to the passing of the Transfer of Property Act, it was the accepted doctrine in India that the agreement created an interest in the land itself in favour of the purchaser....

But there has been a change in the legal position in India since the passing of the Transfer of Property Act. Section 54 of the Act states that a contract for the sale of immovable property 'does not, of itself, create any interest in or charge on such property'. Section 40 of the Act is also important....Its second paragraph taken with illustration establishes two propositions: (1) that a contract for sale does not create an interest in land, but is annexed to the ownership of the land, and (2) that the obligation can be enforced against a subsequent gratuitous transferee from the vendor or a transferee for value but with notice.

Reading Section 14 along with Section 54 of the Transfer of Property Act it is manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it, therefore, follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time-limit within which the option has to be exercised. It is true that the second part of Section 40 makes a substantial departure from the English law, for an obligation under a contract which creates no interest in land, but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice. A contract of this nature does not stand on the same footing as a mere personal contract, for it can be enforced against an assignee with notice. There is a superficial kind of resemblance between the personal obligation created by the contract for sale described under Section 40 which arises out of the contract, and annexed to the ownership immovable property, but not amounting to an interest therein or easement thereon and the equitable interest of the person purchasing under the English law, in that both these rights are liable to be

21. (1882) 20 Ch D 562.

defeated by a purchaser for value without notice. But the analogy cannot be carried further and the rule against perpetuity which applied to equitable estates in English law cannot be applied to a covenant of pre-emption because Section 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in land.

We are accordingly of opinion that the covenant for pre-emption in this case does not offend the rule against perpetuities and cannot be considered to be void in law.

In *Kempraj* v. *Barton Sons & Co.*[22], the respondent entered into a lease with the appellant of certain premises. The lease was for 10 years with an option in the lessee to renew it as long as he desired. The lessee, even before the expiry of 10 years, informed the lessor of its intention to exercise the option. As the lessor did not comply with the notice the lessee filed a suit for the specific performance of the covenant in the lease for renewal. The lessor contended that the option relating to renewal was hit by the rule against perpetuity. It was held:

Section 14 is applicable only where there is transfer of property. Even if the creation of a leasehold interest is a transfer of a right in property and would fall within the expression 'transfer of property' the transfer was for a period of ten years only. The stipulation relating to renewal could not be regarded as transferring property or any rights therein.

In *Ganesh Sonar* v. *Purnendu Narayan Singha*[23], in the case of land an option had been given to the lessor to determine the lease and take possession of the leasehold land under specified conditions. The question was whether such a covenant would fall within the rule laid down in the English case *Woodall* v. *Clifton*[24], in which it was held that a proviso in a lease giving an option to the lessor to purchase the fee-simple of the land at a certain rate was invalid as infringing the rule against perpetuity. The Patna High Court distinguished the English decision quite rightly on the ground that after the coming into force of the Transfer of Property Act, a

22. (1969) 2 SCC 594.
23. AIR 1962 Pat 201.
24. (1905) 2 Ch 257.

contract for the sale of immovable property did not itself create an interest in such property as was the case under the English law. According to the Patna decision the option given by the lessee to the lessor to resume the leasehold land was merely a personal covenant and was not a covenant which *created an interest* in land and so the rule against perpetuity contained in Section 14 was not applicable. The same principle would govern the present case. The clauses containing the option to get the lease renewed on the expiry of each term of 10 years can by no means be regarded as creating an interest in property of the nature that would fall within the ambit of Section 14.

In *Muller* v. *Trafford*[25], Farwell, J., observed that a covenant to renew had been held for at least two centuries to be a covenant running with the land. If so, then no question of perpetuity would arise. It appears that in England whatever might have been the reason, the objection of perpetuity had never been taken to cases of covenants of renewal. The following observations of Farwell, J., which were quoted with approval by Lord Evershed, M.R. in *Weg Motors Ltd.* v. *Hales and others*[26] are noteworthy: 'But now I will assume that this is a covenant for renewal running with land; it is then in my opinion free from any taint of perpetuity because it is annexed to the land. See *Rogers* v. *Hosegood*[27]. Even on the footing that the clauses relating to renewal in the lease, in the present case, contain covenants running with the land the rule against perpetuity contained in Section 14 of the Act would not be applicable as no interest in property has been created of the nature contemplated by that provision.

The case of *Maharaj Bahadur* v. *Balachand*[28] is not contrary to the rule. In that case, a Maharajah agreed to give the Society of Jesus a building site for a temple whenever they should require it. He granted, later, a lease of a hill to the respondent. The Society sued the lessee for possession on the basis of the agreement. The suit was dismissed on the assumption that the agreement created a right, but, since it could possibly take effect at a remote date, the grant was against the rule of perpetuities.

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25. (1061) 1 Ch 54.
26. (1961) 3 All ER 181.
27. (1900) 2 Ch 388.
28. LR 48 IA 376.

But this decision was before the Act when English law was held applicable to transfers in India.

Suppose *A* agrees for himself and his heirs, executors and assigns, to transfer to *B* or his heirs and executors, a piece of land whenever *B* or his heirs or executors require him to do so. This is purely a personal contract and no question of the rule of perpetuity arises. If *A* transfers the land to a third party *C*, *B* can enforce the contract against *A* and *C* under Section 40. The rule of perpetuity does not apply to covenants running with the land.

Suppose a person *A* transfers property to *B* for life and the remainder to *B's* unborn son on his attaining 25 years. The transfer in favour of the unborn son would be void, because, in India, the maximum perpetuity period is the period of gestation (which cannot exceed 9 months) and 18 or 21 years (the age of majority). But, the vesting in the present case is at 25 and one cannot wait and see if the property vests within the perpetuity period.

Suppose property is transferred to *A* for life and thereafter absolutely to those children of *A*, who are alive 3 years after *A's* death. The transfer to the children who are aged 16 and above at *A's* death, would be void, because, they will take the property at an age beyond 18. Such a transfer, however, will be valid in English Law, where the postponement can be upto 21 years.

Illustration (1) to Section 114, Indian Succession Act, is as follows: a fund is bequeath 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 a 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 thus the vesting of the fund maybe delayed beyond the lifetime of *A* and *B* and the minority of the sons of *B* and so, the bequest after *B's* death is void.

It is submitted that the reasoning is fallacious. The bequest after B's death is void because the vesting is postponed beyond the minority period and has nothing to do with the longer lives of *A* or *B*.

Transfers to a class of persons

Section 15 provides:

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

English law

The corresponding rule in English law is found enunciated in case of *Leake* v. *Robinson*[29]. Under that rule the whole limitation fails and no member of the class could take any interest. The reason was, the bequest or gift being in favour of a class; it could not be split up, because, to split it up and confer on each individual person a separate share as and when he satisfies the condition would be making a new will or deed. This rule was embodied in Section 15 of the Transfer of Property Act as it originally stood.

The amendment

In *Bhagabati Barmanya* v. *Kali Charan Singh*[30], it was pointed out by the Judicial Committee that this artificial rule was mistakenly introduced into the Indian statute and that it was, in any event, inapplicable to Hindus. In that case, there was a bequest in a will to the wife and mother of the testator for their lives, remainder on their death, to his sister's sons, those then in existence and those that may be born thereafter. The testator died on the very day on which he executed the will. It was held that there was a valid bequest to such of them as were capable of taking on the date of the testator's death, even though others of the class were incapacitated on account of the rule in the *Tagore case*, because they were then unborn.

But, in *Sundararajan* v. *Natrajan*[31], an estate was given to the testator's daughters for their lives with remainder to the children on attaining the age of 21 years. Since some of the immovable properties dealt with by the will were situated in the city of Madras, the will was

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29. 35 ER 979.
30. ILR 38 Cal 468 (PC).
31. (1925) LR 52 IA 310.

governed by the Hindu Wills Act, 1870. The consequence was that Sections 101 and 102 of the Indian Succession Act, 1865, corresponding to Sections 114 and 115 of the Indian Succession Act, 1925, became applicable to the will. Under Section 101 which dealt with the rule against perpetuity, since the bequest could be, possibly, delayed beyond the lifetime of the daughters and the minority (18 years) of some of the children, the bequest in favour of such children was void and under Section 102, which incorporated the rule in *Leake* v. *Robinson* (supra) regarding bequests in favour of a class, the entire bequest in favour of all the children became void. These two cases brought about an anomaly that in the case of Hindus dealing with property outside the Presidency Towns, the rule in *Leake* v. *Robinson* (supra) did not apply, while in the case of Hindus dealing with property within the Presidency Towns, the rule applied. The Amending Act 20 of 1929, has done away with the rule in all cases and enacted the present section.

A gift is said to be to a class of persons when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain definite proportionate shares. *Pearks* v. *Moseley*[32].

Indian Succession Act, 1925, S. 115

The corresponding section, Section 115 of the Indian Succession Act, 1925, was similarly amended at the same time.

The first illustration to the above section provides: A fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25. *A* survives the testator and has some children living at the testator's death. Each child of *A*'s living at the testator's death must attain the age (if at all) within the limits allowed for a bequest. But *A* may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A*. *The bequest to* A's *children, therefore, is inoperative as to any child born after the testator's death; and in regard to those who do not attain the age of 25 within 18 years after* A's *death, but is operative in regard to the other children of* A.

32. 5 AC 723.

This illustration was considered by the Privy Council in *Aniruddha* v. *Administrator General*[33]. In this case the testator, after making a bequest in favour of his son *A* directed by his will that the residue was to be *made over to* the son or sons of *A*, natural or adopted, but only on completion of 21 years and if there were more than one son of *A* on the youngest completing 21 years. *A* had no son when the testator died but thereafter adopted a son. The Privy Council held that the adopted son could take the residue, because, (1) an adopted son is deemed to be in existence at the time of the death of his adoptive father; (2) though the adopted son was not in existence at the date of testator's death, the bequest in favour of unborn children is valid under the Hindu Disposition of Property Act, 1916; (3) the gift is in favour of a class and is valid under Section 15; (4) the perpetuity rule would not apply because the property had vested in the adopted son immediately after adoption, since the words 'made over to' show that it was only possession that was postponed. Dealing with the illustration to Section 115 of the Succession Act, the Privy Council observed: 'the last sentence in the illustration means that the bequest is inoperative in regard to the children of *A*, born after the testator's death who do not attain the age of 25 within 18 years after *A*'s death, but it is operative in regard to such children who do attain the age of 25 within 18 years, though born after the testator's death'.

It is respectfully submitted that this interpretation of the illustration by the Judicial Committee requires reconsideration. Under Indian Law, the illustration may not be right because the bequest is inoperative with respect to all the children whether they attain 25 years within or beyond 18 years of *A*'s death. The bequest can only be operative if they take their shares when they attain 18.

In *Bajrang Bahadur* v. *Bakhtraj Kuer*[34], by a will of 1929, property was bequeathed to *A* for life, then to *A*'s heirs successively for life, and finally upon the extinction of *A*'s line upon *B* and his heirs. The testator died in 1930 and thereafter *A* died. *A*'s widow claimed a life estate. The Supreme Court held that she was entitled to a life estate, because though some of the heirs of *A* may be unborn and a life estate in their favour would be invalid under Section 13, the widow was in existence and was entitled to take under Section 15. The Supreme Court observed, "It is

33. AIR 1949 PC 244.
34. AIR 1956 SC 593.

quite true that *no interest* could be created in favour of an unborn person (*Tagore* v. *Tagore*) but when the gift is made to a class or series of persons some of whom are in existence and some are not, it does not fail in its entirety". Since the will was of 1929 after the Hindu Disposition of Property Act, 1916, was passed, the testator can confer an interest on the unborn heirs of *A*. The reason why the bequest in favour of such unborn heirs of *A* failed in this case is not because they were unborn but because they only got a life estate instead of the whole interest of the testator as required by Section 13.

Suppose property is given to *A*, a bachelor, for life and thereafter to all his children, when the last child attains majority. The transfer is void with respect to all those children who had attained majority but had to wait till the last child attained majority. But under this section, the last child can take his or her share.

Amendment not retrospective

The amendment to the section is not retrospective. (*See* discussion on Section 63 of Act 20 of 1929 on p. 6).

Section 16 provides:

> Where, by reason of any of the rules contained in Sections 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.

Principle

The effect of the invalidity of a condition on a transfer depends upon whether the condition is precedent or subsequent. In the case of an invalid subsequent condition it is ignored and has no effect on the interest already vested. If it is a precedent then it will affect the transfer and the transferee will take nothing. This is the rule in English law as laid down in *Monypenny* v. *Dering*[35]. The reason why the ulterior disposition fails to take effect is that it forms part of a scheme to prevent alienation.

35. 42 ER 826, 841.

Scope

Suppose a transfer is made to *A* for life, remainder to his unborn eldest son and the remainder to *B* in fee-simple. Under Section 13, the first limitation is void, and therefore the ulterior disposition in favour of *B* which depends upon the prior limitation is void.

Where a testator bequeathed to his great grandsons in tail male not in existence at his death and on the failure of such tail male to the daughter's sons, the latter bequest was dependent on the gift to the great grandsons and is therefore void.

Property was given to a woman for life, then to her male descendants, but if she should have no sons, to her daughters without power of alienation. In the absence of any issue the property was to go to her father. The woman had no children at the time of the gift. The gift in favour of the unborn daughters was void under Section 13, and hence the final disposition in favour of the father, who claimed the estate on his daughter dying without issue, was held to be invalid.

Where however the limitations which are to succeed are not dependent upon or are not intended to take effect in the wake of the prior limitation but are independent of such prior limitation or alternative to it, then the limitations over will take effect if they are otherwise valid. The position is the same if the prior interest is not invalid but fails subsequently. In such a case the subsequent interest is accelerated. In *Ajudhia Baksh* v. *Rakhman Kuar*[36], an Oudh Taluqdar made a bequest to his wife for life and the remainder to his younger son by her. The devise in favour of the wife failed for want of registration. Since the intention of the testator was to give his estate to his younger son, it was held that the remainder in his favour was accelerated. In this case the prior disposition did not fail because of Sections 13 and 14, but for want of registration. The case is governed by the rule contained in Section 27 of the Act which lays down the principle known as the Doctrine of Acceleration. In one case, a man bequeathed his property to his wife and his brother for their lives, after them to the male issue of the brother, and in default of any such male issue to the person whom the brother appointed under a power of appointment. The brother had no male issue and he appointed his daughter. The gift to the daughter was held to be valid because it was

36. ILR 10 Cal 482 (PC); *Bhuthnath* v. *Kalipada*, AIR 1982 Cal 534.

an independent and alternative gift by the testator. (When a person takes property under a power of appointment it is taken not from the grantee of the power but from the donor of the power). The test is, are there two separate gifts dependent on distinct events, or is it a case of one gift falling within Sections 13 or 14 and another just taking effect thereafter. In the former case the second gift would take effect, but not in the latter case.

The section provides that the ulterior disposition would fail only if the prior disposition in favour of the *whole class intended* failed because of Sections 13 and 14. Therefore, if the prior disposition fails only in regard to some of the members of the class, the ulterior disposition will not fail but will take effect.

Indian Succession Act, 1925, S. 116

The section in the Succession Act, 1925, corresponding to this section in the Transfer of Property Act, is Section 116. *See also* Section 20 below.

Accumulations

Section 17 provides:

(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

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

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation 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;

and such direction may be made accordingly.

Principle

A direction regarding income from property to keep it separate or to postpone its enjoyment is a direction for accumulation. The object of the rule against perpetuity is to circumscribe the period during which property might be tied up. The object of this section is to restrict the period for the accumulation of income in order to prevent hardship that may be caused to heirs by postponing their enjoyment of the property unreasonably and also to prevent the locking up of property and hamper the economy of the country.

Originally, there could have been a direction for accumulation in English law for the full period of perpetuity. But in the case of *Thelluson* v. *Woodford*[37], the testator directed the accumulation for nine lives in succession and the direction was held to be bad. The Accumulation Act, 1800, 39 and 40 Geo 3 c 98, was passed fixing the maximum period for accumulation. That Act was repealed by the Law of Property Act, 1925, which however re-enacted the provisions.

The rule was originally enacted in a simple form in India as Section 18 of the Transfer of Property Act. It fixed the maximum period for accumulation as one year from the date of transfer where: (*a*) the property was immovable; or (*b*) the accumulation was directed to be made from the date of transfer. The period was found to be too short and the position of the rule was logically felt to be after Section 16. Therefore, the present rule regarding accumulation was enacted as Section 17.

No specific rule can be laid down as regards the capacity of a Hindu to direct accumulation. But the rule laid down in the section is not contrary to Hindu law.

Scope

A direction for accumulation for a period in excess of the period permitted by the perpetuity rule will be void also under the perpetuity rule. Such a direction will also be void on the ground of repugnancy under Section 11 where there is a transfer of an absolute interest.

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37. (1805) 11 Ves June 112.

A direction for accumulation for payment of debts for whatever period would not go against the rule against perpetuities, because, the property is not tied up absolutely, since a creditor may at any time demand payment. There must be existing debts and the accumulation *must be* for the payment of such debts.

Indian Succession Act, 1925, S. 117

The corresponding section in that Act is Section 117.

Section 18 provides:

The restrictions in Sections 14, 16 and 17 shall not 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.

Principle

Where property is given for a purpose beneficial to the public it is necessary that it should not be frittered away, but on the contrary should be kept intact so that its income could be utilised for the beneficial purpose. That being so there could be fetters on the transfers of such property. Under Hindu law gifts for religious or charitable purposes were always regarded as valid and the rule against perpetuity does not affect them. The section is thus rightly made applicable to Hindus. Though it does not apply to Muslims, Mohammedan law permits endowments in perpetuity for religious or charitable purposes.

Scope

The illustration to Section 118 of the Indian Succession Act, 1925, sets out what are religious or charitable uses: (*a*) the relief of poor people; (*b*) maintenance of sick soldiers; (*c*) the erection or maintenance of a hospital; (*d*) education of orphans; (*e*) support of scholars; (*f*) erection and maintenance of a school; (*g*) building and maintenance of bridge; (*h*) making of roads; (*i*) erection and maintenance of a church; and (*j*) formation and maintenance of a public garden.

The following are charitable or religious gifts:

(*a*) Gifts of property to temple, idol or for the support of priests;

(*b*) Gift of *sadavart*, that is, feeding;

(*c*) Gift of property to a *dharamshala* where travellers are fed;

(*d*) Gift for building wells; and

(*e*) Gifts for maintaining schools and universities.

The following are *not* charitable or religious gifts:

(*a*) Trust for individual benefit;

(*b*) Gift for the performance of ceremonies for the spiritual benefit of the donor or members of his family; and

(*c*) Gift for repairing a private tomb.

Under this section a gift over from one charity to another is valid as in English law. But unlike English law a gift to a charity even upon the happening of a distant event would be valid under this section.[38]

Exercises

1. Can a transfer of property impose a condition on the transferee or on persons claiming under him that they should not part with their interest in the property? (pp. 50-53)
2. *A* transfers property to *B* with the condition that *B* shall not sell it without *A*'s consent. Is the transfer valid? (The transfer is valid, but not the condition)
3. In what cases are conditions restraining a transferee of property from enjoying it in any manner he likes, valid and in what cases are they invalid? (pp. 55-57)
4. *A* transfers property to *B* on condition that if *B* becomes insolvent, the property reverts to *A*. Is this transfer valid? (pp. 52-53)
5. *A* gifts a house to *B* with the condition that *B* shall not make any alternations in it. Is the condition valid ? (pp. 55-56, it is a condition subsequent and void)
6. *A* transfers his land to *B* with the condition that if *B* joins the Army, the land will revert to *A*. Is the condition valid ? (pp. 54-55)
7. Explain the Rule against Perpetuity. (pp. 66-79)
8. The shebaits of a temple agree to appoint the members of the family of *A*, from generation to generation to perform temple services and to provide for the expenses and remuneration of the person then holding office. Is such an agreement valid? (pp. 76 and 79)
9. Can there be transferors to unborn persons and if so when? (pp. 66-79)
10. In considering the question of remoteness in relation to the rule against perpetuity what is to be considered is the possibility and not the actual events. Explain. (pp. 68 and 69)
11. What are the exceptions to the Rule against perpetuity? (p. 70)
12. How far is the rule in *Leake* v. *Robinson* (35 ER 679) applicable in India? (pp. 80-83)

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38. *Satish* v. *Ramesh*, AIR 1981 Pat 339.

13. *A* gifts her property to *B* her niece for life and then to *B*'s male descendants, if any, absolutely, but if there are no male descendants to *B*'s unborn daughter for life, and that if there is no issue of *B* at all to *A*'s nephew *C*. If *B* dies without issue, can *C* take the property? (pp. 83-84)
14. Even if the ulterior disposition is not valid the prior disposition is not affected. Is this right? (pp. 83-84)
15. How long can the income of transferred property be directed to be accumulated without being enjoyed by the transferee? (pp. 85-87)
16. What is a covenant and what are covenants annexed to land? (pp. 57-61)
17. Distinguish in law and equity, the nature of covenants running with land. (pp. 57-61)
18. Distinguish between restrictive and positive covenants. (p. 58-59)

4
Vested and Contingent Interest

[*Sections 19 to 24*]

Vested and contingent interests

Section 19 defines 'vested interest'. It provides:

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

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

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

If an interest is limited to take effect on the fulfilment of a condition, the condition is known as a *condition precedent*. If the condition refers to an event which is *certain* to occur the interest is a vested interest. (*See* introduction and notes under Sections 13 and 14). That is why, a vested remainder is sometimes described as *not being* subject to a condition precedent. If it is an *uncertain* event it is contingent. Contingent interests are dealt with under Section 21.

Section 119 of the Succession Act, 1925, contains illustrations exemplifying the scope of the section.

The differences between a vested and contingent interest are as follows:

(1) A vested interest is independent of any condition and takes effect from the date of the transfer of interest, whereas a contingent interest depends entirely upon the fulfilment of the condition imposed;

(2) In a vested interest there is a present interest, though its enjoyment is postponed, but in a contingent interest the interest would vest only on the fulfilment of the condition; and

(3) A vested interest is transferable and heritable, but a contingent interest is neither alienable nor transmissible.

In *Rajes Kanta Roy* v. *Santi Debi*[1], the terms of a trust deed showed that the settlor attached great importance to the discharge of the debts becoming an accomplished fact before his two sons took the benefit by way of devolution of his property. The widow of a predeceased son had obtained a decree against the two sons for payment to her of a monthly allowance. Her application for execution of the decree was opposed by the two sons on the ground, *inter alia*, that under the terms of the trust deed they had no attachable interest in the properties sought to be proceeded against. It was held:

> The learned Judges of the High Court relied on illustration (*v*) to Section 119 of the Indian Succession Act and the decision in *Ranganatha Mudaliar* v. *Mohan Krishna Mudaliar*[2], (and granted execution). The learned Solicitor-General appearing for the appellant before us has urged that there is no such inflexible rule of law as is assumed by the Hight Court, namely, that, 'in spite of a clause requiring payment of debts before the property reaches the hands of the donee, the gift is a vested one'. He drew our attention to the fact that both Section 19 of the Transfer of Property Act and Section 119 of the Indian Succession Act clearly indicate that if 'a contrary intention appears' from the document that will prevail....It is to be noticed that at p. 1373 in Jarman *On Wills* (8th Ed.) Vol II, it is stated as follows: '*It was at one period doubted whether a device to a person after payment of debts was not contingent until the debts were paid; but it is now well-established that such a devise confers an immediately vested interest, the words of apparent postponement being considered only as creating a charge*'. Apart from any seemingly technical rules which may be gathered from English decisions and text books on this subject, there can be no doubt that the question is *really one of intention* to be gathered from a comprehensive view of all the terms of a document....These arrangements taken together clearly indicate that what is postponed is not the very vesting of the property in the lots themselves but that the enjoyment of the income thereof is burdened with certain

1. 1957 SCR 77; *Chikkaraj* v. *Viswanathan*, AIR 1979 Mad 103; *Rukhamanbai* v. *Sivram*, (1981) 4 SCC 262: AIR 1981 SC 1881.
2. AIR 1926 Mad 645.

monthly payments and with the obligation to discharge debts therefrom notionally *pro rata*, all of which taken together constitute application of the income for his benefit.

A fund is bequeathed to *A, B* and *C* in equal shares *to be* paid to them on their attaining the age of 18, respectively, with a proviso that, if *all* of them died under the age of 18, the legacy shall devolve upon *D*. On the death of the testator, the shares vested in interest in *A, B* and *C*, subject to be divested in case *A, B* and *C*, shall die under 18, and, upon the death of any of them, (except the last survivor) under the age of 18, his vested interest passes, so subject, to his representatives. The interest is already vested but liable to be divested on the happening of a condition subsequent. For such conditional limitations *see* notes under Sections 12, 28 and 31.

The words "To be paid" or "Payable at a certain age" only postpone the enjoyment of a vested interest. They do not make the interest contingent.

Suppose a property is given to *A* until *B* attains the age of 18 and then to *B*. Apparently the interest given to *B* is a contingent interest, contingent on his attaining 18. But similar devise of real property was construed in an English case as creating a vested interest and the same rule applies in India both with respect to movable as well as immovable property. The reason for such a construction is that the law favours the vesting of property.

Under the Mussalman Wakf Validity Act, 1913, life estates with vested remainders are recognised in relation to wakfs.

Section 21 defines 'contingent interests' and provides:

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

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

Suppose property is given to *A* until *B* attains the age of 18 and then to *B*. *A's* interest is vested and *B's* interest is contingent. Suppose

property is given to *A* but if he marries, to *B*, *A's* interest is vested and *B's* contingent. But if *B* dies and then *A* marries, *A's* interest continues to be vested and *B's* interest (contingent) ceases with his death. Suppose again, property is given to *A*, but if he dies without any issue, to *B*, *A's* interest is vested and *B's* is contingent. Therefore, if *B* dies before *A*, *B's* contingent interest ceases with his death, and the subsequent death of *A* without any issue will not have any effect.

Suppose a property is gifted to *A* for life and thereafter to *B*, if *B* returns from the UK. No time is mentioned for the happening of the contingency. Therefore, the contingency must happen before *A* dies, because, otherwise the ownership of the property will remain in suspense. But, if a time is fixed for *B's* return say 10 years, then, even if *A* dies before *B's* return, *B* will take the property whenever he returns before 10 years. During the interval between *A's* death and *B's* return, the property will be held in trust, and if there is no one, by the official trustee.

Like the Explanation to Section 19, the exception to this section is a rule of construction. The corresponding section in the Indian Succession Act is Section 120.

In *Ma Yait* v. *Official Assignee*[3], the result of a disposition was to create, first of all, *a vested interest in all the children in the income of the property;* secondly, it created *a contingent interest in all the children in the corpus* in respect of all the property until, at any rate, the youngest child reached the age of 20. When the youngest child reached the age of 20, the children who were alive obtained a vested interest and a right to have the proceeds distributed. The eldest son transferred his rights under the settlement deed and the assignee sued for a declaration of the interest to the assignor. On the question whether the assignment was hit by Section 6(*a*) of the Transfer of Property Act, it was held:

> The contingent interest which the children took was something quite different from a mere possibility of a like chance of a relation obtaining a legacy, and also something quite different from a mere right to sue. It is well-ascertained form of property—it certainly has been transferred, in this country for generations—in respect of which it is quite possible to raise money and to dispose of it in any way that the beneficiary chooses.

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3. (1930) LR IA 10.

In this case it is not just a contingent interest (*see* page 90, where it is stated that a contingent interest cannot be transferred). The contingent interest in the present case is a right in the corpus with an additional vested right in the income. This disposition is clearly covered by the exception.

In English Law, while in the case of an *individual*, a direction for the application of the income for the benefit of the donee gives him a vested right, in the case of a grant to a class, no vested right is conferred until all the members of the class attain the age. It is assumed that there is such an exception in Indian Law also, because of section 22. It is respectfully submitted that such an assumption is not justified, because, (a) section 22 does not refer to the application of the income; and (b) *Ma Yait's* case (on page 93) shows that the members of the class have a vested interest.

Below are given a few simple examples of vested and contingent interests:

If *A* gives property to *B* for life and then to *C* but that *C* should not enjoy the income till he is 18, *C* gets a vested interest (*see* Section 17). But if *A* gives property to *B* for life and then to *C* when he reaches a particular age, *C* only gets a contingent interest. Again, if *A* gives property to *B* for life and then to his unborn son, the latter gets a vested interest the moment he is born. If however the grant is to *B* for life and then to his unborn son on attaining 18, it is contigent. But note that if the grant is to *B* for life and then to his unborn son but that the latter should not enjoy the income till he is 18, it is a vested interest; similarly if the income is given but the vesting of the corpus postponed, even then it is vested under the exception to Section 21. If however, property is given to *B* for life and on his death to his son on attaining 18, the son gets a contingent interest till he is 18, and thereafter a vested interest.[4]

Where, under a gift deed the donee is to take possession of the property gifted only after the death of the donor and his wife, the donee takes a vested interest.

If *A* transfers property to *B* in trust for *C* with direction that *B* should give possession to *C* when *C* attains the age of 25; *C* gets a vested interest and is entitled to possession when he attains 18.

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4. *Usha Subba Rao* v. *B.N.Vishweshwariah*, AIR 1996 SC 2260.

The test is: An interest is vested if it vests in the transferee immediately or on the happening of an event which is bound to happen. Such an estate does not cease to be a vested interest, merely because, (*a*) the enjoyment is postponed; or (*b*) a prior interest is given to another; or (*c*) the income accruing from it is directed to the accumulated until the time of enjoyment arrives; or (*d*) where the interest would pass to another on the happening of an event.

Section 20 deals with the case of the creation of an interest for the benefit of an unborn person. It provides:

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

Section 23 provides for a transfer contingent on the happening of specified uncertain events. It reads:

> 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.

If the rules (1) and (4) in the notes under Section 14 are examined, one may be tempted to conclude that the rule in this section is the same as rules (1) and (4) in English law, but there are two important differences. They are: (*a*) A limitation such as to *A* for life, remainder 5 years after *A's* death to *B* in fee simple, is not permissible in English law, because the contingent interest must vest at the latest *eo instanti* the determination of the particular estate; but would be permissible under Indian law, because, time is mentioned for the occurrence of the event, and the conditions of the section are not applicable; and (*b*) under the English law a contingent gift must be supported by a prior estate but that artificial rule is not imported into Indian law under this section.

Section 21 deals with two kinds of contingent interests: those that take effect on the happening of a specified uncertain event and those that take effect when a specified uncertain event does not happen. In the case of the former kind, there are two possibilities: (*i*) A time is specified for the happening of the event, or (*ii*) No time is specified. If time is specified, that situation will be covered by Section 21. But, if no time is specified, that situation is covered by Section 23.

Illustrations to the section can be gathered from those under Section 124 of the Succession Act, which is the corresponding section under that Act.

The case of a transfer to members of a class who attain a particular age is provided for in Section 22. It reads:

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

If however, the intention is clear that the property is to be divided among all the members of the class when they attain 18, Section 22 does not apply, because, that is postponing only the division or enjoyment of the property and hence the gift is not contingent.

Section 24 provides for the case of a transfer to such of certain persons as survive at some period not specified. It reads:

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

Illustration

A transfers property to *B* for life, and after his life 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*.

In the illustration if both *C* and *D* survive *B* and thereafter *C* dies, *C's* legal representatives and *D* share the property equally. If both *C* and *D* predecease *B* the property will be shared equally by the representatives of *C* and those of *D*. This is due to a peculiar rule stated by Lord Lindley in *Penny* v. *Commr. of Railway*[5] to the effect that the survivorship clause is in the nature of a divesting clause and if none of the donees survive, the clause will be inoperative, so that the donees are deemed to have vested interests.

Further illustrations are found under Section 125 of the Indian Succession Act.

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5. (1960) AC 628, 634.

Exercises

1. What are 'vested' and 'contingent' interests? (pp. 90-95)
2. What is a contingent remainder and when should it vest to be valid? (pp. 94 and 95)
3. What is the nature of the interest in the following case:

   A gifts his property to *B* for his life on condition that after *B*'s death it devolves on *C*, but if *C* dies before *B* then it devolves on *D*. What are the interests of *C* and *D* during *B*'s lifetime? (*C*'s interest is vested, whereas *D*'s is contingent)

5
Transfers with Conditions

[*Sections 25 to 30, 33 and 34*]

Conditional Transfer

A conditional transfer is defined in Section 25. It provides:

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

Illustrations

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

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

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

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

Where a transferor makes the existence of a right dependent on the happening or non-happening of an event, it is a conditional transfer. Conditions maybe (*a*) precedent, (*b*) subsequent or (*c*) conditional limitation. The last has been discussed on pages 45 and 46.

Under Section 19, we have already seen what is a condition *precedent*. A condition *subsequent* is one, on the happening of which an interest once vested, is either determined or shifted from the grantee to another person (*see* Section 28). For example, a grant to *A* in fee simple. If he married *B's* daughter, then to *C* in fee simple. Similarly, a grant to *A* for life but if he marries a second wife, the life estate shall be determined. The differences between the two kinds of conditions are as follows:

(*i*) A condition precedent precedes the vesting, but a condition subsequent succeeds the vesting.

(*ii*) The fulfilment of a condition precedent has the effect of vesting an estate not already vested, whereas, the fulfilment of a condition subsequent divests an estate already vested.

(*iii*) A condition precedent to be effective need not be strictly fulfilled. It is sufficient if it is substantially fulfilled. A condition subsequent, however, must be strictly fulfilled.

(*iv*) When a condition precedent is void, the grant will be void, whereas, if a condition subsequent is void, the condition is ignored. This follows from Section 32.

Sometimes a condition precedent is construed as a condition subsequent. Suppose a grant is made to *A* when he attains 21, but if he dies before attaining that age, then to *B*. The condition of *A's* death before 21, could be treated as a condition precedent for the vesting of the estate in *B*. But in *Edwards* v. *Hammond*[1], it was treated as a condition subsequent, that is, the estate had vested in *A* and was divested by the fulfilment of the condition subsequent, namely, *A's* death before attaining 21. The reason for such a construction was that the law favours vesting, in this case in *A*.

The rule against perpetuity and the rule of the double possibility, already discussed, under Sections 13 and 14 come under the head 'forbidden by law'.

In *Ghumna* v. *Ramchandra*[2], the donor made a gift of his property to a person and his wife, on condition that the donor should physically enjoy the wife. The condition being immoral, the gift was held to be void.

The difference between a transfer being void and a condition being void may be examined at this stage. Transfers in favour of unborn persons but without giving them the whole estate (Section 13), transfers violating the rule against perpetuity (Section 14), and conditional transfers when the condition is illegal, immoral or impossible (Section 25), are cases where the *transfers* are void. But in the case of a transfer with a total restraint on alienation (Section 10), a transfer subject to a restriction repugnant to the interest created (Section 11), a transfer subject to a condition making interest determinable on insolvency or attempted

1. (1683) IB & PNR 324 N.
2. (1925) ILR 47 All 619

alienation (Section 12), a transfer subject to a condition directing accumulation beyond the period mentioned in Section 17 (Section 17), are cases where the transfer is valid but the condition is void, that is, the condition is ignored and transfer is deemed to be unconditional.

What is considered as fulfilment of a condition precedent is provided for in Section 26, as follows:

> Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.
>
> *Illustrations*
>
> (*a*) *A* transfers Rs 5000 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 5000 to *B* on condition that he shall marry with the consent of *C, D* and *E*. *B* marries with the consent of *C, D* and *E*, but obtains their consent after the marriage. *B* has not fulfilled the condition. (It is a case of approval and not consent). The approval was subsequent and not prior to the marriage.

In *Veerabhadra* v. *Chiranjivi*[3], the appellant's father made a bequest to his brother, the respondent, who had no legal claim to maintenance. After reciting that the legal pretensions of his brother and nephew were unjust, the testator purported to make a bequest contingent on two events: (*i*) the Court's decision in the then pending litigation being in his favour; and (*ii*) the defeated litigants humbly applying for subsistence. The respondent and the nephew sent petitions to the Collector complaining about non-payment of maintenance and filed a suit. It was held:

> *The condition regarding humble application was a condition precedent*....But what humility there is, therefore, is primarily addressed to the Collector, and not to the offended brother, who was now dead. But when the substance of the document is examined, it is seen there is no renunciation, but, on the contrary, a reassertion of the appellant's father's duty to maintain the applicant; and the abstention from further appealing in the (earlier) litigation is frankly ascribed to prudential reasons. Finally, the application is not for what was given in the will, but for twelve times as much. Their Lordships

3. (1905) ILR 28 Mad 173 (PC).

are entirely unable to find in this document either the language of humility, or what is more important, the substance of the humble request for subsistence. [The condition precedent not having been complied with, it was held that the suit should be dismissed.]

This section is also an instance of the Doctrine of Cypres.

The case of a condition *subsequent* is illustrated by the following:

The condition referred to must be a valid condition. The difference between Section 28 and Section 31 is that in the former the condition subsequent not merely divests the interest but vests it in another, whereas, under Section 31 the interest is divested and revested in the grantor. *See also* Section 12.

Suppose a grant is made to *A* in fee simple, but if he refuses to marry a girl chosen by *B, C* and *D*, then to *E* in fee simple. Suppose *B* dies and *A* refuses to marry a girl chosen by *C* and *D. A* will not be divested, because the condition is a condition subsequent requiring strict fulfilment. As already explained the policy of law is to encourage vesting and discourage divesting.

Other illustrations can be culled from the Succession Act, the corresponding section in which is Section 128.

Sections 28 and 29 deal with conditions subsequent. They provide:

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

"Condition superadded" means a condition subsequent. This section deals with defeasance on the fulfilment of a condition subsequent. Defeasance is different from repugnancy.

It is a maxim of the feudal system that *Cujus est dare ejus est disponere*, which means the bestower of a gift has a right to regulate its disposal; but at the present day, as Lord St. Leonards remarked in *Egerton* v. *Earl Brownlow*[4]. No man can attach any condition to his property which is against public good, nor can he alter the usual line of descent by a creation of his own. Therefore, if after conferring an absolute estate on the donee, the donor gives a further interest after the

4. 4 HL Cas 241.

termination of the donee's estate (and not in defeasance of it) such further interest will be void on the ground of repugancy. [*See* also Sections 10, 11 and 12]. The scope of this section is that conditions of defeasance can be imposed, but they should not violate the rules in the various sections referred to in the section.

In *Saraju Bala Debi* v. *Jyotirmoyee Debi*[5], a Hindu granted properties to his daughter subject to three conditions: (1) the properties were not to pass to the grantee's daughters; (2) they were not to be transferred by gift except to a limited extent for religious purposes; and (3) the transferor and his heirs should have a right of pre-emption on the happening of specified events. There was a defeasance clause on the failure of designated heirs, namely, the sons of the transferee (daughter) and their sons successively. The transferee died without issue, but left a will leaving the properties to the respondent. The appellant, claiming to be the nearest reversioner of the last male holder (transferor), filed the suit against the respondent. It was held:

> The first condition is that the properties should not in any case pass to the daughters and their heirs....*It is an attempt to alter the legal course of succession to an absolute estate and is therefore void: Tagore* v. *Tagore*.[6]
>
> The next condition is that neither the grantee nor her heirs should transfer by way of gift except a gift for religious purpose. This again is more consistent with an *attempt to restrict the powers of an absolute owner than an intention to enlarge the power of a life tenant. As such a restriction is repugnant to the absolute estate it is void on that ground: Lalit Mohan Singh Roy* v. *Chukkunlal Roy*.[7]
>
> The last condition gives a right of pre-emption....This condition implies a power of sale rather than negativing it, and is inconsistent with the notion of an estate for life.

The conditions referred to above are followed by a defeasance clause....*A Hindu, no doubt, may give property by way of executory gift upon an event which is to happen, if at all, immediately on the close of a life in being and in favour of a person born at the date of the gift, and*

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5. (1931) LR 58 IA 270; *Jagdish Prasad* v. *Mauleshwar*, AIR 1982 All 163; *Kalidas* v. *Banerji*, AIR 1982 Cal 158.
6. (1874) LR 1 IA 389.
7. (1897) LR 24 IA 76.

such a gift over might be a sufficient indication that only a life-estate to the first taker is indicated. Sreemutty Soorjeemony Dossee v. *Denobindoo Mullick*[8]*; Tagore* v. *Tagore*[9]*. That, however, is not the case here. The event which is referred to in the grant is an indefinite failure of the male issue of the grantee and the attempted gift over is therefore void.*

The condition referred to must be a valid condition. The difference between Section 28 and Section 31 is that in the former the condition subsequent not merely divests the interest but vests it in another, whereas, under Section 31, the interest is divested and revested in the grantor. *See also* Section 12.

Suppose *A* granted property to his wife on conditions that "if any issue is born to us, then to that issue after your death; but if there is no issue, then, after your death to your brothers". She died in *A's* lifetime without issue. In a contest between *A* as heir and the brothers under the grant, the brothers will succeed under Section 28.

Suppose three brothers' partition their joint property in three equal shares. The partition deed provides that in the event of the death of any one without male issue his share should pass to the other brothers. The conditions subsequent are valid under Section 28.

I have already stated that a condition subsequent, which is a condition of defeasance in so far as the prior interest is concerned, may be viewed as a condition precedent in relation to the ulterior disposition. That is why it is made subject to Sections 10, 12, 21 to 25 and 27. Section 26 is not mentioned because the rule applicable is the one, in Section 29:

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

Illustration

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

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8. (1862) 9 MIA 123.
9. (1874) LR 1 IA 389.

Sections 27, 30, 33 and 34 provide for certain special cases. Section 26 deals with a case of a condition precedent. If it is fulfilled, even though not literally the property will vest in the transferee. If it is not fulfilled the property will continue to be that of the transferor. This section, Section 27 deals with a case when on the failure of the condition precedent there is a future or ulterior transfer in favour of another. Suppose *A* transfers Rs 1000 to *B* on condition that *B* should reside with *A*. This is a condition precedent, and if *B* does not reside with *A*, *B* will not get the Rs 1000 and it will continue to be the property of *A*. But, if *A* transfers Rs 1000 to *B* on condition that *B* should reside with *A*, otherwise to *C*. On failure of the condition precedent, i.e. *B* not residing with *A*, the fund will go to *C* under Section 27. The transfer in favour of *C* will take effect in whatever way the prior disposition fails, for example, if *B* dies during *A's* lifetime. That is, instead of the ulterior disposition failing it is accelerated. Of course, the condition on which the prior disposition fails must be valid under Section 25, because, if it is not valid, for example, when the prior disposition fails because of Sections 13 and 14, even the ulterior disposition in favour of *C* will fail. Section 27 provides:

> Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.
>
> But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations

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

(*b*) *A* transfers property to his wife; but in case she should die in his 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.

This rule is known as the Doctrine of Acceleration. Illustration (*b*) may no longer be good law, if *A* and *B* are Hindus, in view of Section 21 of the Hindu Succession Act, 1956.

A testator believing his wife to be pregnant made a disposition to the child and that in case the child died before attaining the age of 21, to *A*. After the testator's death, it turned out that his wife was not *enciente*. It was held that the limitation in favour of *A* took effect, because, the first disposition having failed the only question was whether the disposition in *A*'s favour should also fail, because the failure of the prior disposition did not occur in the precise manner contemplated, that is, by the birth of the child and its death before 21. The beneficial rule in the first part of the section was held applicable. It would not have been applicable if the ulterior disposition was to take effect only in the particular manner contempleted as provided in the second part of the section.

This section may be compared with Section 16. Under the earlier section the prior disposition was *invalid* because of Sections 13 and 14. In the present section (Section 27) the prior disposition is *valid* but *fails* for some reason.

Section 30 deals with the validity of a prior disposition when the ulterior disposition is invalid. It provides:

> If the ulterior disposition is not valid, the prior disposition is not affected by it.
>
> *Illustration*
>
> *A* transfers a farm to *B* for her life, and, if she does not desert her husband to *C*. *B* is entitled to the farm during her life as if no condition had been inserted.

In *Narsingh Rao* v. *Mahalakshmi*[10], a person executed a gift deed in which two intentions appeared, namely, one to exclude his son *B* who was of a bad character and to bring in *B's* son on attaining majority. He also gave all his property to his junior widow and the settlor's intention was that the property should pass to her and her heirs unless a son was born to *B* and attained majority. *B's* son filed a suit to recover the properties on his attaining majority. It was held:

> Both intentions are effectuated under the deed by holding that the Rani and her successors took an estate subject to defeasance on the happening of a certain event, the attainment of majority by a son of Balwant. But this condition of defeasance was illegal and void under Hindu law as it created an interest in favour of an unborn person according to the decision of this Board in *Jatindra Mohan*

10. (1928) LR 55 IA 180.

Tagore v. *Ganendra Mohan Tagore*[11]. Their Lordships are of opinion that the provisions in the unborn sons's favour amount to a condition subsequent, and it is a well-settled principle of law, which has now been embodied in Sections 28 and 30, Transfer of Property Act, that in such a case if the ulterior disposition is not valid the prior disposition is not affected by it.

Under Section 133 of the Succession Act, 1925, is given the following illustration: An estate is bequeathed to *A* for his life with the condition superadded that, if he shall not, on a given day walk 100 miles in an hour, the estate shall go to *B*. The condition being void, *A* retains his estate as if no condition has been inserted in the will.

The remaining two Sections 33 and 34 are as follows:

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

Suppose a grant is made to *A* subject to the condition that he enters the army, otherwise the gift is to go over to *B*. *A* takes holy orders and thereby renders it impossible that he should fulfil the condition. The gift over to *B* will take effect.

Suppose a grant is made to *A*, subject to the condition that he shall marry *B's* daughter. If the condition be not complied with, the gift is to be of no effect. *A* marries a stranger and thereby indefinitely postpones the performance of the condition. The gift will cease to have effect. But this illustration would not apply to Muhammedans who can take a second wife at any time.

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

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11. (1897) LR 24 IA 76.

This section exemplifies the principle which is basic to every civilized system of jurisprudence, namely, that no man should be permitted to take advantage of his own fraud.

These two sections deal with transfers conditional on the performance of certain acts.

Exercises

1. What are conditions precedent and subsequent? (pp. 98-103)
2. The law favours vesting. How does the Act give effect to the principle? (pp. 99-103)
3. Explain—If the ulterior disposition fails, the prior disposition is not affected. (pp. 105-106)
4. Discuss the rule of acceleration of a subsequent interest on the failure of a prior disposition. (pp. 104-105)
5. What is meant by saying that a conditional limitation is a condition subsequent as regards prior interest and a condition precedent as regards the ulterior interest? (pp 98-103)
6. What is the effect of an interest created by a transfer of property dependent upon a condition, if the condition (*a*) is precedent and void; and (*b*) is subsequent and void? (pp. 98 and 103).

6
Election and Apportionment

[*Sections 35 and 36*]

Election

The doctrine of election is dealt with in Section 35 and it provides as follows:

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

subject nevertheless,

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

and in all cases when the transfer is for consideration,

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

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 1000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs 1000. In the same case, *A* dies before election. His representative must out of the Rs 1000 pay Rs 800 to *B*.

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

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

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

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

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those

circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

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

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

Illustration

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

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

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

Though the life of law is not wholly logic (it is logic applied to experience) one of the logical rules which comes up for constant application in courts is: *Allegans contraria non est audiendus*, which means, he is not to be heard who alleges things contradictory to each other. This is the principle underlying the doctrine of election or as it is known in Scotland as that a man cannot approbate and reprobate, or more picturesquely, that a man cannot blow hot and cold. The rule is explained by Lord Cairns thus: 'When a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument, without at the same time conforming to all its provisions, and renouncing every right inconsistent with them'.

The doctrine being general and universal, is applicable to Hindus, Muslims as well as Christians.

It is necessary for the application of the doctrine that the dispositions giving rise to the inconsistent right must form part of the same transaction. In *Ramayyar* v. *Mahalakshmi*[1], a Hindu widow, who was

1. 1921 MWN 434.

only entitled to a life interest made a gift of some property in excess of her right. She died subsequently leaving a will. By that will she disposed of all her properties to the plaintiff, except those which she had already gifted away. On the question whether the plaintiff was entitled to dispute the earlier gift, it was held, the gift and the will being two entirely different transactions, the plaintiff could not be compelled to elect, but could take under the will and could also dispute the earlier gift. The question whether two dispositions form parts of the same transaction, is a question of substance and not form and the fact that the dispositions are contained in different instruments will not necessarily make them independent.

The elector—owner, who relinquishes the benefit conferred on him, is referred to as the "refractory transferee or donee".

First Rule

The doctrine under the English law is different from the rule in the section. Under the English law, if the grantee (the owner of the property which is transferred) takes against the instrument, the Court of equity assumes jurisdiction over the benefit intended for him under the instrument and gives compensation to those who were disappointed by his election. The surplus, after compensation, does not revert to the donor but is restored to the donee. Under the Indian law, the benefit conferred by the instrument reverts to the donor or his representatives, except in the two cases specified in the section.

The illustrations to Section 182 of the Succession Act furnish additional illustrations of the doctrine:

(*i*) The farm of Sultanpur was the property of *C*. *A* bequeathed it to *B*, giving a legacy of 1000 rupees to *C*. *C* has elected to retain his farm to Sultanpur which is worth 800 rupees. *C* forfeits his legacy of 1000 rupees, of which 800 rupees goes to *B*, and the remaining 200 rupees fall into the residuary bequest, or devolve according to the rule of intestate succession as the case may be.

(*ii*) *A* bequeaths an estate to *B* in case *B*'s elder brother (who is married and has children) shall leave no issue living at his death. *A* also bequeaths to *C* a jewel, which belongs to *B*. *B* must elect to give up the jewel or to lose the estate.

(*iii*) *A* bequeaths to *B* 1000 rupees, and to *C* an estate which will under a settlement, belong to *B* if his elder brother (who is married and has children) shall leave no issue living at his death. *B* must elect to give up the estate or to lose the legacy.

(*iv*) *A*, a person of the age of 18, domiciled in India but owning real property in England, to which *C* is heir at law, bequeaths a legacy to *C* and, subject thereto, devises and bequeaths to *B* 'all my property whatsoever and wheresoever', and dies under 21. The real property in England does not pass by the will. *C* may claim his legacy without giving up the real property in England.

A person was managing the properties inherited by his brother's daughter from her father. Under the law then prevailing she only got a life estate in the properties. Her uncle by his will, bequeathed a portion of these properties to *A* and gave his niece a sum of Rs 800 from his properties absolutely. She filed a suit to recover the properties bequeathed to *A*, because they had been inherited by her from her father. It was held that the doctrine of election applied though she had to choose between a life estate and an absolute right to the sum of Rs 800.

The reason for this rule under Indian law is that the transfer of the benefit to the owner is regarded as a conditional transfer. Hanbury, in his *Equity* thinks the Indian rule is the better rule. The Indian rule is based upon forfeiture, whereas the English rule is based on the principle of compensation, i.e., compensating the disappointed transferee to the extent of the value of the property transferred to him.

Suppose *A* gives to *B* by a document Rs 5000 and to *C* a property of *B* worth Rs 1000. *B* refuses to surrender the property to *C*. Under English Law, *B*, as the refractory donee can take the Rs 5000 and compensate *C*, the disappointed donee, to the extent of rupees 1000. But under Indian Law, the Rs 5000 reverts to *A* because, *B* forfeits it and *A* or his representative will have to give *C* the sum of Rs 1000.

Second Rule

In applying the second clause of the section an interesting question might arise where the transferor has some right in the property disposed of, but was not absolutely entitled to it. In such cases, it must be established that the transferor intended to transfer more than he could, before the doctrine can be applied. For example, *A* who owns a life

interest in certain property grants it to *B* and by the same instrument confers some benefits on *C* who was entitled to the reversion. In such a case *C* cannot be made to elect, unless it is shown that *A* attempted to dispose of not merely the life interest which he was entitled to dispose of, but also something more than such life interest. The presumption in such cases is that the transferor only intended to dispose of what belonged to him, though it is a rebuttable presumption.

Third and Fourth Rules

The third and fourth clauses of the section are explained by the illustration to Section 184 of the Succession Act, which is as follows: The lands of Sultanpur are settled upon *C* for life, and after his death upon *D*, his only child. *A* bequeaths the lands of Sultanpur to *B*, and 1000 rupees to *C*. *C* dies intestate shortly after the testator, and without having made any election. *D* takes out administration to *C*, and as administrator elects on behalf of *C's* estate to take under the will. In that capacity he receives the legacy of 1000 rupees and accounts to *B* for the rents of the land of Sultanpur which accrued after the death of the testator and before the death of *C*. In his individual character he retains lands of Sultanpur in opposition to the will. In this illustration apart from the different characters of *D* the benefit under the will which *D* gets, not being direct but only derivative and indirect, he cannot be compelled to elect between the legacy and his independent title to the lands got by him after *C's* death.

Similarly, a trustee or a guardian can accept a grant under a transaction in favour of the *Cestui que trust* (the beneficiary—pronounced as 'Settee kee trust') or the ward. At the same time, in his individual capacity, he could claim other properties purported to be disposed of by the donor in his favour. Another illustration is furnished by the illustration of Section 185, Succession Act. The estate of Sultanpur is settled upon *A* for life, and after his death, upon *B*. *A* leaves the estate of Sultanpur to *D*, and 2000 rupees to *B* and 1000 rupees 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* and as administrator elects to keep the estate of Sultanpur in opposition to the will, and to relinquish the legacy of 2000 rupees. *C* may do this, and yet claim his legacy of 1000 rupees under the will.

Suppose *A*, widow of *B* executes a will by which she gives her money of Rs 1000 to *C* and the land of her husband *B* in her possession, to *D*. *C* and *D* are the reversions of *B*. On the death of *A* her will comes into operation. Also, *C* and *D* are entitled to a half share each in the land. Under the will, *C's* half share is given to *D* and *C* is given Rs 1000. Therefore *C* will have to elect between Rs 1000 and the half share in the land. But if *A* had executed a gift deed instead of a will, with the same terms, *C* can take under a gift deed and there is no question of election by him at that time because he has no right yet to the half share in the land. He would get that half share only after *A* dies. Therefore the question of election does not arise.

Suppose again, a Hindu dies leaving a widow *A* who inherits the life-estate in the property of her husband and *A* surrenders the property to *B* and *C*, the next reversioners. One of the items surrendered is an item of property to which *C* had an independent claim. *B* however claimed a half share in that item also and relied upon the Doctrine of Election. On these facts, there is no question of election at all, because *A* has not given any property of *C* to *B* and given *C* any property in lieu thereof.

Exception

The first exception is exemplified by the illustration to Section 186 of the Succession Act. It is as follows: Under *A*'s marriage settlement his wife is entitled, if she survives him to the enjoyment of the estate of Sultanpur during her life. *A* by his will bequeaths to his wife an annuity of 200 rupees during her life, in lieu of her interest in the estate of Sultanpur, which estate he bequeaths to his son. He also gives his wife a legacy of 1000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1000 rupees.

A Hindu *A* bequeathed his property to *B* and included therein also the property of his brother which was inherited by his widow *C*. *A*, however, made a provision for *C's* maintenance. *C* knew that the provision for maintenance was in lieu of her husband's property. She filed a suit against *B* and obtained a decree for her maintenance. Thereafter, she filed a second suit for her share in her husband's property. It was held that the second suit was not maintainable because she had elected to take the maintenance.

Knowledge

The obligation to elect and an actual election are two distinct things. Suppose *A*, who has a life estate in certain property grants a perpetual lease to *B*. *C* the reversioner, after *A's* death accepted rent from *B* for 3 years, but *C* was not aware of the terms of the lease between *A* and *B*. In such a case *C* could not be held to have elected to confirm the lease.

Similarly *A*, a *purdanashin* widow took the benefits given to her under her husband's will. She was not aware that there were some terms disadvantageous to her in the will which was never read out to her or explained to her. She could not be bound by those disadvantageous terms on the ground that she elected to be so bound by accepting the benefit under the will. Hence, a person cannot be held to have elected unless it is clear that he knew that he was bound to elect and he intended that his acts should have the effect of election. That is, he must have knowledge of the rights between which he has to elect and their nature and value and that there is a conflict between them and that if he accepts one he must either give up the other or make adequate compensation. The illustrations to Section 187 of the Succession Act further exemplify the rule: (*i*) *A* is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled. The will of *A* gives the estate of Sultanpur Khurd to *B*, and the estate of Sultanpur Buzurg to *C*. *B* in ignorance of his own right to the estate of Sultanpur Buzurg, allows *C* to take possession of it, and enters into possession of the estate of Sultanpur Khurd. *B* has not confirmed the bequest of Sultanpur Buzurg to *C*. (*ii*) *B*, the eldest son of *A* is the possessor of an estate called Sultanpur. *A* bequeaths Sultanpur to *C*, and to *B* the residue of *A's* property. *B* having been informed by *A's* executors that the residue will amount to 5000 rupees, allows *C* to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees. *B* has not confirmed the bequest of the estate of Sultanpur to C.

If however, a person had a right to have the estate valued before making an election, waives such right and accepts a legacy under a will he would be deemed to have elected, especially, if he takes possession according to the tenor of the will and retains it for two years. On this aspect there is difference between the English and Indian laws. Under the former, there is no time-limit at all while the section prescribes two

years' enjoyment for raising the presumption that there has been an election.

Similarly, the one year rule in the section is also not found in English law, where no time-limit is fixed, and it is open to one party to make his election within a *reasonable* time, unless the instrument itself prescribes a time-limit. Another difference between the two systems of law is, while in English law, if the person asked to signify does not do so, it will be treated as if he elected *against* the instrument, in India, he is deemed to confirm the transfer in similar circumstances.

Apportionment

The rules regarding apportionment are set out in Sections 36 and 37. They are as follows:

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

The rule is similar to the one stated in Section 8. It does not apply to transfer by operation of law. *See* Section 2; but there are cases where the rule has been applied on grounds of equity. Therefore, in the case of transactions before the Act came into force, the rule may be applied on grounds of equity. But the equitable rule is deemed to be the English common law rule, which does not allow apportionment in periodical payments other than interest, and hence, such apportionment is not permissible in transactions before the Act.[2] Apportionment means distribution of a fund among more than one claimant. Suppose a lessor leases his property on yearly rent and the rent is payable on 30th June of each year. If the lessor sells the property on 1st June, the transferor (lessor) gets the rent up to 31st May and the transferee will get the rent for the rest of the year. The lessee however need not pay the respective amounts on the day of transfer or on any other day before 30th June. His obligation is only to pay on 30th June which is the day appointed for payment.

In the case of leases notice to the tenant of the transferor would be necessary in view of Section 50.

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2. *Phirozshaw* v. *Bai Goolbai*, ILR 47 Bom 790 (PC).

Section 37 provides:

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

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

Nothing in this section applied to leases for agricultural purposes unless and until the State Government by notification in the Official Gazette so directs.

Illustrations

(*a*) *A* sells to *B*, *C* and *D* a house situate in a village and leased to *E* at an annual rent of Rs 30 and delivery of one fat sheep, *B* having provided half the purchase money and *C* and *D* one quarter each. *E*, having notice of this, must pay Rs 15 to *B*, 7 1/2 to *C*, and 7 1/2 to *D*, and must deliver the sheep according to the joint direction to *B*, *C* and *D*.

(*b*) In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation, *E* had agreed as a term of his lease to perform this work for *A*. *B*, *C* and *D* severally require *E* to perform the ten days' work due on account of the house of each. *E* is not bound to do more than 10 days' work in all, according to such directions as *B*, *C* and *D* may join in giving.

The difference between this section and the previous one is that Section 36 deals with what is called 'apportionment by time' while this section is said to deal with 'apportionment by estate'. This section also is not applicable to transfers by operation of law.[3]

The notice to the person obliged to do the duty could be given to him either by the transferor or the transferees.

Notice

At this stage we may consider what is meant by notice and its scope.

Section 3 defines when a person is said to have notice.

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3. *Sk. Sattar Sk. Mohd. Choudhari* v. *Gundappa Amabadas Bukate*, (1996) 6 SCC 373.

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

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908 (16 of 1908) from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder,

(2) the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and,

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

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

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

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

In *Tilakdhari* v. *Khedanlal*[4], the Privy Council held 'that notice cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian Register of deeds'. The Legislature, following the rules in U.S. law and in modern English law in the English Law of Property Act, 1925, amended the Transfer of Property Act by Act 20 of 1929 and provided that the registration of a document is itself, in cases *where the transfer is compulsorily registerable*, constructive notice of the transaction effected by the instrument in so far as subsequent purchasers

4. (1920) LR 47 IA 229; *Vinod* v. *Suresh*, AIR 1985 P&H 361.

are concerned.[5] But the amendment is not retrospective. Also in parts of the country where the Transfer of Property Act does not apply, the law as laid down by the Privy Council still obtains.

A hypothecation of goods (movable property) does not require registration. Therefore, even if the deed of hypothecation is registered, if the owner of the goods sells the goods to a stranger, the purchaser cannot be imputed with constructive notice of the hypothecation and the purchaser would get a valid title to the goods.

The words 'wilful abstention from enquiry and search' mean such abstention from enquiry or search as would show want of *bona fides* and not a mere want of caution.

Suppose a partition deed between two brothers containing a clause of pre-emption is registered. One of the brothers sells his half share to a stranger. The stranger cannot be imputed with notice of the pre-emption clause even though the partition deed was registered because partition deeds are not compulsorily registrable, except when the deed itself effects a partition. In cases where the deed is only a memorandum of an earlier oral partition it does not require registration.

Explanation II.—Possession of a small part of a house or other property by a person does not import that the purchaser had constructive notice of that person's right to the whole property. The Explanation requires actual possession, and hence constructive possession cannot operate as constructive notice.

Section 4 provides :

> The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.
>
> And Section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908.

Under the Registration Act, registration is optional in the case of transfers of immovable property of value less than Rs 100, irrespective of whether it is tangible or intangible. Since Section 54 is *supplemental* to the Registration Act, the rules in Section 54 prevail. Under that section a sale of intangible immovable property, of whatever value, can only be

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5. *Asharfi Devi* v. *Prem Chand*, AIR 1971 All 457 (case of will dedicating property to a deity); *Narasimhaswami* v. *Venkatalingam*, AIR 1927 Mad 636 (FB); *Chalamanna* v. *Parameswaran*, AIR 1971 Ker 3 (FB) (case of registration of a sub-mortgage).

made by a registered instrument, and, even in the case of tangible immovable property of value less than Rs 100, it should be by a registered instrument, unless there was a delivery of possession.

Exercises

1. What is the doctrine of notice under the Act? (pp. 116-118)
2. How far is registration by itself constructive notice of the transaction under the registered document? (pp. 117-118)
3. How far is possession of a person notice of his title? (p. 118)
4. How far is notice to an agent also notice to the principal? (p. 117)
5. A person cannot accept a benefit under an instrument without at the same time conforming to all its provisions—Discuss (pp. 108-115)
6. What is the method of election? (pp.108)
7. What are the conditions for the application of the doctrine of election? (pp. 108-115)
8. The difference between the English doctrine and the Indian is that the former is based on compensation and the latter on forfeiture—Explain (p. 111)