

CHAPTER

3

TRANSFER OF PROPERTY ACT, 1882

**EXPECTED
MARKS COVERAGE
(15 to 20)**

Covering-

- Bare Act
- ABC Analysis
- Immovable property-meaning
- Transfer of property
- Who can transfer the property
- Absolute interest
- Vested and contingent interests
- Properties which can be transferred
- Properties which cannot be transferred
- Conditional transfer
- Restraint on transfers / rule against inalienability
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- Rule against perpetuity
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- Advance Your Knowledge
- Self Test Questions
 - From Past CS Exam
 - From ICSI Module

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– From Bare Act... –

रजिस्ट्री सं० डी० एल०-33004/99

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भारत का राजपत्र
The Gazette of India

THE TRANSFER OF PROPERTY ACT, 1882

(ACT NO. IV OF 1882).

[17th February, 1882]

2 An Act to amend the law relating to the Transfer of Property by Act of Parties.

Preamble WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows:-

CHAPTER I

PRELIMINARY

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

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

Extent 3[It extends to the whole of Bangladesh.]

Repeal of Acts Saving of certain enactments, incidents, rights, liabilities, etc 2. 4[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(a) the provisions of any enactment not hereby expressly repealed: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

(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 5[Muslim] law.

Interpretation-clause

3. In this Act, unless there is something repugnant in the subject or context,-

“immoveable property” does not include standing timber, growing crops or grass:

“instrument” means a non-testamentary instrument:

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TRANSFER OF PROPERTY ACT, 1882

ABC Analysis (ICS) -Exam Point of view)

A

1. Concept of Vested and contingent interest.
2. Concept of Important Doctrine.
3. Concept of mode of transfer.

B

4. Concept of Mortgages.
5. Distinguish between mortgage and charge.

C

6. Concept of retrain on transfers/ rule against inalienability.
7. Restraint on enjoyment.
8. Concept of Transfer of Property.



Department of Land Resources
Government of India - Ministry of Rural Development
(An ISO 9001:2008 Certified Department)

The law relating to transfer of **immovable property** is governed by the Transfer of Property Act, 1882.

The **Act deals with**

- | |
|--|
| (i) various specific transfers relating to Immoveable property and |
| (ii) lays down general principles relating to transfer of both moveable and immovable property . |

MOVEABLE PROPERTY-MEANING

The Transfer of Property Act **does not defines** the term “moveable property”. Therefore, it is to be defined with the help of **other statutes**. For e.g.,

It has been defined in the **General Clauses Act, 1897** as to mean “property of every description except immovable property”.

The **Registration Act** defines “moveable property” to include property of every description excluding immovable property but including standing timber, growing crops and grass

IMMOVABLE PROPERTY-MEANING

The term “immovable property” is not defined under **Transfer of Property Act, 1882**. However, it is **negatively defined** in section 3 of the Act as “the immovable property does not include standing timber, growing crops, or grass”

The **General Clauses Act** defines the term “immovable property” as “immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth”

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If the definitions of "immoveable property" as given in the Transfer of Property Act, and The General Clauses Act are **viewed together**, we can say that:-

"Immovable property" includes land, benefits arising out of land, and things attached to the earth, but does not includes standing timber, growing crops, or grass"

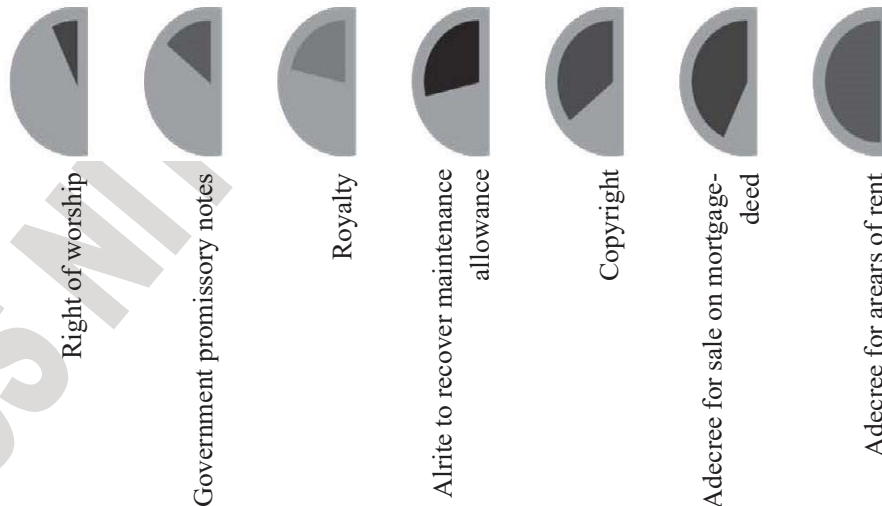
Attach to the earth means:

- (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;

The following have been recognised as immoveable property:

Right to collect rents of immoveable property	A right to way	A right to collect dues from fair on a piece of land	Hereditary offices
The equity of redemption	The interest of mortgagee	Right to collect lac from trees	A right of ferry
A right of fishery	Right to receive future rents and profits of land	Reversion in property leased	A factory

The following have been held not to be immoveable property:



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DISTINCTION BETWEEN MOVEABLE AND IMMOVEABLE PROPERTY

The distinction between moveable and immovable property was explained in the case of Sukry Kurdepa v. Goondakull, as moveability may be defined to be a capacity in a thing of suffering alteration.

Immoveability for such alteration e.g., a piece of land in all circumstances is immovable. *If a thing cannot change its place without injury to the quality it is immovable.*

Certain things e.g. trees attached to the ground are **so long as they are so attached, immovable** when the severance has been effected they become moveable.

TRANSFER OF PROPERTY

According to Section 5 of the Transfer of Property Act, the term “transfer of property” *means an act by which a living person conveys property in present, or in future, to one or more other living persons, or to himself, and one or more other living persons.*

In this section, "living person" includes a company or association or body of individuals whether incorporated or not.

FORMALITIES OF TRANSFER

Property can be transferred either orally or by writing.

Moveable property can be transferred by delivery of possession or by registration.

Section 54 lays down the mode of **transfer of immovable property**. Such transfer, in the case of **tangible immovable property** of the value of one hundred rupees and upwards, or **other intangible thing**, can be made only by a registered instrument.

In the case of **tangible immovable property** of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

(I) ATTESTATION

Attestation is an important formality in connection with the execution of transfer

Attestation, in relation to a document, signifies the **fact of authentication of the signature of the executant** of that document **by the attestator by putting down his own signature** on the document in testimony of the fact of its execution

All transfers do not require attestation. For example, a **sale or a lease does not require** attestation. But a **mortgage or a gift requires** that a mortgage deed or a gift deed must be attested by two or more witnesses.

(II) REGISTRATION

Registration is an essential legal formality to effect a valid transfer in certain cases.

The advantage of registering a document is that any **person who deals with the property would be bound by the rights** that are created in earlier registered document.

(III) NOTICE

Notice, may be **actual or constructive**.

If a person **knows about a fact**, he has an actual notice.

But, in certain circumstances law treats a man **who ought to have known a fact** even though he did not in fact know it. This is called constructive notice

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SUBJECT MATTER OF TRANSFER

Section 6 of the Transfer of Property Act says that **property of any kind may be transferred except as provided by this Act or any other law for the time being in force.**

The words “property of any kind” indicate that transferability is the general rule and the **right to property includes the right to transfer the property to another person.**

Property of any kind **excludes from its purview the future property.** A transfer of future property can **only operate as a contract** which may be specifically performed **when the property comes into existence.**

WHO CAN TRANSFER THE PROPERTY

According to Section 7 of the Transfer of Property Act, **every person who is competent to contract and entitled to transferable property**, or authorised to dispose of property is competent to transfer such property.

Hence, every person **competent to contract and having ownership** can transfer property.

Exception

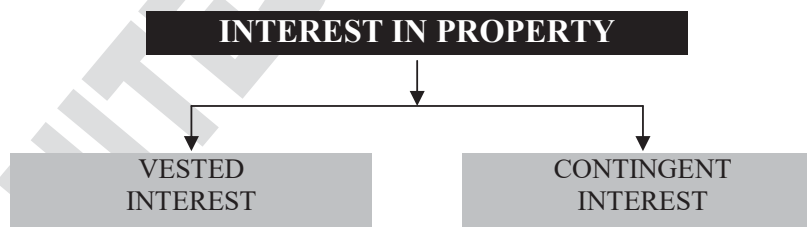
If a person holds himself out as the owner with the consent of the owner i.e. doctrine of holding out or if a person represents to be the owner i.e. **doctrine of feeding the grant by estoppels.**

ABSOLUTE INTEREST

When a person **owns property**, he has an "absolute interest" in the property. Ownership consists of a bundle of rights, the right to possession, right to enjoyment and right to do anything such as selling, mortgaging or making gift of the property.

For eg:- If A is the owner of a land, he has an absolute interest in the land.

VESTED AND CONTINGENT INTERESTS



➤ VESTED INTEREST

An interest is said to be vested when

it is **not subject** to any condition/event **or**

when **it is subject** to any condition/event, **such event is bound to satisfied / happen.**

For eg:- if a land is given to A for life with a remainder to B, A's right is vested in possession, B's right is vested in interest.

A vested interest is **transferable and heritable.** If property is given to A for life and afterwards to B, B gets a vested interest and if B transfers this interest to C, C will take when the life estate of A comes to an end. B's interest, since it is vested, is also heritable. Therefore, if B dies during the lifetime of A, C will get the property after the death of A.

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➤ CONTINGENT INTERESTS

A contingent interest, is an interest which takes effect **after the condition is satisfied**. It is subject to a condition precedent, i.e., unless A marries B's daughter, he will not get the property.

For example- Property is given to A for life and then to B if he marries C. B should marry C before A dies. If he does so, his interest is converted into vested interest. Before B marries C his interest is contingent.

DISTINCTION BETWEEN A VESTED AND A CONTINGENT INTEREST

The following are the principal points of distinction between a vested and a contingent interest:-

(a)	When an interest is vested the transfer is complete. It creates an immediate proprietary interest in the property though the enjoyment may be postponed to a future date.
	A contingent interest on the other hand is dependent upon the fulfilment of some conditions which may or may not happen.
(b)	A vested interest takes effect from the date of transfer .
	A contingent interest in order to become vested is conditioned by a contingency which may not occur.
(c)	A vested interest cannot be defeated by the death of the transferee before he obtains possession.
	A contingent interest may fail in case of the death of transferee before the fulfilment of condition.
(d)	Since vested interest is not circumscribed by any limitation which derogates from the completeness of the grant, it logically follows that a vested interest is transferable as well as heritable . If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs.
	A contingent interest, on the other hand, cannot be inherited though <i>it may be transferred coupled with limitation</i> regarding fulfilment of a condition.

REVERSION AND REMAINDER

Some interests in the property are called in English Law, reversion and remainders.

<u>Reversion</u>
A " reversion " is the residue of an original interest which is left after the grantor has granted the lessee a small estate. For example , A, the owner of a land may lease it to B for a period of five years. The person who grants the lease is the lessor and the person who takes the lease is called the lessee. Here, after the period of 5 years the lease will come to an end and the property reverts back to the lessor. The property which reverts back to him is called the reversion or the reversionary interest.
<u>Remainder</u>
When the <u>owner of the property grants a limited interest in favour of a person or persons</u> and <u>gives the remaining to others</u> , it is called a " remainder ". For example , A the owner of a land transfers property to B for life and then to C absolutely . Here the interest in favour of B is a limited interest, i.e., it is only for life. So long as A is alive he enjoys the property. He has a limited right since he cannot sell away the property. His right is only to enjoy the property . If he sells this interest it will be valid so long as he is alive. So after B's death the property will go to C, interest is called a remainder. In the case of a "remainder", the property will not come back to the owner, but it goes over to the other person.

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PROPERTIES WHICH CAN BE TRANSFERRED

Section 6 of provides that **property of any kind** may be transferred.

PROPERTIES WHICH CANNOT BE TRANSFERRED

Section 6 of this Act contains **some exceptions** to the general rule that property of any kind may be transferred. Consequently, the following properties cannot be transferred, namely:-

1. CHANCE OF AN HEIR APPARENT OR 'SPES SUCCESSIONIS'

'Spes Successionis' is a latin phrase which means the **expectancy of succession**. In other words, it is the **possibilities of future interest in a property**. The chance of a heir apparent succeeding to the estate of a deceased person cannot be transferred.

For eg”- A is the owner of the property and B is his son. B is the heir of A. During the life time of his father A, B has **only a hope expectancy** that he will inherit the property of his father. This type of property which B hopes to get after the death of the father cannot be transferred, **during the life time of A**.

2. RIGHT OF RE-ENTRY

The right which the **lessor has against the lessee for breach of an express condition** which provides that on its breach the lessor may re-enter is called the right of re-entry.

For eg-, if A leases his property to B and adds a condition that if B sub-lets the leased land, A will have the right to re-enter, i.e., the lease will terminate if the lessee breaks the condition by subletting to a third person.

Thus, right of re-entry being a right for the personal benefit of any party cannot not be transferred.

3. TRANSFER OF EASEMENT

An easement is a **right enjoyed by the owner of land over the land of another**. Such as, right of way, right of light, right of support, right to a flow of air or water.

For eg;- if A, the owner of a house X, has a **right of way** over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if he transfers the house itself to C, the easement is also transferred to C.

4. RESTRICTED INTEREST OR PERSONAL INTEREST

An interest restricted in enjoyment to the owner personally is by its very nature and are not transferable.

Example of such restricted interest or property is--The office of a **Shebait of a Temple** or **mohunt of a mutt or mutuwalli of a wakf**.

5. RIGHT TO FUTURE MAINTENANCE

This again is a personal right in the property which the law says that it cannot be transferred. The right of a **Hindu widow to maintenance** is a personal right which cannot be transferred.

However the **arrears of past maintenance can be transferred**.

6. MERE RIGHT TO SUE AND ACTIONABLE CLAIM

A 'mere right to sue' apart from the interest from which such right accrues cannot be assigned. The 'right to sue' is a personal right annexed to the ownership of property and cannot be served, from it.

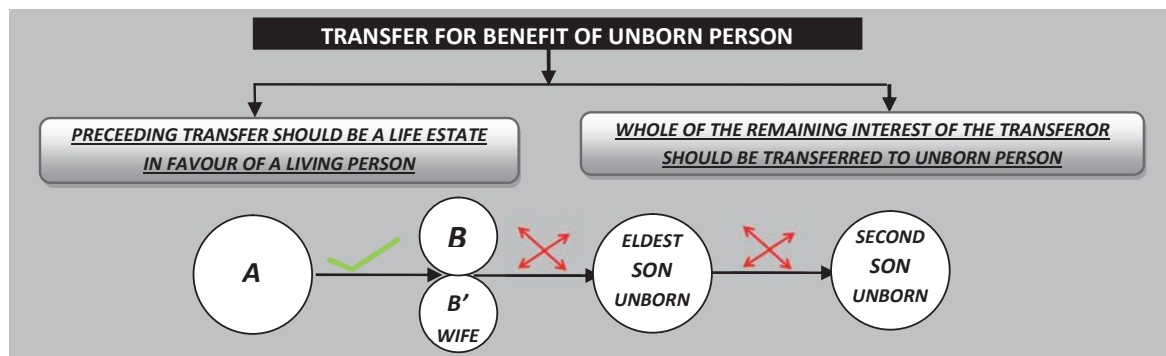
7. TRANSFER OF PUBLIC OFFICE AND SALARIES, STIPENDS, ETC.

It is against public policy to transfer the public office, salary etc.

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CONDITIONAL TRANSFER

When an interest is created on the transfer of property **but is made to depend on the fulfillment of a condition by the transferee**, the transfer is known as a conditional transfer. Such a transfer may be subject to a **condition precedent** or a **condition subsequent**.

If the interest is made to accrue on the fulfilment of a condition, the condition is said to be condition precedent. For instance, A agrees to sell his land to B if B marries C. This is a **condition precedent**.

Condition subsequent is one which destroys or divests the rights upon the happening or non-happening of an event.

For example, 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.

RESTRAINT ON TRANSFERS / RULE AGAINST INALIENABILITY

Section 10 of the Act says that when property is transferred, the transferee should not be restrained absolutely from alienating the property. Any condition restraining alienations of the property is **void**

PARTIAL RESTRAINT VALID

Though absolute restraints are bad in law, partial restraints are valid. For eg- If there are conditions which restrain the **transferee not to alienate the property outside the family**, it has been held by the Courts that they are partial restraints.

RESTRAINT ON ENJOYMENT

Section 11 of the Act also embodies a rule which is based on the principle that restraint on the enjoyment of the property is invalid. The section lays down that where land is transferred by one to another, the transferor ***should not impose conditions as to how and in what manner the transferee should enjoy*** the property. **For eg-** A sells his house to B and adds a condition that **B only should reside in that house, the condition is invalid.**

Rule under Section 11 is subject to the **exception** that, if a **person transfers a plot of land keeping another plot for himself**, he can impose certain conditions which may interfere with the right of enjoyment of the transferee.

For eg- A has properties X and Y. He sells property Y to B and puts a condition that B should not construct on property Y more than one storey so that A's property X which he retains should **have good light and free air**.

TRANSFER FOR BENEFIT OF UNBORN PERSON

Section 13 of the Transfer of Property Act lays down that 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.

Thus if a property is given to an unborn person, two **conditions** should be satisfied:-

- | |
|---|
| (a) it should be preceded by a life estate in favour of a living person , and |
| (b) it should comprise the whole of the remaining interest of the transferor so that there can be no further interest in favour of others. |

For eg:- 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.

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RULE AGAINST PERPETUITY

According to **Section 14**, the rule against perpetuity contains two propositions, i.e.:

(1) No transfer is valid after the life-time of one or more persons living at the date of such transfer.

Transfer **can remain in effect only during the life time of an existing person.**

(2) Transfer can be extended to a person who is not in existence **but if he is in existence at the time of termination of the period of last transfer.** The moment the person is born he shall have contingent interest and after minority i.e. after the age of 18 years, he shall have vested interest. Barring these two conditions, a restriction on alienation of a property is void.

For example, A transfer may be made to 'A' for life and then to 'B' for life and then to 'C' for life and so on, **provided that A, B and C are all living persons** at the date of the transfer. But if the ultimate beneficiary is someone who is **not in existence at the date of the transfer**, the whole residue of the estate should be transferred to him. If he is **born before the termination** of the last prior estate, he takes a vested interest at birth and takes possession on the termination of the last prior estate but **if he is not born till the termination** of the last prior estate, the transfer to him **fails**.

The rule against perpetuities is also called the **rule against remoteness**.

The rule against perpetuities applies to **both moveable and immoveable property**.

EFFECT OF A TRANSFER ON FAILURE OF PRIOR INTEREST

According to **Section 16**, where by reason of any rules or the rules contained in **Sections 13 and 14**, interest created for the benefit of a person or 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 or upon failure of such **prior interests also fail**.

For example, property is transferred to A for life then to his unborn son B for life and then to C, who is living at the date of transfer, absolutely. Here B is given only a life interest. So the transfer to B is invalid under Section 13. **The subsequent transfer to C absolutely is also invalid**

So, according to **Section 16**, *if a prior transfer fails, the subsequent transfer will also fail.*

IMPORTANT DOCTRINES

➤ **DOCTRINE OF ELECTION**

Section 35 of the Transfer of Property Act deals with what is called doctrine of election.

'Election' may be defined as *"the choosing between two rights where there is a clear intention that both were not intended to be enjoyed"*.

The foundation of doctrine of election is that a **person taking the benefit of an instrument must also bear the burden**, and he must not take under and against the same instrument. It is, a general rule that **no one may approbate and reprobate.**

For eg:- A transfers to you his paddy field and in the **same deed** of transfer asks you to transfer your house to C. Now, if you want to have the paddy field you must transfer your house to C, because the transferor is transferring to you his paddy field on the condition that you give your house to C.

Thus, either you take the paddy field and part with your house or do not take it at all. This is called the doctrine of election.

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The question of Election arises only when a transfer is made by the **same document**. If the transferor makes a gift of property by one deed and by another asks the donee to part with his own property then there is no question of election.

For eg- A transfers his land to B by a document. A by another document transfers B's property to C. In this case B can retain the property given to him and refuse to transfer his property to C as the two transfers do not form part of the same document.

➤ **TRANSFER BY OSTENSIBLE OWNER OR DOCTRINE OF HOLDING OUT**

The Doctrine **makes an exception to the rule that a person cannot confer a better title than he has**. *An ostensible owner is one who has all the indicia of ownership without being the real owner.*

Where, with the consent, express or implied, of the real owners of immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, **the transfer shall not be voidable on the ground that the transferor was not authorised to make it**, provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in **good faith**.

The following conditions are necessary for the application of the transferor is the ostensible owner:-	(a) he is ostensible owner by the consent, express or implied, of the real owner;
	(b) the transfer is for consideration, and
	(c) the transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer.

If any one of these elements is absent, the transferee is not entitled to the protection of this section.

➤ **DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL**

Where, a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

In order to invoke this section, the transferee must prove that:-	(a) there was a representation, fraudulent or erroneous;
	(b) it was to the effect that the transferor is entitled to transfer the immoveable property;
	(c) the transferor is found to have subsequently acquired the interest which he professed to transfer;
	(d) the transfer of property was for consideration;
	(e) the transferee has not rescinded the contract;
	(f) the transferee acted in good-faith for consideration and without notice of the rights under the prior transfer.

➤ **DOCTRINE OF FRAUDULENT TRANSFER**

Where a person transfers his property **so that his creditors shall not have anything out of the property**, the transfer is called a fraudulent transfer.

“Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor **shall be voidable** at the option of any creditor so defeated or delayed.”

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➤ DOCTRINE OF PART-PERFORMANCE

SECTION 53A

A contract for the sale of land has been entered into between A and B. The transferee has paid the price entering into possession and is willing to carry out his contractual obligations. As registration has not been effected A, the transferor, seeks to evict B from the land. **B will not be allowed to suffer simply because the formality of registration has not been through.** The legislature grants some relief to such a transferee under Section 53A, which embodies the doctrine of part-performance.

Followings are the essential conditions for the operation of the doctrine of part-performance according to <u>Section 53A:-</u>	(a) There must be a contract to transfer immoveable property.
	(b) It must be for consideration.
	(c) The contract should be in writing and signed by the transferor himself or on his behalf.
	(d) The terms necessary to constitute the transfer must be ascertainable with reasonable certainty from the contract itself.
	(e) The transferee should have taken the possession of the property in part performance of the contract. In case he is already in possession, he must have continued in possession in part performance of the contract and must have done something in furtherance of the contract.
	(f) The transferee must have fulfilled or ready to fulfill his part of the obligation under the contract.

However, the doctrine of part-performance **will not affect the right of a subsequent transferee for consideration** without notice of the earlier contract and of its being partly performed.

➤ DOCTRINE OF LIS PENDENS

Lis means dispute, Lispendens means a *pending suit, action, petition or the like*.

Doctrine of Lispendens states that **during the pendency of a suit in a Court of Law**, property which is subject to a litigation cannot be transferred and if transferred, the transferee will be bound by the result of the suit/proceedings.

For example, A and B are litigating in a Court of law over property X and during the pendency of the suit A transfers the property X to C. The suit ends in B's favour. Here C who obtained the property during the time of litigation cannot claim the property. He is bound by the decree of the Court wherein B has been given the property.

MODES OF TRANSFER

1. SALE

Under **Section 54** of the T.P. Act, "sale" has been defined as a *transfer of ownership in exchange for a price paid or promised or part paid and part-promised*.

Essentials for sale	(a) The seller & buyer must be a person competent to transfer.
	(b) The subject matter is transferable property.
	(c) There is a transfer of ownership. This feature distinguishes a sale from mortgage, lease etc., where there is no such transfer of ownership.
	(d) It must be an exchange for a price paid or promised or part paid and part promised.
	(e) There must be present a money consideration. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale.

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2. EXCHANGE

Sections 118 to 121 of the Transfer of Property Act, 1882 deal with "Exchanges".

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange".

<u>Essentials for exchange</u>	(a) The person making the exchange must be competent to contract.
	(b) There must be mutual consent.
	(c) There is a mutual transfer of ownership though things and interests may not be identical.
	(d) Neither party must have paid money only.
	(e) This Section applies to both moveable and immoveable property.

3. GIFT

Section 122 of the Transfer of Property Act defines "gift" as follows:-

"Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person called the donor, to another called the donee and accepted by or on behalf of the donee.

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

<u>Essentials for gift</u>	(a) There must be a transfer of ownership.
	(b) The subject matter of gift must be a certain existing moveable or immoveable property.
	(c) The transfer must be made voluntarily.
	(d) It must be done without consideration.

4. LEASES

According to Section 105, a "lease" of immovable property is a **transfer of a right to enjoy** property.

Since it is a transfer to enjoy and use the property, possession is always given to the transferee.

The lease of immovable property must be made for a certain or in perpetuity period. For example, one may give a lease of property for a definite number of years, or for life, or even permanently.

<u>The essentials of a lease are:-</u>	(a) It is a transfer of a right to enjoy immovable property;
	(b) Such transfer is for a certain time or perpetuity;
	(c) It is made for consideration
	(d) The transfer must be accepted by the transferee.
	(e) The parties to the lease (i.e. lessor and lessee), must be competent to make and to take the lease respectively

5. LICENCE

A licence is a right to do or continue to do in or upon the immovable property of the grantor, something which would, in the absence of such a right, be unlawful.

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DIFFERENCE BETWEEN LEASE AND LICENCE

(a)	lease is a transfer of a right to enjoy immoveable property, but licence does not transfer any interest in the property.
(b)	In case of lease possession is always given to the transferee but the licensee has no right to possession .
(c)	A lease cannot be revoked any time at the will of lessor but a licence can be revoked by the grantor at any time.
(d)	The transferee of the lessor is bound by the lease but the transferee of the licensor is not bound by the licence .
(e)	in case of death of licencer, licence terminates but in case of lease, it is not so.

6. ACTIONABLE CLAIMS

Actionable claims are **claims, to unsecured debts**. A debt is a liquidated money obligation which is **usually recoverable by a suit**. An essential of an actionable claim is that it is not in possession of a person and the person can claim such a debt by bringing an action in a Court of law.

The Section also says that it must be a claim to any debt which the Civil Courts recognise as affording grounds for relief to the person who claims it.

Illustrations of actionable claims:-

(a)	Arrears of rent accrual constitute a 'debt' so it is an actionable claim (<u><i>Sheu Gobind Singh v. Gauri Prasad</i></u>).
(b)	Provident Fund that is standing to the credit of a member of the Provident Fund.
(c)	Money due under the Insurance Policy.
(d)	A partner's right to sue for accounts of dissolved partnership is an actionable claim being a beneficial interest in moveable property not in possession (<u><i>Thakardas v. Vishindas</i></u>).

7. MORTGAGES

According to **Section 58** of the Transfer of Property Act, a "**mortgage**" is *the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to pecuniary liability*.

The transferor is called a mortgagor, the transferee a mortgagee.

Essentials of a mortgage:-	(a) Transfer of interest
	(b) Specific immoveable property
	(c) To secure the payment of a loan

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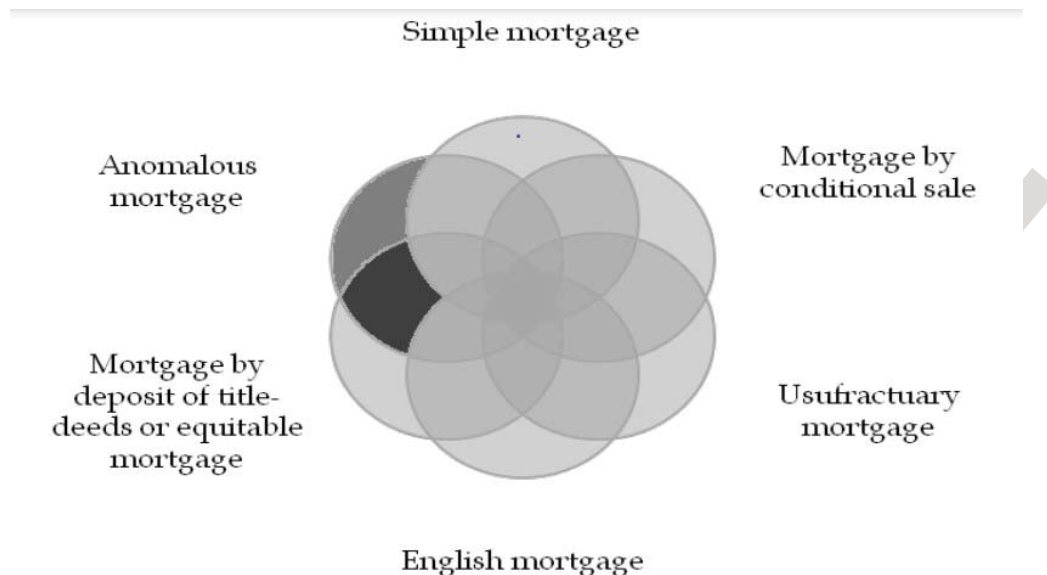
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KINDS OF MORTGAGES

There are in all **six kinds** of mortgages in immoveable property.



1. SIMPLE MORTGAGE

In a simple mortgage, the *mortgagor binds himself personally to pay the debt* and agrees in the event of his failure to pay the mortgage money, the mortgagee shall have the right to cause the property to be applied so far as may be necessary by means of a decree for the *sale of property*. In simple mortgage, *no right of possession or foreclosure is available to the mortgagee*.

2. MORTGAGE BY CONDITIONAL SALE

In this type of mortgage, the mortgagor ostensibly sells the property with the following three conditions:-

(a) If the loan is repaid, the sale becomes void.
(b) If the loan is not repaid at the stipulated time, the sale will become absolute and binding.
(c) When the debt has been repaid at the stipulated time, the mortgagee shall re-transfer the property to the mortgagor.

Unlike in the case of a simple mortgage, *the mortgagor in this case does not bind himself personally to repay the debt*.

The mortgagee is *not given the possession of the property* in this type of mortgage.

In a mortgage by conditional sale, *the mortgagee's remedy is 'foreclosure'*, that is he becomes the owner of the property in default of payment of the debt by the mortgagor, he has to institute a regular suit in a Court of law to "foreclose" the mortgage.

3. ENGLISH MORTGAGE

This type of mortgages has features of both, (i) simple mortgage and (ii) mortgage by conditional sale. It is a **combination** of both.

Here the mortgagor *transfers the ownership of the property* as security and the mortgagee promises to re-transfer the ownership, if the money is paid within a definite time.

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There is also a **personal covenant as the mortgagor** promises to repay within a certain date. The remedy of the mortgagee is **sale of the property** to recover the debt.

4. USUFRUCTUARY MORTGAGE

“Where the mortgagor **delivers possession of property to** mortgagee and authorises him to retain such possession until payment of the mortgage money, and **to receive profits accruing from the property** and to appropriate the same in lieu of interest, or in payment of the mortgage money, the transaction is called an usufructuary mortgage. It is also called a mortgage with possession.”

The mortgagee in this case has **no remedy either by forecloser or by sale.**

5. MORTGAGE BY DEPOSIT OF TITLE DEEDS/ EQUITABLE MORTGAGE

In this transaction, a person delivers to mortgagee, **documents of title** of his immoveable property. All the features of simple mortgage applies here.

6. ANOMALOUS MORTGAGE

Transfer of Property Act provides that “a mortgage **which is not** a simple mortgage, a mortgage by conditional sale, usufructuary mortgage, an English mortgage, or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage”.

Thus, an anomalous mortgage is a **combination of various other mortgages,**

RIGHTS OF MORTGAGOR

By mortgaging the property the mortgagor does not cease to be its owner, he only transfers an interest in it. The law, therefore, grants him the following rights:

1. Right of redemption

Right to redeem means the **right to take back** the mortgaged property by paying the mortgage money at any time after the stipulated date for repayment.

2. Right against clog on redemption

Any condition **which prevents the mortgagor from redeeming the property** is **called a “clog”** on the right of redemption and is void. Right of redemption is the essence of a mortgage, and any provision inserted in the mortgage deed to prevent, evade or hamper redemption is void.

Mohd. Sher Khan v. Seth Swami Dayal	A mortgage deed provided that if the mortgage money was not paid at a certain time, the mortgagee might enter into possession for a period of twelve years and that mortgagors right to redeem would remain suspended for that period. It was held the condition was a clog and therefore unenforceable.
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A mortgage deed provided that in case the **payment was not made by the mortgagor within the stipulated period,** the mortgagee would become the absolute owner of the property. It was held to be a clog on the equity of redemption.

3. Right of partial redemption:

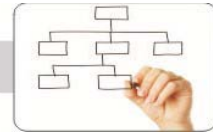
A mortgage, **as a rule, being one and indivisible** for the debt and every part of it, the mortgagor cannot redeem piecemeal; **he must redeem the whole property.**

But Section 61 of the Act gives a **right of partial redemption** stating that “**a mortgagor who has executed two or more mortgages in favour of the same mortgagee** shall, *in the absence of a contract to the contrary,* when the principal money of any two or more of the mortgages has become due, **be entitled to redeem any one such mortgage** separately or any two or more of such mortgages together.”

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SUB-MORTGAGE

Where the **mortgagee transfers by mortgage** his interest in the mortgaged property, or creates a mortgage of a mortgage the transaction is known as a sub-mortgage.

For example, where A mortgages his house to B for `10,000 and B mortgage his mortgagee right to C for `8,000. B creates a sub-mortgage.

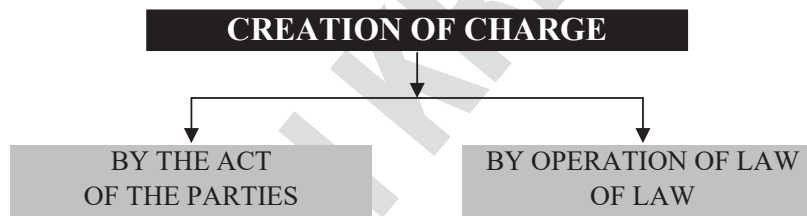
PUISNE MORTGAGE

Where the **mortgagor**, having mortgaged his property, **mortgages it to another person** to secure **another loan**, the **second mortgage** is called a puisne mortgage.

For example, where A mortgages his house worth ` one lakh to B for `40,000 and mortgages the same house to C for a further sum of `30,000, the mortgage to B is first mortgage and that to C the second or puisne mortgage. C is the puisne mortgagee, and can recover the debt subject to the right of B, the first mortgagee, to recover his debt of `40,000 plus interest.

8. CHARGES

"Charge" has been defined under Section 100 as follows: "**Where immovable property of one person is by the act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property**".



Illustrations

CHARGE BY THE ACT OF PARTIES

'A' inherited an estate from his grandfather and executed an agreement to pay his sister B a fixed annual sum out of the rents of estate. B has a charge on the estate.

CHARGE BY OPERATION OF LAW

W files a suit against her husband H for maintenance. The Court grants a decree awarding the wife `100 per month, and in case of default by the husband makes his property liable for the amount of maintenance. Here a charge is created over the husband's property.

KINDS OF CHARGES

A charge on the property of the company as security for debentures may be of the following kinds, namely:

- | |
|-------------------------------|
| (1) Fixed or specific charge; |
| (2) Floating charge. |

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➤ **FIXED OR SPECIFIC CHARGE**

A charge is fixed or specific when it is made specifically to cover assets which are **ascertained** and **definite** or are capable of being ascertained and defined, at the time of creating charge e.g., land, building, or heavy machinery.

A fixed charge, therefore, is against security of certain specific property, and the company loses its right to dispose of that property as unencumbered.

➤ **FLOATING CHARGE**

A floating charge is a charge on a class of assets present and future which in the ordinary course of business is **changing from time to time** and leaves the company free to deal with the property as it sees fit until the holders of charge take steps to enforce their security.

A floating charge is not attached to any definite property but covers property of a fluctuating type e.g., **stock-in-trade** and is thus necessarily equitable.

CRYSTALLISATION OF FLOATING CHARGE

A floating charge attaches to the company's property generally and remains dormant till it crystallises or becomes fixed. The company has a right to carry on its business with the help of assets having a floating charge till the happening of some event which determines this right.

A floating charge crystallises and the security becomes fixed in the following cases:-	(a) when the company goes into liquidation;
	(b) when the company ceases to carry on the business;
	(c) when the creditors or the debenture holders take steps to enforce their security.
	(d) on the happening of the event specified in the deed.

EFFECT OF CRYSTALLISATION OF A FLOATING CHARGE

On crystallisation, the **floating charge converts itself into a fixed charge** on the property of the company. It has priority over any subsequent equitable charge and other unsecured creditors.

DISTINCTION BETWEEN MORTGAGE AND CHARGE

(a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.
(b) A charge may be created by act of parties or by operation of law . A mortgage can only be created by act of parties
(c) A mortgage deed must be registered and attested by two witnesses , while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.
(d) In certain types of mortgage, the mortgagor can foreclose the mortgaged property but in charge, the charge-holder cannot foreclose though he can get the property sold as in a simple mortgage.
(e) The mortgage is for a specified term . Unlike charge, which continues forever .

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Q. 1. AMRIT (LESSOR) GRANTS HIS IMMOVABLE PROPERTY (PREMISES) ON LEASE FOR 4 YEAR TO SUKANT (LESSEE) COMMENCING FROM 1ST JUNE, 2001. THE LESSOR GIVES A NOTICE TO THE LESSEE ON 1ST FEBRUARY, 2008 FOR VACATING THE PREMISES ON 1ST MARCH, 2008:

- (a) **IS THIS NOTICE A VALID NOTICE?**
 (b) **IF THE LEASE IS CONTINUED AFTER 4 YEARS, WILL THE TENANCY BE ON MONTHLY BASIS OR YEARLY BASIS? DECIDE.**

Ans. Under the Transfer of property Act, 1882, in order to be valid, a notice has to be valid, has to be proper notice. There are two things to be kept in mind, so that it can be termed as per proper notice

- It has to clearly specify the intention to terminate tenancy.
- The date of termination of tenancy should be mentioned in it.

Moreover, depending on whether should be fifteen days and six months respectively. In this case, the lease is granted by Amrit to be Sukant for years, w.e.f. 1st June, 2001. This lease ends on 1st June, 2005. Since the tenant has continued residing in the property after this period, we can safely assume that the lease after 1st June, 2005 continued as a monthly lease, for which a fifteen days notice suffices.

Hence,

- (1) The notice is a Valid Notice.
- (2) The tenancy is a Monthly tenancy.

Q. 2. A MAKES A GIFT OF A HOUSE TO BE B WITH WHOM HE HAD ILLICIT RELATION IN THE PAST. IS THIS TRANSFER VALID? WILL IT MAKE ANY DIFFERENCE IF A'S CONSIDERATION FOR THIS TRANSFER IS ADULTEROUS RELATIONS OF B WITH A? GIVEN REASON.

Ans. Section 6 of the Transfer of Property Act, inter alia provides that no transfer can be made for an unlawful Object or Consideration within the meaning of Section 23 of the Indian Contract Act, 1872. According, Sec 23, a Consideration or object in unlawful if the court regard it as immoral or opposed to public policy. In the Case Nagaratnambu vs. Ramavva the Supreme court held that in such a case past-cohabitation was only motive and not the consideration for the gift, and such a transfer is not hit by Section 6(h) of the Transfer of property Act by reason of the fact that they were motivated by a Desire to compensate the concubine for her past

service. Therefore, the gift in Question for past illicit Cohabitation is valid in the eye of law.

Where the illicit connection or adulterous inter course, it is opposed to law and it cannot possibly sustain a transfer of property or constitute a valid consideration in the case of Manicka Gounder v. adulterous cohabitation is an unlawful consideration. Therefore, if 'A' connection with B is adulterous, the gift would be invalid and hit by section 6(h) of the Transfer of property Act.

Q. 3. DISTINGUISH BETWEEN 'MOVEABLE PROPERTY' AND 'IMMOVEABLE PROPERTY'.

Ans. Moveable Property

The Transfer of Property Act does not define the term "moveable property". Therefore, it is to be defined with the help of other statutes. For e.g., it has been defined in the General Clauses Act, 1897 as to mean "property of every description except immovable property". The Registration Act defines "moveable property" to include property of every description excluding immovable property but including standing timber, growing crops and grass.

Moveable property is sometimes regarded as immovable property. This may happen when a thing of chattel is attached or embedded in earth. If the machinery is fixed on the land permanently then it becomes immovable property, whereas if the machinery or engine or any other thing is fixed on a temporary basis, then it will be regarded as moveable property.

Immoveable Property

The term "immovable property" is also not defined under the Transfer of Property Act. However, it is defined in the negative sense as "the immovable property does not include standing timber, growing crops, or grass". Standing timber are trees fit for use for building or repairing houses. This is an exception to the general rule that growing trees are immovable property.

The General Clauses Act defines the term "immovable property" but not exhaustively. It states: "Immovable property shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth". The Indian Registration Act expressly includes under to immovable property the benefits to arise out of land, hereditary allowances, rights of way, lights, ferries and fisheries.

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Q. 4. WHAT IS MEANT BY 'ONEROUS GIFT' ?

Ans. Several things are transferred as a gift by single transaction. Whereas some of them are really beneficial, the others convey burdensome obligations. The result is that the benefit which it confers is more than counter balanced by the burden it places. For instance, A makes a gift of shares in the companies X and Y. X is prosperous but heavy calls are expected in respect of shares in Y company. The gift is onerous. The rule as laid down in Section 127 of Transfer of Property Act, 1882 is that the donee is at liberty to accept one of them and refuse the other.

Q. 5. WHICH SECTION OF THE TRANSFER OF PROPERTY ACT PROVIDES THAT WHEN A PROPERTY IS TRANSFERRED, THE TRANSFEREE SHOULD NOT BE RESTRAINED ABSOLUTELY FROM ALIENATING THE PROPERTY?

Ans. Section 10.

Q. 6. WHICH SECTION OF THE TRANSFER OF PROPERTY ACT DEALS WITH THE VARIOUS CONTINGENCIES IN WHICH A LEASE COMES TO AN END?

Ans. Section 111.

Q. 7. IN WHICH OF THE FOLLOWING MORTGAGES, THE OWNERSHIP IN THE MORTGAGED PROPERTY IS ABSOLUTELY TRANSFERRED TO THE CREDITOR?

Ans. English mortgage.

Q. 8. WHICH OF THE FOLLOWING MORTGAGES IS CALLED EQUITABLE MORTGAGE IN ENGLISH LAW?

Ans. Mortgage by deposit of title deeds.

Q. 7. EXPLAIN THE MEANING OF 'USUFRUCTUARY MORTGAGE' AS GIVEN UNDER THE TRANSFER OF PROPERTY ACT, 1882. [Dec. 2017]

Ans. Section 58(d) of the Transfer of Property Act, 1882 defines a "Usufructuary Mortgage" as "where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such

possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage. It is also called a mortgage with possession.

Q. 7. DIFFERENTIATE BETWEEN VESTED AND CONTINGENT INTEREST UNDER TRANSFER OF PROPERTY ACT, 1882.

Ans. The following are the principal points of distinction between a vested and a contingent interest:

1. When an interest is vested the transfer is complete. It creates an immediate proprietary interest in the property though the enjoyment may be postponed to a future date. A contingent interest on the other hand is dependent upon the fulfillment of some conditions which may or may not happen. In other words, in interest, the title is as yet imperfect but may become perfect on the fulfillment of a stipulated condition.
2. A vested interest takes effect from the date of transfer. A contingent interest in order to become vested is conditioned by a contingency which may not occur.
3. A vested interest cannot be defeated by the death of the transferee before he obtains possession. A contingent interest may fail in case of the death of transferee before the fulfillment of condition.
4. Since vested interest is not circumscribed by any limitation which derogates from the completeness of the grant, it logically follows that vested interest is transferable as well as heritable. If, therefore, a transferee of the vested interest dies before actual enjoyment, it will devolve on his legal heirs. A contingent interest, on the other hand, cannot be inherited though it may be transferred coupled with limitation regarding fulfillment of a condition.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



- Write short notes on the following:
 - Doctrine of feeding the grant by estoppel
 - Doctrine of lis pendens
 - Spessuccessionis
 - Usufructuary mortgage.
- Distinguish between the following.
 - 'Mortgage' and 'charge'
 - 'Vested interest' and 'contingent interest'.
 - 'Condition restraining alienation' and 'condition restraining enjoyment'.
 - 'Movable property' and 'immovable property'.
 - 'Sale' and 'exchange'.
 - 'English mortgage' and 'mortgage by conditional sale'
- Explain the following:
 - Doctrine of part-performance.
 - Doctrine of election.
 - Doctrine of marshalling
- Attempt the following:
 - State the circumstances in which a property may be transferred in favour of an unborn person.
 - Explain the rule of lis pendens as provide in the Transfer of Property Act, 1882.
 - Discuss briefly the right of redemption.
- Exception to the rule that absolute restraint on transfer of property is void. Comment.
- State the meaning and characteristics of immovable property as per the Transfer of Property Act, 1882.
- Explain the doctrine of 'clog on equity of redemption' under the Transfer of Property Act, 1882.
- What do you mean by 'immovable property' under the Transfer of Property Act, 1882?
- What is the 'doctrine of election' as enunciated under the Transfer of Property Act, 1882.
- There was a partition between a Hindu father and his five sons. The deed provided that if any one of the sons wanted to sell his shares, he shall sell it to one of his brothers only and not to any stranger. The consideration for that share shall be `1,000 only. Are these conditions valid? Give reasons.
- Arjun transfers his property to Bhanu for life and after Bhanu's death to that of his unborn sons as shall first attain the age of 25 years and if no son of Bhanu shall attain that age, to Chandan who is living at the time of the transfer. Decide the validity of this transfer.
- Anil has two properties Property-X and Property-Y. He sells Property-Y to Sunil and puts a condition that Sunil should-X which he retains should have good light and free air. Is such a condition valid? Give reasons in support of your answer.

FROM ICSI MODULE



Answer the following:

- Discuss the object of the Transfer of Property Act. Distinguish between immovable and moveable property.
- What is the subject matter of transfer under the T.P. Act? Discuss properties which cannot be transferred.
- Define a mortgage. Discuss various types of mortgages.
- What is the rule against perpetuity?
- Write short notes on
 - Puisne mortgage;
 - Charges under the T.P. Act;
 - Vested and contingent interest;
 - Actionable claims.



13. Ajoy voluntarily makes a gift of his immovable property to Bijoy. Bijoy accepts the gift. The possession of the property was given to Bijoy but the gift deed which required registration under section 123 of the Transfer of Property Act, 1882 was not registered. Whether Ajoy, the donor can revoke the gift? Decide.
14. The managing clerk of a firm of solicitors, while acting in the ordinary course of business committed fraud against a lady client by fraudulently inducing her to sign documents transferring her property to him. The clerk did so without the knowledge of his principal.

CS NITESH KR. JAISWAL



Answers to be analysed in Classroom

Q. 1.

Answer to Question No. 1:-

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Answers to be analysed in Classroom

Q. 2.

Answer to Question No. 2:-

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