

# Chapter I

## Preliminary

1. **Short title**—This Act may be called the Transfer of Property Act, 1882.

**Commencement**—It shall come into force on the first day of July, 1882.

<sup>1</sup>[It extends to the whole of Bangladesh].

### Case Law

**Scope and applicability**—The Act is to be read in the light of the Contract Act, 1929 A 394. It is not exhaustive; nor does it cover the whole of law of transfer. *109 IC 195—1928 N 223*. It is not exhaustive even on the law of mortgages. *83 IC 548 (2)—1924 S. 23; 34 Cal. 223; 14 CLJ 530; 23 CWN 284—47 IC 428; 2 PLJ 293*. The Act does not profess to be a complete code. In any case not covered by the Act the Court is entitled to apply rules of English law which are not inconsistent with the Act. Thus the holder of a statutory charge is entitled to a decree for sale. *61 Cal. 1047—38 CWN 917—1934 Cal. 862*. See also *1940 NLJ 1—940 Nag. 163 ILR(1941) Nag. 513*. Although the Act is not exhaustive, the application of the equitable principles embodied in the Act to cases not

specifically provided for is not precluded by the Act. *42 Mad. 589—36 MLJ 543—46 LA 109(PC); 51 All. 454*; The Act does not apply to easements. *34 IC 450—20 CWN 1158*.

The Act applies only to alienations *inter vivos* and has no application to disposal of property by will. *43 MLJ. 486—46 M 190 (FB)*; nor to transfers effected by an award. *45 IC 813—34 MLJ 184*. In the absence of any rules to the contrary the principle of the Act is applicable to mortgages created before the Act came into force, *26 ALJ 887—1928 A. 381*; and to mortgages in Upper Burma, *84 IC 395—1925 Rang. 13; 2 Rang. 382*. Although the Act did not apply to Berar in 1902, yet the principle embodied in the Act would be applicable as principles of equity, justice and

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1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "the third, fourth, fifth, sixth and seventh paragraph's" (with effect from the 26th March, 1971).

good conscience. Consequently, the Court could extend the time for payment under a mortgage in the exercise of its equitable jurisdiction. 1923 N 81. See 42 M 589—46 IA 109—36 MLJ 543 (PC) See also 38 PLR 733—1936 Lah. 390.

The provisions of the Act do not apply to a tenancy created before the Act came into force, and a non-permanent tenure created before the passing of Act is not transferable 7 P 341—109 IC 306—1928 P 431. Settled raiyat—Acquisition of occupancy rights in homestead under Section 182, Bengal Tenancy Act—Subsequent sale of agricultural land—Occupancy in homestead—if divested—Incidents of tenancy—Law applicable 40 CWN 182. Under-raiyati holding of homestead and agricultural land—Lease of homestead only by under-raiyat after passing of Bengal Tenancy Act—

Incidents of—If governed by Transfer of Property Act or Bengal Tenancy Act 40 CWN 86. As to the case of gifts under Muhammadan Law, and as to the necessity of keeping in view the spirit of the Act, see 54 IA 23—5 R 7—52 MLJ 36 PC).

**Act is not retrospective in its operation**

—As to whether the amending Acts of 1926 and 1927 are retrospective, see also 51 MLJ 641—99 IC 143—1927 M 85. As to the provisions of the new amending Act XX of 1929 which are not to have retrospective operation, see 1931 L 501—134 IC 289. They are enumerated in section 63 of Act XX of 1929.

"Nothing herein contained" refers to what is contained in the Act and not merely to what is contained in the section. 3 C 802 (809).

**2.. Repeal of Acts, saving of certain enactments, incidents, rights, liabilities, etc.**

<sup>1</sup>[Nothing herein contained shall be deemed to affect].

- (a) the provisions of any enactment not hereby expressly repealed;
- (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;
- (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability: or

1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "the first paragraph" (with effect from the 26th March, 1971).

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

and nothing in the second chapter of this Act shall be deemed to affect any rule of <sup>1\*</sup>, <sup>2</sup>[Muslim] <sup>3\*</sup> law.

### Case Law

**Section 2(c)**—The doctrine of merger contained in section 111 of the Transfer of Property Act is subject to section 2(c) which makes it inapplicable to leases created before the Act came into force. *6 DLR 25*.

**Section 2(a)**—*See 41 B. 170 (180)*.

**Section 2(b)**—*Section 26 IC 184—16 MLT 365*.

**Section 2(c)**—Under the law as it stood before the Act, tenancies whether of homestead lands or of agricultural lands were not transferable in the absence of a customs to the contrary or of an express contract to that effect. The law is not different in the case of lands let out for the purpose of living upon the land. (12 WR 495 held to be bad law.) *54 C 333—31 CWN 231—1927 c 39*. On this cl (c), see also *41 B 170; 19 CWN 525—20 CLJ 448; 39 C 227; 39 CWN 694*. Rights that have become extinguished under a prior enactment are not revived by this Act. See *16 C 693 (PC)*.

**Section 2(d)**—Section 136 is controlled by section 2, sub-cl. (d) and, therefore, a

purchase in execution of a claim under a life insurance policy by a legal practitioner entitles him to claim the amount from the insurance company. *46 CLJ 225—1927 C 691*. There is no warrant for confining the operation of the saving provision of Section 2(d) of the Act to sections 85 to 90. The saving provision is perfectly general in its terms and in virtue of it. Section 100 as amended applies to transfers by auction sales in execution of decrees. *ILR (1940) All 669—1940 ALJ 560—1940 All 456*. Section 51 does not apply to a transfer in execution of a decree. *1931 ALJ 273—1931 A 277 (FB)*. The Act does not affect transfers by operation of law (as) on insolvency, forfeiture or execution sale. See *2 CPLR 137*. A sale by an OR in insolvency is not a transfer coming within section 2(d). Such a transfer is not exempted from registration under section 54. *40 LW 747—67 MLJ 746*. Where an Official Receiver reports a sale of house to the Court and highest bid and the Court accepts the reports and approves of the sale, it falls

1. The word "Hindu" repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 3.
2. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule, for "Muhammadan" (with effect from the 26th March, 1971).
3. The words "or Buddhist" repealed by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 3.

within the words 'transfer by order of a Court of competent jurisdiction' in Section 2(d). *14 Luck 404—1939 OWN 32—1939 Oudh 55*. Where a Court obtains a security bond which hypothecated immovable property to secure a proper disposal of the money due to minors, deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety can be made by an order of the Court without any registered deed of transfer *53A. 786—1931A 389(FB)*. The technical provisions contained in this Section 2(d) are not binding on the Courts in the Punjab *35 PLR 402—1934 L 460*. See also *1936 Lah 390*. Section 2 (d) if governs the word 'transfer' in Section 4,

Partition Act. See *66 CLJ 87*. The provisions as to apportionment do not apply to a dispute as to rent of land between auction-purchaser and original landlord. *84 IC 77—1924 R 365*.

**Proviso**—Where the provision in the Act does not offend against any rule of Muhammadan Law, it will apply. *1930A 462*.

**Sections 2(e) and 6**—A deed of release being a registered document with promise to compensate in case the promisee suffers any loss is a kind of contrivance that comes within the broad spectrum of definitions of transfer under section 2, if not section 6 of the Transfer of Property Act *Bangladesh vs Aziz Molla 44 DLR (AD) 90*.

**3. Interpretation clause**—In this Act, unless there is something repugnant in the subject or context,—

"immovable property" does not include standing timber, growing crops or grass:

"instrument" means a non-testamentary instrument:

<sup>1</sup>["attested", in relation to an instrument, means <sup>2</sup>[and shall be deemed always to have meant] attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but

1. Inserted by section 2 of the Transfer of Property (Amendment) Act, 1926 (XXVII of 1926).

2. Inserted by the Repealing and Amending Act, 1927 (X of 1927), section 2 and Schedule 1.

it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary:]

"registered" means registered in <sup>1</sup>[Bangladesh] under the law<sup>2</sup> for the time being in force regulating the registration of documents:

"attached to the earth" means—

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

<sup>3</sup>["Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent:]

<sup>4</sup>["a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

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1. Substituted by the Bangladesh Laws (Revision and Declaration) Act, 1973 (Act VIII of 1973), section 3 and 2nd Schedule for "a Province" (with effect from the 26th March, 1971),
  2. See the Registration Act, 1908 (Act XVI of 1908).
  3. Inserted by section 2 of the Transfer of Property Act, 1900 (II of 1900).
  4. This paragraph with the explanations and provisos was substituted for the original paragraph by section 4 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

Explanation 1—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, <sup>1</sup>[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 Registration Act, 1908 (XVI 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 in being acquired, is situated]:

Provided that—

- (1) the instrument has been registered and its registration completed in the manner prescribed by the Registration Act, 1908 (XVI of 1908), and the rules made thereunder,
- (2) the instrument <sup>2</sup>[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.

1. Substituted by section 2 of the Transfer of Property (Amendment) Act, 1930 (V of 1930).

2. Inserted by section 2 of the Transfer of Property (Amendment) Act, 1930 (V of 1930).

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.]

### Case Law

**Section 3**—Where licensee is permitted to erect permanent structure and thereafter allowed to continue to enjoy the same—licence becomes irrevocable.

A mud-wall hut is a permanent structure.  
*Md Ahsanullah vs Etwari Mia 14 DLR 776.*

—"A person is said to have notice"—When duty to make enquiry is imposed on purchaser of property having tenants on it. It was contended that if a tenant be in possession of land which is transferred it is the duty of the purchaser to make an enquiry from the tenant as to the nature and incidents of his title.

**Held:** Immovable property in a town or an agricultural estate may have hundreds or even thousands of tenants on it. It cannot be the duty of a person who purchases large property to make an inquiry from every one of the tenants of the property as to any agreements relating to the property which he may possess. A duty to make enquiry would arise only if there be some circumstances which puts the purchaser on enquiry. That tenants are in possession of the property which is purchased is not a fact which by itself will put the purchaser on enquiry, for

this may be and will probably be the normal incident of the property purchased. Property may be in the possession of occupancy tenants, or it may consist of only the rent-receiving interest.

Possession which is *prima facie* lawful does not call for an enquiry. If, however, a person was in possession without any apparent title, or if the explanation given about the title of such person by the vendor was unsatisfactory there would be good grounds for making further enquiry. The purchaser cannot be penalised unless he has somehow failed in his duty and his duty circumstances which puts a person of ordinary prudence on enquiry. *Abdur Razzak Howlader vs Sh Muhammad Shafi 14 DLR (SC) 119.*

—"Actionable claim" includes existing debts payable in future or assignments of benefits under contracts for the supply of future goods. *7 DLR 406.*

—The word "conditional or contingent" means that in case of debts or benefits accruing conditionally or contingently the immediate right to recover by action does not arise until the condition has been fulfilled or the contingency has occurred. *Ibid(411)*

—The true test of determining the nature of the claim sought to be assigned should be to see that the claim when it does accrue partakes of the character of a debt or a beneficial interest in movable property not in the possession, either actual or constructive, of the claimant which can be recovered by an action. *Ibid* (411 *rt h col*).

—Beneficial interest in movable property—Right to claim the benefit of a contract.

Right to claim the benefit of a contract for future delivery of goods sold is a beneficial interest in movable property' within the definition of actionable claim and as such assignable. *Ibid*.

—A entered into a contract with B to do certain works; he also entered into a contract with C under which C agreed to finance A in the execution of his contract works on condition that this advance would be a first charge on the bills due plus certain interest.

**Held:** What A purported to assign was the right only to claim payment for works performed under the contract. This was not merely a right to sue for breach of contract but was an actionable claim. *Ibid*(412 1-h *col*)

—Attestation—personal acknowledgment of signature.

A personal acknowledgment of signature or mark as regards the execution of a deed by an executant within the meaning of the section may be either express or may even be inferred from conduct and it is sufficient if it is an acknowledgment of the execution of the deed. 8 DLR 65 (68).

—Valid attestation—It is sufficient for valid attestation, if the attesting witnesses received acknowledgment from the executant of the deed that he put his signature or mark on the deed though the attesting witnesses themselves did not see him do it.

Registration—notice—Registration is notice when the document is compulsorily registrable.

The doctrine of constructive notice by reason of registration applies only in the case of documents which are compulsorily registrable. 9 DLR 476.

—Constructive notice—Notice of registration of sale-deed is a constructive notice unless proof is given to show that there was no such notice. *Ibid*.

—Whenever notice is enough to excite the attention of a man of ordinary prudence and called for further enquiry is, in equity, notice of all facts to the knowledge of which an enquiry suggested by such notice and prosecuted with due diligence would have led. 8 DLR 616 (632).

—Registration—a constructive notice—A registered transfer amounts to a notice 5 DLR 22(24 1 h *col*).

—Notice—When presumed—Onus of proving want of notice is on transferee, Cases decided under section 3 of the Transfer of Property Act show that a person has notice if it was his duty to make an enquiry or if there was something to put him on an enquiry which if he pursued he would have learnt the truth.

The onus of proving want of notice is on the transferee. *Suleman Khan vs Punjab*



*Province PLD 1953 Lahore 388—PLR 1953 Lahore 919.*

—Registration—Does not amount to notice—The Transfer of Property Act not being in force in the region formerly known as the Punjab, the law even after the 1929 amendment of section 3 remains the same, viz, that registration by itself does not amount to notice, the question of notice is one of fact to be determined in the circumstances of each case. *Muhammad Sharif vs Muhammad Shafi PLD 1956 Lahore 675—PLR 1956 Lahore 1840.*

Section 3 An interest created under an agreement for sale of an immovable property does not fall within the definition of actionable claim.

Purchase of any interest in any actionable claim is prohibited under this section when the purchaser is a judge, lawyer or an officer of the court. *Ayaz Bahadur Kahan vs Abdus Sobhan 30 DLR 15.*

—Lease-deed executed and registered not by the party competent to do it but by a 3rd party on the basis of a letter—No title passes. *Ayaz Bahadur Kahan vs Abdus Sobhan 30 DLR 15.*

**Immovable Property**—"Property" is a most comprehensive term descriptive of every possible interest in a thing which a party can have or possess. *5 LJ(Ch) 90.* The "Property" of a person is the bundle of rights which he has in it. *27 ALJ 620—1929 A 465 (FB).* For other definitions of the term, see General Clauses Act, Section 3 (Act X of 1897) Registration Act Section 2, Trustees Act: (1866), Section 2, Succession Act

Section 3. The definition of the term in this Act cannot be imported into other enactments (as) the Land Revenue Sales Act (XI of 1859). *52 C 862—90 IC 901.* The terms "immovable property" comprehends all that would be real property according to English Law and possibly something more. *13 BLR 254 (PC).* A debt secured on immovable property does not become identified with it and is not immovable property. *58 IA 323—35 CWN 1034—61 MLJ 589 (PC).*

It can be transferred apart from security. (*Ibid*) The following are immovable property:—*Right to fishery, 20 C, 446; 29 C 414; 12 B 221; 3 C 276; 24 C 449.* See also *3 PLT 53—1922 P9. Right of ferry, 13 M 54; easements, 24 WR 32;* (as) *right of way, 13 CWN 451; or water course, 4 WR 107;* [but not a mere chance of acquiring an easement (as)of light and air *23 B 704*]; *hereditary offices, 9 BHCR 225; 5 B 322; 10 C 73; 6 B 512; 2 MIA 23; 4 BHC 51; office of hereditary priest of temple, 6 BHCR 137; life-interest in immovables, 23 B 1; malikana, 9 A 591; 5 C 921; right to levy rate or cess on all exports and imports, 33 B 373; right to the assessment of the dhara is a nibhanda or immovable property. 34 B 287; 12 Bom LR 9.* See also *9 BHCR 222; 14 MIA 551; Mortgage debt is not immovable property, 23 IC 129—15 MLT 198; 21 B 226; 21 OC 400—50 IC 157; 12 C 546; 27 CLJ 453; 29 C 1; 19 B 121; 4 Bom LR 18; 13 A 89.* See also *26 B 305; 20 C 806; See contra 45 IC 986—22 CWN 641; 41 MLJ 453; 44 M 196—40 MLJ 25; 34 PLR 233—1933 L 210.*

As to mortgage of mere superstructure exclusive of land, see *8 MHCR 100* As to equity of redemption, see *18 C 164; 22 C 33;*

21 B 226 Claim for unpaid purchase-money is in the nature of an interest in immovable property 28 M 227. As to claim for maintenance. See 21B 327; 9C 555. *Toda Garas Hak*: 8 MIA 1 Right to annual payments charged on immovable property. 23 B 22 See also 23 A 209; 6 B 546 (grant made by Peishwas). Right to rent from occupancy tenant; 5 MLJ 95 [As to future rents, see 1942 Pat 120; 196 IC 837]; or to get the benefits of a *hat* or market or the lease of the same 22 C 752; or to collect dues from a fair, 27 A 462; rights of certain class of Brahmins to receive dues from funerals, 15 ALJ 41 Doors and windows are not, 16 IC 877—38 M 18; 11 C 164; 13 M 518; 14 M 467; neither an interest in Royalty, 65 IC 673—1922 p 36; nor a turn of worship 46C 455; 39 C 227; 19 CWN 208, 22 CWN 994; 4 C 683; nor arrears of rent, 4 p 43—83 IC 81; nor a mere right to get a lease executed. 1929 R 184; nor machinery not permanently attached to the earth, 46 A 286.

**Trees**—“*Timber*” means trees fit for building and repairing houses, 24 B 31; 31 B 181. *Karuveta* and *velvela* trees are timber, and the word “timber” cannot be limited to the class of trees of timber which is used for building purposes alone. 106 IC 421—1928 M 392; after severance trees become movables, 24 Bom 31; sugarcane is movable property. 10 A 20; 21 B 60; fruit trees are immovable property, 17 IC 910—10 ALJ 516; mango tree used as fruit tree and not as timber is immovable property. 1927 p 1—5 Pat 765; The question whether a mango tree is a standing timber is a question of intention. If the intention is that the plaintiff should enjoy the fruit of the tree and not cut it down as timber, then it is immovable property and can only be conveyed by a registered

instrument. 90 IC 769—1926 P 125; 54 A 437.

Palm and date trees are trees the produce of which can be got and therefore are immovable property. (1926 P 125 Rel on) 17 Pat LT 170 ;1936 P 66 Grove of Mahua trees is immovable property 81 IC 650—1925 O 108(2). A grove consisting of *shisham* and *nim* trees, which are only timber trees, is not immovable property as defined by Section 3. 1938 All 115—174 IC 315. A claim for possession of trees is a claim to an interest in immovable property. 63 IC 264(1)—3 Pat LT 622.

**Growing Crops**—Under section 3 growing crops are immovable property, and therefore a mortgage of such crops needs no registration. 89 IC 410—1926 A 164. See also 10 A 20; 9 CWN 376—32 C 459; 31 C 667; 6 CWN 881.

**Fixtures**—The English law relating to fixtures does not apply in toto in India. If a thing is embedded in the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. If the attachment is merely for the beneficial enjoyment of the chattel itself, then it remains a chattel, even though fixed for the time being so that it may be enjoyed. An engine installed in a factory may be immovable property or may be attached according to the circumstances of the case. Where it appears that the intention of the parties was not that the engine should be permanently attached as an improvement to the premises for the benefit of whoever might be entitled to those premises, it cannot be regarded as immovable property. 51 LW 155—1940 Mad 527.

**Instrument**—Act has no application to testamentary instruments. See 43 MLJ 486—46 M 190—1922 M 457 (FB).

**Attestation**—As to requirements of valid attestation, see 52 M 123—55 MLJ 794—1929 M 1 (FB); 27 CWN 263—1923 C 149; 13 IC 557; 1931 ALJ 342. If the attestors to a deed of mortgage executed by a gosha lady did not see her sign it, the lady did not acknowledge her signature to it, and the attestors themselves did not sign the instrument in the presence of the lady, the instrument is not properly attested within the meaning of the term 'attested' as defined by the Amending Act of 1926. 54 M 163—1931 M 140—60 MLJ 56. See also 8 OWN 194—1931 O 146.

Whether an attesting witness signs his name in the presence of the executant is a question of fact depending on the circumstances of each case. Where a document executed by a pardanashin lady is attested by the witnesses while the lady is sitting behind a thin curtain and it is clear enough that, if she had been minded to see the witness sign, she could have done so, even if she did not actually see them through the curtain, it amounts to sufficient compliance with the provisions of section 3 (10 OWN 724—1933 O 365—144 IC 860 Reversed). 63 IA 326—11 Luck 346—1936 PC 207—71 MLJ 151 (PC). An attesting witness cannot be presumed, from the mere fact of attestation, to be aware of the contents of the document, much less of a mere recital of boundaries. (AIR 1933 Lah 551 Rel on) 177 IC 966—1938 Lah 97. It was held previous to the new definition of attestation in section 3 that an attestation must be by a witness who

had actually seen the executant sign the document. 48 C 61; 35 M 607 (PC); 5 P 58; 42A 25; 46 M 64—43 MLJ 745; 45 C 748—45 IA 94—34 MLJ 545 (PC); 26 Bom. LR 737—83 IC 170—1925 PC 89(PC); 11 ALJ 757; 22 Bom LR 86—44 B 231; 35 CLJ 473; 2 P 52; 38 CLJ 114—1924 C 415. Now even acknowledgment of signature by executant before attesting witnesses would suffice. See 52 Bom 219—30 Bom LR 565—1928 B 267; 1927 C 926; 28 LW 955; 55 MLJ 794; 105 IC 422; 92 IC 948—1926 C 637; 47 CLJ 118—1928 C 154; 16 IC 207.

The words "personal acknowledgment" in section 3 do not mean express acknowledgment. It is not necessary therefore that the acknowledgment of execution should be express or should be made verbally by the executant. An acknowledgment of signature may well be inferred from the conduct of executant at the time when the deed is attested by witnesses, for example, by gestures or by other ways. There is no ground for assuming that the law in India is different from that in England. *ILR (1937) All 723—1937 ALJ 710—1937 All 646*. Registering officer or identifying witnesses, before Registrar are not attesting witnesses and so proof of registration is not proof of attestation. 165 IC 498—1936 ALJ 262—1936 A 712. The signature of the Registrar or Sub-Registrar on the back of the document registered by him may be treated as a valid attestation : 19 NLJ 123—1936 N 171. But before that can be done evidence is necessary to establish that the registering officer signed the document in the presence of the executant. 58 M 220—1935 M 178(2)—68 MLJ 191; 67 CLJ 31; 1937 Sind 47; 150 IC 762—58 CLJ 545; 61 C 525—38

*CWN 753—1934 C 72*(case of gift deed)1937 section 47.

It is the instrument that an attesting witness has to sign in order to comply with the terms of the definition of the word "attested" When the Registrar (or Sub-Registrar) appends his signature to the endorsements or to the particular endorsement relating to the admission of execution and then the witnesses append their signatures to the endorsement as to the identification, it cannot be said by any stretch of imagination that they are signing the instrument. Therefore the signatures of the Registrar and of the witnesses identifying the executant at registration, made in the manner required by sections 58 and 59, Registration Act, are not sufficient attestation of the deed for the purpose of the Transfer of Property Act, even if they signed the deed in the presence of the executant after receiving acknowledgment from him of his signature or mark thereon. *1939 Rang. LR 388—1939 Rang 211*. See also *1938 Mad 959—(1938) 2 MLJ 775*. Signature by third person for attesting witness with his consent is valid attestation. *1927 O 510—3 Luck 113*.

The meaning of the word "attest" in section 3 Transfer of Property Act as amended by Act XXVII of 1926, has been given a retrospective effect by Act X of 1927 *105 IC 864(1)—29 Bom LR 1334; 51 MLJ 641*. The decisions in *100 IC 651; 103 IC 662—1927 C 763; 49 A 25—24 ALJ 921—1927 All 1 (FB)* are now good law in view of the amending Act X of 1927 See also *1928 MWN 425; 5 R 772—1928 R 101; 1927 O 565; 105 IC 891—1928 Nag. 70; 1928 S 93; 1928 B 16; 53 CLJ 326; 1930 A 223*. The effect of the amending legislation regarding

the definition of attestation in the Act is that in spite of the retrospective effect given by the explanation the invalidity of anything already done is unaffected. *111 IC 407—1928 M 773*. But see *53 CLJ 326; 1931 N 95; 1932 M 272*. By the amending Act of 1927, the Legislature could not have intended to validate mortgages held by a competent Court to be invalid for want of proper attestation according to law then in force. *1931 S 64*. In *125 IC 507—1930 A 669*, it was held that the amendment cannot operate retrospectively on a deed of gift executed on Feb. 12, 1916. See also *1930 ALJ 623—1930 A 669*. Attestation can be by affixing marks, *53 A 1—1931 All 101 ; 58 M 220—1935 M 178 (2)—68 MLJ 191—1937 Rang. 393*. Attestation must be with the intention of attesting the executant's signature, *1931 O 146—8 Luck 619*.

**Scribe as an attesting witness**—See *39 M 1035—30 MLJ 250; 55 IC 616—44 B 48; 53 IC 79—4 Pat LJ 511, 1 Pat LJ 129; 20 CWN 699, 32 CWN 1228—48 CLJ 281; 1927 S. 118; 1926 C 150*. But See also *62 IC 97—48 C 61 ; 41 M 535 ; 24 MLJ 534—19 IC 589; 39 M 1035; 39 IC 153*. The scribe will not be an attesting witness unless he intends to sign the deed as such. *1930 All 223—52 A 434*. Whether the scribe is an attester is a question of fact and must be determined by the Court as a question of fact. *90 IC 774—1926 C 150; 41 M 535—43 IC 983; 98 IC 205—1926 R 145*. 'Attested' means that a person has signed the document by way of testimony of the fact that he saw it executed. In a case where a person places his signature upon a document and at the same time describes himself as the writer thereof though the inference is that he signs as the writer and

nothing else, it can, as a matter of fact, be shown that he signed as a witness as well, of the fact that he saw the document executed or received a personal acknowledgment from the executant that he had executed it. In other words, a scribe could play the dual role of a scribe and an attesting witness. *1940 Rang LR 199—1940 Rang 134.*

Where the executant is a marksman, the scribe, who writes out the name of the executant (in case of a lady executant) cannot be an attester. See *1925 Oudh 737; 1932 M 272.* But see also *1927 S.118; 33 Bom 44—10 Bom LR 943; 41 Bom 384; 35 A 254; 46 C 522; 44 Bom 405.* Where a mortgage is signed by the writer as well as the mortgagee without indicating that they signed as attestors, the mortgage is not validly attested. *65 IC 64.* But see *91 IC 507—1926 Oudh. 209.* The writer of a document, who signs after an admitted attester signs as an attester, though he merely describes himself as the writer, *26 IC 409.* Where the scribe signed the deed after the executant signed it and then other witnesses—held, he may properly be described as an attesting witness. *1930 C 750.* Where the man put his name under the separate heading of "scribe", he is not an attesting witness. *32 CWN 1228—1929 C 123,* Attestation is not notice of the contents of the document: *49 b 25—25 Bom. LR 818—1925 B 58.* But when he was present at the transaction and attested the deed having heard its contents he is estopped from challenging the right of the transferee. *150 C 765—1934 P 93 [20 C 296 (PC) Rel on]*

**Attached to the earth: Building for sheltering machinery**—If there was a

building inside in which a machinery was sheltered, it cannot be said that this machinery was attached to the building for the permanent beneficial enjoyment of the building itself as is contemplated in cl (c) of the definition in Section 3. *46 A 286—1924 A 365.* As to materials of a standing house, see *1923 L 150.*

**Actionable claim**—Actionable claim postulates a debt. A share of profits to be regarded as a debt must be liquidated sum. The right to recover profits does not become an actionable claim unless the profits are assigned. *1942 NLJ 30.* Assignment of insurance money by way of charge must be in writing, *37 B. 198—40 IA 24—24 MLJ 60(PC).* It is immaterial whether the writing is on separate paper or is endorsed on the policy itself. *31 SLR 98—1937 S. 181.* Benefit of any executory contract for purchase of goods *34 C 289.* *Book debt* is an actionable claim according to the new definition. *54 A 499—1932 ALJ 275,* *Claim to future rent* is an actionable claim. *1926 M 1173—98 IC 263 (C)(2).* See also *4 P, 43—83 IC 81* (right to rent after accrual constitutes a debt); but not a right to sue for breach of contract. *106 PR 1914—27 IC 115; 46 B 719* See also *1938 All 544* (Right of vendor to recover money left with vendee for payment of vendors' creditor). A claim to recover an ascertained amount is an actionable claim and can be validly transferred, but a claim for unliquidated damages for breach of contract after the breach, is not an "actionable claim" and cannot be transferred because of the provisions of cl (e)-of Section 6. *55 A 814—1933. 642.*

A claim for damages, return damages, return or earned money with interest and a

part of the purchase price is an actionable claim. "Debt" means an actually existing debt 1927 S. 78—22 SLR 1. *Prima facie* a liability to arise in the future on the part of an unknown person out of a relationship, contractual or otherwise, which does not yet exist, cannot on any ordinary use of language, be described as a "debt", still less can it be described as an "existing" debt. Neither can it be "accruing" or "conditional" and it cannot be "contingent". A contingency is something that may happen in future which affects a present relationship: For instance, a contingent interest such as a contingent life-interest presupposes an existing interest which may or may not develop into interest in possession. The interest is there all the time. It is even saleable as such. When section 3 refers to an "existing" debt, it intends thereby to exclude a debt, which does not yet exist at all. So, also section 130(1) in its terms points to an immediate interest of some sort passing. While, it is in every way appropriate to an accruing conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. 175 IC 786—1938 Rang. 1 "Debt"—Money due under policy of life assurance—Saleability. See 39 Bom LR 493—1937 Bom. 382. *Claim to mesne profits* is not an actionable claim. 3 P 575—1924 P 551; 99 IC 735—1927 R 39; nor a right to recover profits from the co-sharer which is enforceable in the Revenue Court: 1934 A 155—56 A 624 (FB); nor a claim under a decree of Court. 40 MLJ 123.

A mortgage assigning by way of security a decree that would be passed in a pending money suit instituted by the mortgagor and containing a stipulation that the mortgagee would be entitled to realise out of the decretal

amount a certain sum due to him, is not a transfer of a mere right to sue. What is transferred is the claim to a debt and, as such, would come within the definition of "actionable claim" as given in section 3 of the Transfer of Property Act. The mortgage must be deemed to attach itself to the decree as soon as it is passed, and the mortgagee is entitled to execute the decree as an assignee. *ILR (1939) 2 Cal 341—43 CWN 953—1939 Cal 715. A claim to recover goods lent or damages for a breach of contract for failure to return them is a mere right to sue within section 6(e) and is not transferable. 1923 N 67. A right to recover arrears of annuity is a debt, and though charged upon immovable property, the claim under it amounts to an actionable claim. 63 C 1—62 IA 265—39 CWN 1191—69 MLJ 503(PC) See also 1936 PWN 395—1936 Pat 527.*

The right of the subscriber or depositor to the Provident Fund money is an actionable claim. 1935 C 756—63 C 578. Copyright is no doubt beneficial interest in movable property, but hardly comes within the purview of "actionable claim" as defined in Section 3. *ILR (1939) All 275—1939 ALJ 71—1939 All 305.*

**Explanation I—"Notice whether registration constitutes"—**"Notice," as defined in section 3, includes both actual and constructive notice. There was a conflict of decisions whether the registration of a document under the Indian Registration Act is of itself constructive notice of the transaction effected by the document. The matter has been set at rest by the amending Act of 1929. The Statement of Objects and Reasons for the amendment regarding this matter is as follows:

"In our opinion, in a country like India, where the system of registration has generally applied, if registration is to be held as not implying notice, one of the objects for which instruments are required to be registered would be defeated. Moreover, as will be seen below, one of the important changes suggested by us is 'compulsory registration'. It is therefore, necessary the express provision should be made in the Act making it clear that registration of an instrument relating to immovable property amounts to notice of the instrument from the date of the registration. For this purpose we propose to add Explanation I to the definition of 'Notice' in section 3.

The latter portion of Expl. I was further amended by the Amending Act V of 1930, and the reasons for the same have been stated as follows:—"The formal amendments contained in this Bill are designed to carry out the intentions of Explanation I contained in Section 4 of the Transfer of Property (Amendment) Act, 1929. The difficulties sought to be met by the latter part of the body of the explanation are not confined to cases where registration is effected under subsection (2) of section 30 of the Indian Registration Act 1908, but they are also encountered when an instrument relating to scattered properties is registered in the ordinary manner. Further, it is possible under the present Examination, that a subsequent transferee may make a genuine search in the offices of all the sub-districts in which the property he seeks to acquire is situated, and find no record of a transfer, but may still find himself saddled with notice of a transfer by reason of a memorandum relating to some other property, included in a previous transfer

along with the property he is interested in, having been filed in some distant sub-district. The Bill is intended to remove these anomalies."—Gazette of India, Pt V, p 15, dated 25th January, 1930.

**Explanation II—Possession how far is notice**—On this point the Statement of Objects and Reasons for the amendment of the section is as follows:—"We propose to add Explanation II to the definition of 'Notice', providing that the person dealing with any immovable property shall be deemed to have notice of the title of any person who, for the time being, is in actual possession thereof. It may be noted that notice in this case is not extended to possession which is merely of a constructive nature. The explanation is in accordance with Illustration 3 to section 27(b) of the Specific Relief Act."

**Explanation III—Notice to agent—Scope and effect of amendment**—The Statement of Objects and Reasons for the amendment is as follows:—"The last portion of the existing definition of notice which relates to notice through an agent seems to us to be defective. It provides that a person has notice of the fact when information of the fact is given to or obtained by his agent under circumstances mentioned in section 229 of the Indian Contract Act. The words 'given to or obtained by his agent used in the definition suggest that the rule is restricted to the facts of which the agent has actual knowledge, or, in other words, express notice. The reference to section 229 of the Indian Contract Act does not extend the scope of the definition. If notice to the agent, whether actual or *constructive*, is not made notice to the

principal, it has been said that notice would be avoided in every case by employing agents. "The general rule that the knowledge of the agent is the knowledge of the principal has no doubt certain limitation. It is necessary that the matter for which the agent was employed should be taken into consideration. It is necessary that the agent should be acting in the course of the particular business for which he was employed. (34 IA 179). This general principle is now embodied in section 199 of the English Property Act, 1925. We propose, therefore, to add Explanation III to the definition." Explanation III which provides that notice to an agent whilst acting in the course of business is notice to his principal was criticised as being too general and vague. The Select Committee therefore added provisions to the effect that the notice must be of a fact which is material to the course of the business in which the agent is engaged, and that the agent must not fraudulently have concealed the fact from his principal.

**Notice—Illustrative cases—**The Explanations to the definition of notice in Section 3 inserted in the Transfer of Property Act, by Act XX of 1929, do not affect the terms or incidents of transfers made before the 1st April, 1930; 1936 OWN 1086—1937 O. 1. As the Transfer of Property Act is not in force in the Punjab, the question whether registration is or is not notice in that province would depend on the facts of each case. 37 PLR 168. The Transfer of Property Act is not in force in the Punjab and hence section 3 of that Act as amended in 1929 does not affect that province. Consequently, the state of law as existed prior to 1929 according to which registration did not necessarily amount to

notice continues to hold good in that Province. 190 IC 599—1940 Lah 269.

Though a will is registered, except the executant or his agent, no one else is competent to take inspection or copies, and it will be scarcely justifiable to take registration as sufficient notice for the purposes of limitation. 1935 L 313. If a mortgagee taking a mortgage in a place where he knows that mortgages by deposit of title-deeds are legal and usual does not ascertain whether the title-deeds were already pledged, his failure so to ascertain is such abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of Section 3. 45 MLJ 505—51 C 86—1 R 637—50 IA 283(PC).

Registration of a sub-mortgage itself is no notice to the original mortgagor. But as the plaintiff in a mortgage suit is under a duty to Court to implead all parties interested in the property, his omission to search the register amounts to gross negligence, sufficient to fix him with constructive notice. 62 MLJ 272—1932 M 1152. The registration of a sale deed by a judgment-debtor cannot be regarded as giving the decree-holder attaching the property sold constructive knowledge of the sale, because no duty lies on the decree-holder to search the registers. 1936 AMLJ 104. Gross negligence and wilful abstention amounts to notice. 34 IC 906—20 MLT 127; 6 L 344—89 IC 615—1925 L 542.

See also 5 B 342; 1929 C 83; 15 M 268. What would be gross negligence in one case would not be so in another. It all depends upon the man's knowledge and the means of information which lay to his hand. Where it is incumbent on a person, who was in possession of certain facts to inspect the registers, and omission to look into entries



against the property in question and to look into them carefully, must be construed to be either due to wilful abstention or to gross negligence. A person can be charged with the negligence or bad faith of his agent. 1939 NLJ 129—1939 Nag. 132. See also 1937 Oudh 307.

The words "wilful abstention from an inquiry or search" in section 3 must be taken to mean such abstention from inquiry or search as would show want of bonafides, and a mere omission to make inquiries cannot be regarded as sufficient to constitute constructive notice within the meaning of the section. 53 LW 744—1941 Mad 707—(1941) 1 MLJ 815 See also 1937 Oudh 301—1937 CWN 438; 1940 OWN 122.

Ordinarily speaking, a purchaser must be held to have notice of a prior or registered mortgage unless special circumstances are shown which will excuse him for not making a search in the registration office 1933 R 153=145 IC. 118. Purchaser of portion of bhag in possession—Subsequent purchaser of entire bhag—Failure to inquire of the prior purchase whether amounts to wilful or gross negligence amounting to constructive notice. See 33 Bom LR 499—1931 B 430. Purchaser need not inquire into title of adjoining property. Vendor must disclose burdens, if any, on the property. 86 IC 19—1925 B 183. See also 54 MLJ 109; 1929 P 284.

Where a person has to prove that notice has been given to another person, the mere fact that the transaction in question might have been known to considerable number of people will not amount to the necessary proof. 107 IC 254—1928 A 307. The fact that a customer of a bank was a man of business, well conversant with dealings of

banks and bank rates of interest and thus had the means of knowing the rate of compound interest charged on his overdrafts was held to be equivalent to knowledge or reasonable grounds of belief so as to fix him with adoption or ratification of the rate of interest. 59 C 662—1932 C, 521. Notice to husband is no notice to wife. 2 OWN 413—1925 O 613.

Notice to agent in the course of business is notice to the principal 97 IC 577—1927 S. 24. See also 31 B 566 (PC) A notice sent to a firm and received by one member is notice to other members. 131 IC 289—1931 L 227. Where one person is an officer of two companies, his personal knowledge is not necessarily the knowledge of both the companies. The knowledge which he has acquired as officer of one company will not be imputed to the other company unless he has some duty imposed on him to communicate his knowledge to the company sought to be affected by the notice, and some duty imposed on him by the company to receive that notice. 60 B 326—37 Bom LR 978.

Constructive notice is not imputed to an involuntary purchaser as to a private purchaser. 42 C 625—19 CWN 37. A *melkanomdar* who does not make enquiries whether the *kanomdar* has renewal in his favour should be deemed to have constructive notice of the renewal and the *melcharath* cannot be enforced as against the *kanomdar*. 55 M 519—62 MLJ 525. A family settlement creating a charge on immovable property is compulsorily registerable and hence the fact of its registration would *per se* amount to constructive notice to the purchaser of the property in respect of the charge created on

the property sold. (142 IC 367, *Diss from*)  
1937 OWN 438—1937 O 301.

Where some co-sharers sell joint property to stranger under a registered sale deed, the other co-sharers cannot be considered to have notice or knowledge of its contents, merely because it is registered. Though a subsequent transferee or any other person dealing with any property may be fixed with notice of a prior registered instrument, a co-sharer cannot be presumed to know the contents of a registered deed executed by his co-sharers who impliedly denied his title by executing the document. It is impossible to expect every owner of property to periodically inspect registration offices to find out if his property has been adversely dealt with by another person. 155 IC 824—1935 AWR 728.

But if the vendee takes possession of the property sold to him, in a manner calculated to give clear notice to the co-sharer that his right is denied and that he is excluded, the vendee's possession will be adverse. 155 IC 824. As to the application of the doctrine of constructive notice, see 33 B 1—35 IA 130; 45 MLJ 173; 55 M 519—62 MLJ 525. Thus, a person wilfully refusing a registered letter sent by post will be deemed to have notice of its contents. 15 C 681; 16 WR 223; 6 CWN 134. Plea of *bonafide* purchaser—Attestation by purchaser of deed creating charge—Close relation with the family and circumstances—Constructive notice. 38 LW 463—1933 M 15—65 MLJ 390.

A person cannot be said to have knowledge of the contents of a document

merely because he signs the document as an attesting witness. But there may be circumstance when he would be deemed to have notice of the contents of the documents. 33 PLR 685—1932 L 566. See also 14 L 369—1933 L 551; 35 Bom LR 252. To a purchaser at an involuntary sale (as) in Court-auction constructive notice cannot be attributed to the same extent as at private sale. 42 C 625—21 IC, 201. As to what amounts to notice of vendor's lien, see 108 IC 291—54 MLJ 109. See also 8 P 316—1929 P 284. See also 1941 OWN 122 (Notice of arrears of municipal taxes). Possession of stranger is notice of title of such person. 41 IC 628; 33 IC 121. See also 45 MLJ 175—1924 M 67. Notice of tenancy is also notice of agreement with tenant, in absence of enquiry. 94 IC 538—1926 C 204. See also 45 MLJ 157.

But the mere circumstance that the property was in possession of a tenant who, if questioned, would have named the lessor is not by itself sufficient to fix the purchaser with constructive notice of the nature and extent of the lessor's title. 134 IC 1211—34 LW 669. See 10 Mys LJ 67. An attesting witness need not as such be considered as being aware of the contents of the documents he attests. 25 Bom. LR 818—1924 B 58. Attempt to separate the two questions of notice and *bonafide* is not usually sound. It is seldom possible to form an adequate or correct opinion of the conduct of the transferee without considering whether his good faith extends to his possession of actual or constructive notice with reference to the whole circumstances of the case. 44 MLJ 527—46 M 478—1923 M 558.

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**4. Enactments relating to contracts to be taken as part of Contract Act**—The chapters and sections of this Act which relate to contracts shall be taken as part of the Contract Act, 1872, (IX of 1872).

<sup>1</sup>[And sections 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Registration Act, <sup>2</sup>[1908] (XVI of 108)]

### Case Law

**Section 4**—Section 137 is to be taken as part of the Contract Act. *38 B 255—21 IC 943* Section 107 of the Transfer of Property Act cannot be taken to have been inserted in Section 17 of the Registration Act and an unregistered lease deed for less than one year is not a document required to be registered under Section 17, and Section 49 of the Act can have no application to it. *39 MLJ 639—44 M 55—59 IC 350 (FB)*. The only effect of the provision in Section 4 Transfer of Property Act, that section 107 shall be read as supplemental to the Registration Act i.e. to section 17 of the Registration Act, is that the proviso that leases of immovable property from year to year or for any term exceeding one year or reserving a yearly rent shall be registered, contained in section 17 of the Registration Act shall be read as amplified by the proviso to section 107 of the Transfer of Property Act. It has not the effect of requiring the Court to construe the word "lease" in section 107 of the Transfer of Property Act in the wider sense in which it is defined in the

Registration Act. The question whether a contract is to be construed as a lease or merely as an agreement to lease must be gathered from the terms of the whole document, and where a contract operates as an actual demise it must be deemed to be a lease. *1923 O 237. See also 16 CWN 606, 35 M 95*. On this section, see *also 2 Pat LJ 168*.

Section 4 properly read means, so far as it is applicable to the case of mortgages, that if and when a document of mortgage is executed, it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of section 59 which expressly provides that in certain areas a mortgage can only be by means of an instrument in writing, *1933 MR 972*. The expression "shall be read as supplemental to the Indian Registration Act" in section 4 cannot be intended to mean that the sections mentioned therein are to be taken as a part of the Registration Act. Those sections cannot, therefore, be governed by the definitions in

1. Inserted by the Transfer of Property Act (1882) (Amendment) Act 1885 (III of 1885), section 3.

2. Substituted by the Transfer of Property (Amendment) Act, 1929 (XX of 1929), section 5, for "1877".

that Act, but must be governed by the definitions in the Transfer of Property Act. *ILR (1940) Lah 70—1939 Lah 423.*

**Section 4—Sale—**Two sale-deeds were executed for the same piece of land—Sale-

deed executed later in time would carry no weight or value in the eye of law for a piece of land could not be sold twice by the same vendor. *Bashir Ahmed vs Jamal Din 2001 MLD 125.*