

**LAW ON DRAFTING, PLEADING AND CONVEYANCING**

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## **CHAPTER 1: INTRODUCTION ON PLEADING AND CONVEYANCING**

Drafting, Pleading and Conveyancing are the three common terms used in the law sector. **Drafting** refers to the act of preparing the legal document like agreements, contracts and deeds. In drafting besides seeking right words, the draftsman seeks the right concepts. **Conveyancing** refers to the transferring of a real property to its new owner by means of deeds and whereas **pleading** refers to a legal document filed in a law suit. This can be a document pertaining to the initiation of litigation or a document in response to this initiation.

### **(a) Pleadings:**

The art of drafting the pleading has not yet fully developed in spite of the increase in the civil litigation. Many dead sure win cases drag on for years in the Courts only because of the faulty drafting. Hence it is important to understand that pleading is an art, of course, and art which requires not only technical and linguistic skill but also an expert knowledge of the law on the given point brought before a lawyer. Even the experienced lawyers and

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attorneys are not infallible and sometimes they also make mistakes. However, in the matter of pleading longer experience and great linguistic acumen are both essential ingredients and ultimately what matters is how clearly and systematically have the facts been presented before the court of law.

**According to Lord Halsbury** – “Where system of pleadings may exist, the sole object of it is that each side may be fully alive to the questions that are brought to be argued in order that they have an opportunity of bringing forward such evidence as may be appropriate to the issue”.

When a person comes to seek the assistance of court of law in any matter, he has to prepare a statement of his claims, and the facts on which such claims are founded. Such statements fully drawn up, setting out all contentions are called “pleadings”. Thus pleadings are the foundations of all sort litigation. No judicial system in the world can do justice in any matter unless and until the court of justice is fully aware as to the claims and contentions of the plaintiff and of the counter claims and defences of the defendant. There can be **Civil Pleadings** like Complaint, Interlocutory Applications, Execution

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Petition, Affidavits etc. and **Criminal Pleadings** like Complaint, Bail Application etc.

When the civil codes came to be drafted, the principles of pleadings were also given statutory form. Vide Order VI Rule 1 “pleading” – shall mean plaint or written statement. The elaborated definition of pleading is that pleadings are statements, written, drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his reply for the same.

**Objectives of Pleadings:**

The whole object of pleadings is to give fair notice to each party of what the opponent’s case is. Pleadings bring forth the real matters in dispute between the parties. It is necessary for the parties to know each other’s stand, what facts are admitted and what facts are denied, so that at the trial they are prepared to meet them. Pleadings also eliminate the elements of surprise during trial besides eradicating irrelevant matters which are admitted to be true. The facts admitted by any parties need not to be pursued or proved.

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Thus, pleadings save the parties much bother, expense and trouble of adducing evidence in support of matters already admitted by a party, and they can concentrate on their evidence to the issue framed by the court in the lights of facts alleged by one party and denied by other party.

Another advantage of pleadings is that parties come to know beforehand what points the opposite party will raise at the trial and thus are prepared to take them and are not surprised, which could certainly be the case if there was no obligatory rules of pleadings where by the parties are compelled to lay bare their cases before the opposite party prior to the commencement of the actual trial.

**Fundamental Rules of pleadings under Civil Procedure Code:**

- (1) Pleadings shall contain only statement of facts and not law.
- (2) Pleadings shall contain material facts and material facts only.
- (3) Pleadings shall state only facts on which the party pleadings relies and not the evidence by which they are to be proved.

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(4) Pleadings shall state such material facts concisely, but with precision and certainty.

(b) **Conveyancing:**

Conveyancing is an art of drafting deeds and documents whereby any title, right or interest in an immovable property is transferred from one person to another. Such person can be natural or artificial i.e. Corporate, the Company, the Society or the Corporate Sole as the case may be.

Conveyancing is based on law and legal principles which have been evolved in the sphere of conveyancing over years or rather centuries. The objective of Conveyancing cannot be possible without a thorough knowledge and understanding of the legal provisions applicable on the subject matter of transfer of property or right therein.

In the present world, the scope of conveyancing has become very wide and extensive in use and advantage to different fields of business, profession and industries. Drafting document is now a legal task and not merely a technical

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one. Different types of deed require knowledge of different types of law on which those deeds are based.

In India the forms of conveyancing are based on the present English forms. No legislation in India has been ever passed on the law of conveyancing. Both in India and England, there are two types of deeds namely – “Deed Poll” and “Indenture”. The deed poll is a document which is executed unilaterally in the first person like bonds, power of attorney and will etc. The Indenture is a document which is executed bilaterally or consist of multilateral deed like mortgages, sale deed, gifts and lease etc.

**Principles of drafting a document may be classified into 4 parts:**

- (1) Clarity of expression
- (2) Design of Draft
- (3) Precision of language
- (4) Communicability of the intention of the parties to the document

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**Essentials of a Deed:**

- (1) The non-operative part
- (2) The operative part
- (3) The format part

The non-operative part contains description or name of deed, date of the deed, parties to the deed and the recitals.

The operative part contains testatum or premises, habendum, exception and reservations and covenants.

The formal part contains testimonium, signature and attestation, parcels of description of the parties

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## **CHAPTER 2: SALE DEED**

Sale deed is a legal document describing the transfer of right, title and ownership of property by a seller to a purchaser at a price fully paid or to be paid in instalments at a future date. The entire amount of sale transaction also known as sale consideration is paid at the time of registration of sale deed.

**It is pertinent for the draftsman to study the following provisions before incorporating the Sale Deed:**

- Sale can be of immoveable property and moveable property. Sale of immoveable property is defined in section 54 of the Transfer of Property Act, 1882 as a transfer of ownership in exchange for a price paid or promised or part paid and paid promised. Sale of goods (moveable property) is defined in section 4 of Sale of Goods Act, 1930 as a contract whereby property in goods is actually transferred by the seller to the buyer for a price.

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- Money consideration is essential in a transaction of sale and if that consideration is not money but some other valuable consideration, the transaction may be termed as an exchange and not a sale. The law does not require that the consideration should be immediately ascertainable in money. It is sufficient if it is ascertainable at the time when payment is made. The actual payment of price is not essential to the completion of a sale. The sale gets complete as soon as the sale deed is registered even if the payment of price is promised on a future date provided it has been ascertained or made certain able.
- Immovable property as per section 2(26) of the General Clauses Act, 1987 states that immovable property shall include land and things attached to the earth or permanently fastened to anything attached to earth. Section 3 of the General Clauses Act, 1987 states that moveable property means property of every description except immovable property. Tangible property means something that can be touched i.e. material object but all the abstract rights are incapable of being touched and are hence intangible. Some examples of intangible

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property are goodwill of business, mortgagee or lessee's rights or interest of a partner in a Partnership Firm etc.

- What can be transferred or sold?

Generally, the right to property includes the right to transfer it to other person. Section 6 of Transfer of property Act provides that property of any kind can be transferred, except as provided by this act or by any other law for the time being in force.

Exceptions:

- (1) The chance of an heir- apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature, cannot be transferred.
- (2) A mere right of re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.
- (3) An easement cannot be transferred apart from the dominant heritage.

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(4) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(5) A mere right to sue cannot be transferred

(6) A public office cannot be transferred nor can the salary of a public officer whether before or after it has become payable.

(7) Stipends allowed to military, naval, air force and civil prisoners of the government and political pensions cannot be transferred.

- Section 7 of the Transfer of property Act deals with the competency to carry out a transfer. Transfer must be done by persons who are:

1.) Competent to make a contract.

2.) Have title to the property or authority to transfer it if not his own.

- Consequences of transfer :

Section 8 of the transfer of Property Act states that all interest which the transferor is capable of passing passes forthwith to the transferee, if the property is land, the easements annexed, the rents and profits accruing after the transfer and all things attached to the earth pass to the transferee and if the property is machinery attached to the earth, the moveable parts thereof. In case of a house, the easements annexed

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to it and the rents, doors, locks, keys, windows, bars and all other things provided for permanent use therein pass to the transferee. If the property is a debt or other actionable claim, the securities thereof but not arrears of interest accrued before the transfer. If the property is money or other property yielding income, the interest or income accruing after the transfer passes to the transferee. But is open for the parties to decide among themselves other terms and consequences other than mentioned at the time of transfer.

- Section 55 of Transfer of Property Act lays down the rights and liabilities of a buyer and a seller. These conditions are implied in every transfer and it is not necessary to mention them in the deed of transfer.
- Section 10 to 14 of the Transfer of Property Act lays down the unlawful conditions which may not be included in the deed of transfer. So this should be kept in mind while drafting a Sale Deed.

**Modes of transfer by sale:**

There are only two modes of transfer of property by sale and those are:

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- (1) By registered instrument
- (2) By delivery of possession

Such transfer in case of tangible immovable property of the value of 100 rupees or upwards or in the case of reversion or other intangible thing can be made only by registered instrument. In case of tangible immovable property of a value less than 100 rupees, such transfer shall be either made by a registered instrument or by delivery of the property.

In case of registration the ownership is deemed to pass not on the date of registration but on the date of the instrument. But in case where the vendor refuses to deliver the property or the registered deed, because he had not paid the price, it may be inferred that there was no transfer of ownership because there was no intention to transfer. In case of delivery it must be actual and not constructive. Ordinarily ownership passes when registration is compulsory, on the execution of sale deed and where delivery is the proper method by delivery of possession of the property.

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**Contents of Sale Deed:**

A sale deed is usually executed as deed poll by the vendor/ seller and written in the first person. The law does not require execution by the purchaser also.

Sometimes a deed is executed between a vendor and a purchaser, particularly when it contains covenants binding on the purchaser.

A sale deed must contain apart from the description of the deed and date, details of the following elements:

- (i) The name of the parties to the deed with their full address
- (ii) The capacity and capability of the vendor to transfer the party.
- (iii) The vendor title to the property.
- (iv) The property and its capability of being transferred and also the details of the property.
- (v) The encumbrances and charges if any upon the property and whether the sale is subject to encumbrances and whether any money was being left with purchaser to pay off the encumbrances.
- (vi) The Price settled, how and when to be paid (earnest money if paid to be set off)
- (vii) The other terms agreed upon

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(viii) Delivery of possession, actual or constructive

The signing of the deed signifies that the process of sale has been completed.

The seller transfers the right of ownership to the buyer through sale deed. As soon as the document is signed, the buyer becomes the complete owner of the property. Usually the sale deed is executed only when both the sellers and buyers are fully satisfied and are ready to comply with the terms and conditions as mentioned in sale agreement. Though not required by law, a sale deed is usually attested by two witnesses.

**Stamp Duty:**

The sale deed is drafted on a non-judicial stamp paper of value as set by the State Government in which the property transaction is taking place. Every state has predetermined value of stamp paper that are used for drafting immovable property. Stamp duty in a sale deed is chargeable under section 23 schedule of the Stamp Act.

Also, an outstanding amount can be paid through challan or stamping for legalizing the sale deed.

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**Registration of a Sale Deed:**

A sale deed is registered in accordance with the Registration Act, 1908. Both the parties have to be present in person along with two witnesses with all the relevant documents in the sub registrar's office to sign the sale deed and close the deal.

The certified copy of the registered deed with the name of the buyer can be obtained from the registrar's office. The original documents have to be produced within four months from the date of registration of the deed. It is the buyer who pays the stamp duty and the registration charges while seller needs to clear all other payments related to the property such as property tax, cess, and water and electricity charges before the deed is signed

It is also necessary for the vendor/seller to have clarity in mind regarding the Sale deed and Agreement for sale.

**Agreement for sale:**

It is an agreement to sell a property in future. This agreement specifies the terms and conditions under which the property in question will be

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transferred. The sale of such property shall take place on the terms settled between the parties. Thus, it does not, of itself, create any interest in or charge on such property.

What the sale agreement creates, is a right for the purchaser to purchase the property in question on satisfaction of certain conditions. Likewise the seller also gets the right to receive the consideration from the buyer on complying with his part of the terms and conditions. In case of failure of the seller to sell or hand over the possession of the property to the buyer, the buyer gets a right of specific performance, under the provisions of the Specific Relief Act, 1963. A similar right is available to the seller under the agreement, for seeking specific performance from the buyer.

According to sec 54 of the Transfer of Property Act, an agreement for sale whether with possession or without possession is not a conveyance. It enacts that the sale of immoveable property can be made only by a registered instrument and agreement for sale does not create any interest or charge on its subject matter. Hence, it very important to understand that immoveable property can be transferred/conveyed only by a deed of conveyance (sale deed), duly stamped and registered as required by law.

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So, in the case where you have purchased any property under a sales agreement and got possession, the title of the property still remains with the developer, unless a sale deed subsequently has been executed and registered under the Indian Registration Act. Thus, it becomes clear that a title in an immoveable property can only be transferred by a sale deed.

### **CHAPTER 3: MORTGAGE DEED**

A mortgage deed is a legal document that gives lender an interest in a property when you take out a loan backed by the property. If a borrower does not pay back a loan in accordance with the agreement, the lender can foreclose and take possession of the property or have it auctioned. Basically Mortgage Deed is a paperwork you sign that allows the lender to put lien on the property until the loan is paid.

Section 58 of the Transfer of Property Act, 1882 defines mortgage as transfer of interest in specific immovable property for the purpose of securing. The transfer of interest in immovable property must in order to constitute a mortgage for one of the purposes like the payment of money advanced or to be advanced by loan or an existing or future debt or the performance of an engagement which may give rise to pecuniary liability.

There is a difference between “**transfer of an interest**” and “**transfer of ownership**” used in definition of sale in section 54. In a sale all the rights of ownership which the transferor has pass to the transferee but in mortgage out of the bundle of rights which constitute ownership, some are transferred to mortgagee and some remains vested in the mortgagor. The rights remaining

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with the mortgagor (also called equity of redemption) can again be transferred.

Generally, many misconceive hypothecation for a mortgage, however the difference between these two lies in the factor on which they are created. Hence, it is important to understand the difference between Mortgage and Hypothecation

<b>Points of comparison</b>	<b>Mortgage</b>	<b>Hypothecation</b>
1.) Meaning	Mortgages is wherein the title of real estate property passes from the owner to the lender as a collateral for the amount borrowed.	Hypothecation is wherein a person borrows money from bank by collateralizing an asset without transferring the title and possession.
2.)Applicable to	Immoveable Asset	Moveable Asset
3.)Defined under	Transfer of Property Act, 1882	SARFEASI Act, 2002
4.)Indicates	Transfer of interest in asset	Security for payment in an amount
5.)Loan Amount	High	Comparatively low
6.)Tenure	Long	Comparatively short

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In spite of some differences, both the forms of charge provides security to the loan and the possession of asset remains with the borrower of the asset, while the lender has the first right to it until the dues are cleared. Further in both the cases if the borrower defaults in payment, the lender can recover the amount by selling the asset.

**It is pertinent for the draftsman to study the following provisions before incorporating the Mortgage Deed:**

- A proper description of the property is necessary to create a mortgage and for its registration. The word specific shows that the description of the immoveable property should not only be free from ambiguity and uncertainty, but that it should be specific as distinguished from general. The description should be such that it is sufficient to identify the property. The rules for description of property are laid down under section 21 and 22 of the Registration Act.
- Security, generally speaking is anything that makes the money more assured in its payment or more readily recoverable. It is the assurance in its payment or ready recoverability that constitutes a particular

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thing a security for the debt. A mortgage may be executed for the purpose of providing a security for the repayment of loan already taken or for a loan to be taken in future. A mortgage may not only be made for a specific sum but to secure a current account between the parties up to a limited name. It is sufficient if the money is left at the mortgagor's disposal in a bank deposit.

- A mortgage may also be used as a security for the payment of a present debt or for the payment of a debt that may be incurred in future. A mortgage may be made to secure the unpaid price of a house purchased. A future debt may be a contingent liability. E.g. to secure the payment of the respondent's costs in appeal. A security bond given to an officer of the court to secure an amount that may be decreed or ordered by the court is a mortgage to secure a future debt.
- The word "engagement" means a contract and the qualification "as may give as pecuniary liability" means the contract of fulfilment or non-fulfilment of which may result in a liability to pay money. In other words it contemplates a liability to pay money arising out of a contract.

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- Section 58 of the Transfer of property Act enumerates 6 kinds of mortgages. The classification of mortgage has been made on the basis of the nature of the interest which is transferred for securing loan

(1) **Simple Mortgage**: It is a mortgage deed in which mortgagor undertakes personal liability for repayment. Here possession of mortgaged property is not delivered and on mortgagor's default in making payment, mortgagee is entitled to cause mortgaged property to be sold. But power to sell mortgaged property is only obtained on a decree for sale being obtained. In this type of mortgage, remedy of foreclosure of the mortgage property is not available. The simple mortgage must be effected by a registered deed even if the consideration is below Rs. 100

(2) **Mortgage by Conditional Sale**: It is a mortgage deed in which mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment

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being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee is called a mortgagee by conditional sale. The remedy of the mortgage is foreclosure and not the sale of the mortgaged property. The mortgage must be by a registered deed if the consideration is Rs. 100 or more and if the consideration is less than Rs. 100 then possession is necessary. The transaction must be embodied in a single deed.

(3) **Usufructuary Mortgage:** It is a mortgage deed where the mortgagor gives possession of the property to the mortgagee. Since the possession is with the mortgagee, he enjoys the fruits of the property i.e. produce, benefits, rents or profits of the mortgaged property in lieu of interest on the principal money advanced by him. Therefore on payment of debt, the mortgagee has no right over possession. In this mortgage there is no personal liability of the mortgagor. The mortgagee also cannot foreclose or sue for sale of the

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mortgaged property. Moreover, there is no time limit fixed for the payment in this mortgage deed. The mortgage must be affected by a registered deed if the consideration is Rs. 100; registration is optional but delivery of possession is essential.

(4) **English Mortgage**: It is a mortgage deed where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee but subject to the proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money as agreed. Here the mortgagee is entitled to the possession of the property and to the enjoyment of the profits arising therefrom. The remedy available to the mortgagee is the sale of the property and not by foreclosure.

(5) **Mortgage by deposit of title deeds**: It is mortgage deed where a person in any of the following towns viz. Calcutta, Madras, and Bombay and in any other town which the State Government concerned may by notification in the official gazette, specify in this

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behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon. Mortgage by deposit of title deeds is a peculiar kind of mortgage because execution of mortgage deed by mortgagor is not necessary and mere deposit of title deeds of immovable property by a mortgagor to mortgagee is sufficient. The object of this kind of mortgage is to provide easy mode of taking loans in urgent need particularly by trading community. This is called Equitable Mortgage in English Law. Bankers, in most of the cases, adopt the mortgage by deposit of title deeds since it is simple, inexpensive and non-time consuming. The remedy of this mortgagee lies in filing a suit for sale of the mortgaged property. Title deeds may also be deposited with the banks to secure an overdraft account. Basically, all the provisions applicable to simple mortgage apply to equitable mortgage.

(6) **Anomalous Mortgage**: A mortgage is an anomalous mortgage if it is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by

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deposits of title deeds. When a transaction is a mortgage in all respects but the agreement between the debtor and creditor is of such nature that it cannot be included in any specific category of mortgage, the transaction is called an anomalous mortgage. It may be a combination of 2 or more kinds of mortgages. The remedy available to mortgagee is by sale or by foreclosure depending on the terms of the deed. If the mortgage is for a consideration of Rs 100 or more then the deed must be registered but if below Rs.100 delivery of possession is essential and registration is optional.

**Contents of Mortgage Deed:**

Amongst other information, the mortgage deed includes the following details:

1. Names of the parties with their full address.
2. Details of the mortgaged property
3. Details of sum advanced and its repayment terms
4. Habendum clause
5. Insolvency clause

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6. Mortgage clause
7. Clause on Possession and Title Deeds
8. Redemption Clause

**Registration of Mortgage Deed:**

Registration of mortgage deed is essential to give legal validity to the document.

1. Execute a mortgage deed.
2. Affidavit to be sworn by 2 witnesses in the deed.
3. The deed should be notarised by the notary public.
4. Pay for the stamp duty as chargeable under Article 40 schedule 1 of Stamp Act and registration charges at the Registrar of Deed office.
5. Obtain the title for mortgage.

A simple mortgage whatever may be the amount secured, only be made by a written instrument signed by the mortgagor and attested by at least 2 witnesses should be registered.

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For a mortgage by deposit of title deeds, no formalities are prescribed. It can be either oral or written. When such a mortgage so reduced in writing, it must be attested by at least 2 witnesses and registered if the money secured is Rs 100 or more. But a mere memorandum of an oral mortgage does not require registration.

In other 4 kinds of mortgages, if the amount secured is Rs 100 or above can only be effected by written instrument signed by mortgagor and attested by at least 2 witnesses and should be registered. If the amount secured is less than Rs 100, the mortgages can be either effected by written instrument signed by the mortgagor and attested by 2 witnesses and registered or by delivery of possession.

**Right of Redemption:**

The right of redemption is regulated by section 60 of the Transfer of Property Act.

The right of redemption is the right which every mortgagor possesses, which is created by virtue of the mortgage deed. This right is considered to

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be inalienable and cannot be taken away from a mortgagor by means of any contract to the contrary. The right of redemption allows mortgagor to become the owner of the property mortgaged and makes him able to get his property back from the mortgagee on paying the amount borrowed from him.

Law does not allow any person to alienate a mortgagor of his “right of redemption”. Such right would remain effective unless the property has been sold off or under any statutory provision. Even if the mortgagee has gone to the court for the foreclosure of the property mortgaged, mortgagor can redeem his property by paying off the full amount in the court. Time period is not the essence in case of right of redemption.

**Right of Foreclosure:**

The right of foreclosure is regulated under section 67 of the Transfer of property Act.

The right of foreclosure is a right available to a mortgagee to recover his outstanding money. The result of passing the decree of foreclosure is that

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the mortgaged property vests with the mortgagee and the mortgagor cannot recover it. But this right can only be exercised in the case of a mortgage by conditional sale and in an anomalous mortgage.

The right to foreclosure is a counter part of the right of redemption. Mortgagor gets a right of redeeming his security after payment of debt amount; similarly mortgagee has a right of foreclosure or sale in default of redemption by the mortgagor. The right of foreclosure of mortgagee is co-extensive to the right of redemption of the mortgagor.

Though it is common to hear **mortgage and deed of trust** used interchangeably, yet they are two different types of contracts. A mortgage is a direct contract between 2 parties- the borrower and the lender. The borrower owns title to the property and pledges it to the lender as security for the loan. With a deed of trust, the borrower does not own the title to the property. Instead, a third party known as trustee, has a temporary hold on the title and will only hand over the title to borrower, known as trust or when the loan is repaid in full.

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<b>Point of Comparison</b>	<b>Deed of Trust</b>	<b>Mortgage</b>
Ownership	A third party known as trustee holds title to the property until borrower has paid off the loan.	The borrower owns title to the property but pledges it to the lender as security for the loan.
Foreclosure process	Allows non judicial foreclosure	The lender must go to the court before foreclosing on the property.
Favoured by	Lenders	Borrowers

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## **CHAPTER 4: LEASE DEED**

When a property is used and enjoyed by the person in possession of it in exchange for a consideration to the actual owner, the property is said to be leased or rented. When a property is given on a lease, it means that the lessee or the tenant can use the property for a definite period of time for which he/she would be required to pay a certain fixed amount of rent. When this period extends to more than a year, a lease deed must be prepared.

Lease deed is a legal document which lays out the prescribed terms and conditions under which the property is leased out. Lease deed must contain information about the lessee, lessor, tenure of lease, lease payments payable and other terms to be followed by the lessee and lessor during the lease term.

A lease deed is generally required when the property is leased for a long period of time, ranging between 1.5 years or even longer. In such cases, a lease deed plays an important role to govern the relationship between the landlord and tenant and lays down the provisions legally binding over them.

A lease of immovable property is defined in section 105 of Transfer of Property Act and it consists of following elements:

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- (i) There must be a transferor (lessor) and a transferee (lessee) who both agree to the transaction.
- (ii) The lease must be for a certain time, express or implied, or in perpetuity (period or duration)
- (iii) There must be transfer of the right to enjoy the immovable property
- (iv) The transaction must be in consideration of price paid or promised
- (v) In consideration of money a share of crops, service or any other thing of value to be rendered periodically or on specified occasion to the transferor by the transferee

**Essentials of Lease:**

The essential elements of a lease are:-

- (1) **Parties:** The parties to the lease are the lessor and the lessee. The lessor is the landlord and lessee is the tenant. The lessor must have the capacity and the right to grant lease. Though a minor cannot but his guardian can grant a lease. The manager of lunatic, the Karta of a joint Hindu family, can grant a lease.

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(2) **Subject matter of lease**: Subject matter of lease must be immovable property. The word immovable property may not be only house, land but also benefits to arise out of land, right to collect fruit of garden, right to extract coal of minerals, rights of ferries, fisheries or market dues. The contract for right for grazing is not lease. A mining lease is lease and not a sale of minerals

(3) **Consideration**: The consideration for lease is either premium or rent, which is the price paid or promised in consideration of the demise. The premium is the consideration paid of being let in possession, such as Salami, even it is to be paid in installments.

(4) **Sub-Lease**: A lessee can transfer the whole or any part of his interest in the property by sub lease. However, this right is subject to the contract to the contrary and he can be restrained by the contract from transferring his lease by sub-letting. The lessee can create sub-lease for different parts of the demised premises. The sub-lessee gets the rights, subject to the covenants, terms and conditions in the lease deed.

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**It is pertinent for the draftsman to study the following provisions before incorporating the Lease Deed:**

- The commencement of a lease must be certain in the first instance, or capable of being ascertained with certain afterwards, so that both the time when it begins and the time when it ends is fixed. It is open to the parties to fix the duration or period of the lease. They can even make a perpetual lease. Where a land is let out for building purpose and no period is fixed the presumption is that it was intended to create a permanent tenancy.
- Section 106 of Transfer of Property Act provides that in the absence of a contract or local law or usage to the contrary for agriculture or manufacturing process shall be deemed to lease from year to year and a lease for any other purpose shall be deemed to be a lease from month to month. Sometimes lease contains a renewal clause. The renewal may be at the option of the lessor or the lessee or both. The option does not affect the duration of the lessee or both because until it exercises, it creates no interest in the added form.

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- A lease may be granted on payment of premium alone or rent alone or on payment of both premium and rent. A “**Zuripeshgi lease**” is a lease for a premium which is not a mere contract for the cultivation of land at a rent, but is a security to the tenant for the money advanced. It follows that he may grant lease not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption. In some cases premium in the form of pugree, salami or nazrana is also taken in addition to rent. Most of the lease is for rent only. Premium can also be paid in instalments. In a month to month tenancy rent is usually paid monthly but even in yearly tenancy the parties may stipulate payment of rent monthly. This can be done even in cases of tenancies for fixed periods.
- In the absence of a contract or local usage to the contrary, the lessor possesses and is subject to the liabilities mentioned below:

(1) The lessor is bound to disclose to the property, with reference to its intended use, of which the former is and latter is not aware and which the latter could not with ordinary care discover.

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(2) The lessor is bound on lessee's request to put him in possession of the property.

(3) The lessor shall be deemed to contract with the lessee that if the latter pays the rent reserved by the lease and performs the contract binding on the lessee, he may hold the property during that time without interruption. The benefit of such contract shall be annexed to and go with lessee's interest as such and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

These liabilities of the lessor will be implied in every lease unless provided otherwise and it is not necessary to set them out in the lease deed.

- In the absence of a contract or local usage to the contrary, the lessor possesses and is subject to the liabilities mentioned below:

(1) If during the lease, any accession is made to the property such accession shall be compromised in the lease.

(2) If by fire, tempest or flood, or violence of any army or of a mob, or other irresistible force, any material part of the property be wholly

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destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the lease shall at the option of the lessee be void. Provided that if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.

(3) If the lessor neglects to make within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself and deduct the expense of such repairs with interest from the rent or otherwise recover it from the lessor.

(4) The lessee may even after the determination of the lease remove at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth; provided he leaves the property in a state in which he received it.

(5) When a lessee or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines and to free ingress and egress together carry them.

(6) The lessee may transfer absolutely by way of mortgage or sublease the whole or any part of his interest in the property, and any

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transferee of such interest or part may again transfer it. The lessee shall not by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

(7) The lessee is bound to disclose to the lessor any facts as to the nature or extent of title interest which the lessee is about to take of which the lessee is and the lessor is not aware and which materially increased the value of such interest.

(8) The lessee is bound to pay or tender at the proper time and place, the premium on rent to the lessor or his agent on this behalf.

(9) The lessee is bound to keep, and on the termination of the lease to restore, the property in as good a condition as it was at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agent at all reasonable times during the term to enter upon the property and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition there of and give or leave notice of any defect in such condition, and when such defect has been caused by any act or default on the part of

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the lessee, his servant or agents, he is bound to take it good within three months after such notice has been given or left.

(10) If the lessee becomes aware of any proceeding to recover the property or any part thereof or of any encroachment made upon, or any interference with the lessor's rights concerning such property he is bound to give, with reasonable diligence, notice thereof to the lessor.

(11) The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own, but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted or commit any other act which is destructive or permanently injurious thereto.

(12) He must not without the lessor's consent, erect on the property any permanent structure, except for agriculture purposes.

(13) On the determination of the lease, the lessee is bound to put the lessor into possession of the property.

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**Contents of a Lease Deed:**

The key contents to be included in lease deed are as follows:

- (1) Name of the parties to the lease deed and their full address
- (2) Description of the lease property
- (3) Duration for lease period
- (4) Rent, Maintenance and Security
- (5) Clauses for termination of lease
- (6) Subletting of the lease property
- (7) Dispute Resolution
- (8) Applicable law

**Registration of a Lease Deed:**

A lease of immovable property either from year to year or for any term exceeding 1 year or reserving a yearly rent can be made only by a registered instrument . All other leases of immovable property may be made by a registered instrument or by oral agreement accompanied by delivery of possession. The lease deed is to be executed both by the lessor (landlord) and lessee (Tenant).

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Once the lease deed is drafted, it must be registered with the Registrar or Sub Registrar of the district in which it is located. A lease deed is registered after paying the requisite stamp duty which differs from state to state.

For registration of a residential lease deed basic documents required are as follows:

1. Lease Deed
2. Stamp Paper
3. Receipt of registration fees

For registration of a commercial lease deed, the following documents are required:

1. Power of Attorney/ Board Resolution on Company letterhead
2. ID proof like Aadhar Card, Driving license, Passport etc.
3. Address proof of the authorised signatory
4. Passport sized coloured photographs of the authorised signatory
5. Company Pan Card
6. Company Seal/stamp of authorised signatory.

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**Execution and Stamp Duty:**

Leases can either be oral or written and registered. A lease which is permitted to be made by oral agreement will be valid only if accompanied by delivery of possession. If such a lease is reduced to writing it must be registered and delivery of possession will not validate it. An unregistered written lease is a not valid.

A written registered lease should be attested by at least to witnesses. Stamp duty on a deed of lease is chargeable under Art. 35, schedule I of the Stamp Act. The amendments made by the relevant state legislation may be studied to find out the actual amount of stamp duty payable.

**Lessee Holding Over:**

Where a person who has been in possession under a lawful lease continues to be in possession after the lease has been determined without the consent of the lessor he is said to be a tenant at sufferance. In such a case the possession was rightful in its inception but wrongful in its continuance;

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whilst the possession of a trespasser is wrongful both in its inception and in its continuance. Such a tenant can be evicted without giving notice to quit.

If a lessee remains in possession after determination of the lease and the lessor accepts rent from him or otherwise assents to his continuing on possession the lease is renewed from year to year or from month to month according to the purpose for which the property was leased. The tenant is called tenant holding over.

A tenancy at will is one which is terminable at the will either of the landlord or the tenant. It can be created by express agreement.

**Determination of lease:**

A lease of immovable property determines:

- (1) By efflux of the time limited thereby.
- (2) Where such time is limited conditionally on the happening of some event, by the happening of such event.
- (3) Where the interest of the lessor in the property terminates on; or his power to dispose of the same extends only to the happening of any event,

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by the happening of such event.

(4) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right

(5) By express surrender, that is to say in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them.

(6) By implied surrender

(7) By forfeiture, that is to say;

(i) In case the lessee breaks an express condition which provides that on breach there of the lessor may re-enter;

(ii) In case the lessee renounces his character as such by setting up title in a third person or by claiming title in himself;

(iii) The lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event, and in any of these gives notice in writing to the lessee of his intention to determine the lease.

(8) on the expiration of notice to determine the lease, or to quit, the property leased, duly given by one party to the other.

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**Notice to Quit:**

A lease from year to year can be terminated either by the lessor or the lessee by giving to the other six month notice expiring with the end of the year of the tenancy. And a lease from month to month can be terminated either by the lessor or the lessee by giving to the other fifteen day notice expiring with the end of the month of tenancy. Simple notice to quit or the expiry of six months in the case of tenancies from year to year and 30 days in the case of tenancies from month to month, from the date of the receipt of the notice is sufficient.

The notice must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

A notice to quit is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it

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showing an intention to treat the lease as subsisting. A typical case of waiver is acceptance of rent for a period after the expiry of the notice.

**Effects of Rent and Eviction control legislation:**

In every state there is legislation affecting the rights of lessors and lessees of residential and commercial buildings. They override the provisions of the Transfer of Property Act. Legislation in one state differs from that in another, but all such legislations control and restrict the rent payable and the grounds on which a tenant may evicted. Some enactments regulated duration of a lease, some forbid the payment of premium and some even control the letting out to the extent that this function is exercised by the authorities. Hence, it is desirable to study the local rent control and eviction legislation before entering into a transaction of lease and before taking any legal action on the basis of a lease.

A lease agreement or a rental agreement is a vital legal document that should be completed prior to a landlord renting property to a tenant. While both agreements are similar in nature, they are not the same and it is important to understand the differences.

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**Lease Agreement:**

The length of the lease and the amount of monthly rent are documented and cannot be changed. This ensures that the landlord cannot arbitrarily just raise the rent and the tenant cannot just leave the property whenever they want without repercussions. The lease agreement is effective for the specific time period stated in the agreement and is then considered ended. If the tenants wish to remain in the property, both parties must enter into a new lease agreement.

**Versus**

**Rental Agreement:**

A rental agreement differs from a lease agreement in that it is not a long term contract and usually occurs on a month to month basis. This month to month lease agreement expires and then renews each month upon agreement of the parties involved. Here the landlord has the option to raise the rent or request the tenant to quit the premises without violating the rental agreement.

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## **CHAPTER 5: GIFT DEED**

A deed of gift is a signed legal document that voluntarily and without recompense transfers ownership of real, personal or intellectual property such as a gift of materials from one person or institution to another.

Gift Deed is a legal document that describes the voluntary transfer of gift from a donor (owner of the property) to donee (receiver of gift) without any exchange of money. The donor should be solvent and should not use this as a tool for tax evasion and illegal gains.

As per section 122 of the Transfer of Property Act, 1882 **Gift means;**

- (i) Gift is the transfer of certain existing moveable or immovable property and not a future property
- (ii) It must be voluntary i.e. it should not be induced by coercion, undue influence, fraud or misrepresentation.
- (iii) It should be without consideration i.e. it can be out of natural love and affection or for past consideration.
- (iv) It must be accepted by the donee.

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**It is pertinent for the draftsman to study the following provisions before incorporating the Gift Deed:**

- A person who is competent to make a contract can make a valid gift. A minor or a lunatic cannot make a gift. The donor must also have a disposing power over the property sought to be gifted.
- Anything that qualifies as gift must have following properties:
  - (1) It must be well-defined existing moveable and immoveable property.
  - (2) It must be transferrable
  - (3) It should exist today and not be a future property
  - (4) It should be tangible
- The donee to whom the gift is made must be an existing person. He must be an ascertainable person. A gift can be made in favour of minor or a Hindu idol. But a gift in favour of the public, to dharma or for worship of God is void for vagueness of done. A gift can be made in favour of a legal person and also can be made in favour of Government.

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- Acceptance of a gift be on behalf of the donee is essential for the validity of a gift. The acceptance must be made during the lifetime of the donor and while he is still capable of giving. If either the donee dies before the acceptance, the gift is void. The best and the safest course to join the donee as a party to the deed and to state the acceptance of the gift in the deed itself or a separate endorsement may be made by the donee on the deed accepting and signed by him.
- Minors are not eligible to contract, therefore they cannot transfer property as a gift. Hence a gift deed in case of donor being minor is legally not valid but gift may be accepted on behalf of a minor by his guardian and on behalf of an idol by its manager. The donee receiving the gift deed from the donor after execution thereof, and presenting it for registration and getting it registered amounts to acceptance of gift.
- Section 123 of Transfer of Property Act, 1882 provides separation provisions for the gifts of immovable and moveable properties.

Immovable Property: With regard to gifts of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.

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Registration is compulsory in case of a gift of immovable property, whatever may be the value of the property. One of the prerequisites for registration is the transfer must be in writing and cannot be done orally.

In **Sahadev v/s. Shekh Papa** case, the court held that gift of immovable property are compulsorily registrable and it amounts to notice for subsequent transfer and not for earlier transactions prior to registration.

In **D.N.Dawar v/s.Ganga Ram Saran Dhama** case, the court held that in case of immovable property if the document is not registered, mere delivery of possession cannot pass a title to the donee.

Moveable Property: With regard to the moveable property, the gifts can be effected either by registered instrument signed either by the donor himself or on his behalf or by delivery. Even in the case of moveable property, registration is made optional when delivery of possession takes place and no delivery is required when it is made through registered document. Section 123 provides that delivery may be made in the same manner as goods sold are mad

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- Certain gifts are declared void by the Act which are as follows:
  - (1) Gifts for an unlawful person which is unlawful as per the law
  - (2) Gifts which are made subject to a condition which is impossible to fulfil or re forbidden
  - (3) When donee dies without acceptance of such gift
  - (4) A gift made by a person who is incompetent in law, like idiot, lunatic, minor
  - (5) Gift comprising of existing and the future property is void
  - (6) A gift of a thing to two or more donees, of whom one does not accept, it becomes void to the interest which he would have taken, had he accepted.
  - (7) A gift which is under the agreement between the parties is revocable wholly or in parts at the mere will of the donor, is void wholly or in part as the case may be
- A gift may not always be beneficial but may at times burdened with an obligation and that gift is called onerous gift. Section 127 of transfer of Property Act states about the onerous gift. It says that when a gift is in the form of single transfer of several things to the same

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person of which one is burdened by an obligation, and the others are not, donee can take nothing by the gift unless he fully accepts it. Hence in this situation, either the whole thing is to be accepted or the whole transfer should be rejected.

**Gifts under Hindu Law:**

Section 123 of the Transfer of Property Act governs the manner prescribed to make gifts under Hindu Law a gift. A gift in Hindu Law is not mandatory to be in writing. For a valid gift, it is required that there must be the delivery of physical possession from the donor to the donee.

(1) A Hindu person may dispose of his separate or self-acquired property by way of gift, subject in certain cases to the claim for maintenance of those who are legally bound to be maintained.

(2) A coparcener may dispose of his coparcenary interest by way of gift subject to the claims of those who are legally bound to be maintained.

(3) A father may by way of gift dispose of the whole of his property, whether ancestral or self-acquired, subject to the claims of those who are legally bound to be maintained.

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(4) A female may dispose of her stridhana by way of gift, subject to the consent of her husband.

(5) A widow may in certain cases dispose of by way of gift small portion of the property inherited by her from her husband, but she cannot do so by will.

(6) The owner of the joint property may dispose of that by way of gift unless there is a special custom prohibiting alienation or tenure is of such nature that it cannot be alienated.

(7) In Hindu law it is not allowed to make gift in favour of an unborn persons.

### **Gifts under Mohammedan Law:**

The concept of gift is different in Muslim Law than that given in the Transfer of Property Act. Here it is a transfer of property or right by one individual to another according to Muslim law and it also includes

(1) A hiba, which is an immediate and unconditional transfer of ownership of some property or some right without consideration

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(2) An ariat which means giving of some limited interest to someone in respect of the use or usufruct of some property or right

(3) If gift of any property or right is made without consideration and the object of such gift is to get religious merit is called sadaqah

Under the Mohammedan Law, the essentials of gift are:

- (i) a declaration of gift by the donar
- (ii) acceptance of the gift by the donee
- (iii) if possible, delivery of possession

The registered instrument is not necessary to validate the gift of immoveable property. In Muslim Law gift in favour of child in womb of the mother is valid if the child is born within 6 months from the date of the gift because in that case it is presumed that the child existed.

### **Contents of a Gift Deed:**

Being a very important legal document, there are certain things that you are required to mention in gift deed

- 1.) Date and place where the deed is to be executed

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- 2.) Information about donar and donee like name, residential address, relationship
- 3.) Details about the property
- 4.) Consideration clause
- 5.) Free will of donar
- 6.) Rights and liabilities of donee
- 7.) Delivery of the possession of the property
- 8.) Revocation clause

**Gift process:**

It can be divided into 3 parts as described below:

- 1.) Drafting of the Gift Deed- A gift deed describes what is transferred and to whom. Gift deed is a contract between donar and donee which defines simultaneous and reciprocal act of giving and taking. A gift to be valid must be made by a person voluntary and not under compulsion without any exchange of money.

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2.) Acceptance: Acceptance of the gift after its execution is a legal requirement and donee must accept the gift during the lifetime of donor. In case the donee fails to accept the gift, it is rendered invalid. The acceptance may be validated by acts such as taking possession of the property.

3.) Registration: As per section 123 of Transfer of Property Act, a gift of immovable property cannot pass any title to the donee unless it is registered. Attestation by two witnesses is required during registration and post registration, title transfer is possible.

**Registration of Gift Deed:**

Registration of gift deed is done as per the provisions of the Registration Act, 1908

Common steps for the registration process are:

1. Gift deed should be signed by both the donar and donee and attested by 2 witnesses.
2. Valuation of property being gifted by an approved valuation expert.
3. Payment of stamp duty and transfer duty- stamp duty varies for women and men (slightly lower for women). Stamp duty also varies from state to state and is chargeable under article 33 of schedule I of the stamp act. The

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duty payable is same as payable on conveyance which is for consideration equal to the value of the gifted property.

4. The Gift deed should get registered at registrar or Sub Registrar office.

**Revocation of Gift Deed:**

A gift once made and registered with due process of law cannot be revoked. After the acceptance, it becomes the property of the donee. The donor cannot independently revoke the deed. Also, in a deed where the parties have agreed that the deed shall be revocable in part or whole, by the mere will of the donor, is not a valid Gift Deed.

However, under Section 126 of the Transfer of Property Act, 1882 there are certain grounds when gifts can be revoked. The revocation in itself incorporates the cancellation of the Gift Deed and the possession of the property is returned to the donor. The grounds are –

(1) If there is an agreement between the donor and donee, that if certain specified events happen or do not happen, the gift shall be revoked. The point to note here is that the occurrence of such an event should not be

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controlled by the donor. And both parties must have agreed to such a condition in terms of the Gift Deed.

(2) The conditions stipulated should not be immoral, illegal or reprehensible to the party

(3) In case of **Thakur Raghunathjee Maharaj v. Ramesh Chandra**, Hon'ble Supreme Court state that "even though a condition is not laid down in the gift deed itself, and has been provided under a mutual agreement separately but forms part of the transaction of the gift, the condition would be valid and enforceable".

(4) Another instance, when a gift can be revoked is, if they violate Section 19 of the Indian Contract Act, 1872 which says "Where consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so obtained".

So if the gift was made by obtaining consent on the above grounds it can be revoked. And in case, the donor dies, his heirs have the right to file for revocation of the deed.

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**Gift Deed over will:**

Gift Deed and Will are used for the same purpose but in a different way.

Will operates only after the death of the testator and within his/her lifetime, it can be revoked or changed multiple times. Also, Will doesn't need to be registered; only the testator signature is sufficient.

Whereas Gift Deed once registered cannot be revoked. It is more beneficial in cases, where one fears that after his/her demise there will be tension among family members regarding property ownership. It is much better to transfer property through Gift Deeds so as to avoid any future legal dispute or family troubles. Also, since Gift Deeds are registered documents, they serve as valid legal proof in case any dispute arises at a later stage.

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## **CHAPTER 6: POWER OF ATTORNEY**

A Power of Attorney (POA) or letter of attorney is a written authorization to represent or act on another's behalf in private affairs, business, or some other legal matter. The person authorizing the other to act is the principal, grantor, or donor (of the power). The one authorized to act is the agent, attorney or in some common law jurisdiction called the attorney-in-fact.

Formerly, the term "power" referred to an instrument signed under seal while a "letter" was an instrument under hand, meaning that it was simply signed by the parties. But today some jurisdiction requires that powers of attorney be notarized or witnessed.

A power of attorney is a document whereby one or more persons give authority to one or more persons to act in his or their place. It is delegation of authority in writing by which one person empowers another to act on his behalf. The giver of the authority is called the 'donor' and the recipient is called 'donee'. If the appointment is made for specified act or acts the deed is called "special power of attorney" and if it is made generally for certain acts then it is called "general power of attorney".

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It is important to understand the difference between a general and a special power of attorney.

General Power of Attorney: It gives a broad authorization to the agent. The agent may be able to make medical decisions, legal choices or financial or business decisions.

Special Power of Attorney: It narrows what choices the agent can make. In other words, special power of attorney allows you to be more specific. Several different POAs can be made with different agents for each.

**It is pertinent for the draftsman to study the following provisions before incorporating the Power of Attorney:**

- The law relating to power of attorney is governed by the provisions of the Power of Attorney Act, 1882. It is well settled therein that an agent acting under a power of attorney always acts, as a general rule, in the name of his principal. Any document executed or thing done by an agent on the strength of power of attorney is as effective as if executed or done in the name of principal i.e. by the principal himself.

Therefore an agent always acts on behalf of the principal and

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exercises only those powers which are given to him in the power of attorney by the principal.

- An agent never gets any personal benefit of any nature. The aforesaid principle is applied in the case of **Suraj Lamp and Industries Private Limited v/s. State of Haryana & Anr.** and held that “ A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immoveable property. The power of attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor which when executed will be binding on the grantor as if done by him. It is revocable or terminable at any time unless it is made irrevocable in a manner known to law.
- An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.
- A power of attorney can be either durable or non-durable and is generally used to manage the personal affairs of the principal when they cannot effectively do so for themselves, such as upon

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incapacitation or if they are out of the country when a specific event occurs. The main difference between a durable and non-durable power of attorney is that a durable power of attorney continues to be effective upon the incapacitation of the principal while the non-durable power of attorney does not. There is also a springing power of attorney which takes effect immediately upon the signature of the principal or it can be triggered at a later time by certain events.

- A power of attorney can be executed by or in favour of two or more persons. When executed in favour of more than one person it is desirable to state that whether the donee's will act only jointly or severally and jointly.
- There are some precautions we need to take while signing the power of attorney agreement and ensure that our interests are fully protected.

There are some basic rules which should be followed irrespective of whether power of attorney is made in favour of a family member or a trusted friend

(1) First and foremost it is important to understand the difference between Letter of Authority and Power of Attorney. The LOA is good

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for small tasks but for more important tasks that involve larger amounts of money or asset values, it is always better to execute a power of attorney as the rights and duties are more enforceable in case of POA.

(2) Ensure that the Power of Attorney is duly registered and stamp duty prescribed by the state where the POA is executed has been paid. The legal jurisdiction should be the place where the POA is executed and the stamp duty is paid. An unregistered POA is like an LOA and is not enforceable in a court of law.

(3) Signatures and photographs of the principal and power agent must be affixed. This can be a useful source of information in case any of the transactions are disputed at a future date or if the POA goes to a legal recourse.

(4) The holder of the POA should first check whether the principal or the donar of the POA has a valid title to the property and that his/her name is reflected as owner in government revenue records. Also, before accepting the POA he must check that the no encumbrances certificate is obtained.

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(5) The rights and obligations of the principal and the POA holder should be clearly laid out including decisions like leasing the property, hypothecating the property, selling the property etc. For availing loans based on POA, check whether power agent has the authority to sign the loan documents and creates an equitable mortgage in favour of banks/financial institutions on behalf of the principal.

(6) Ensure that as on the date of execution of any document based on the POA, the POA is in force and the principal is alive. Otherwise the POA is void ab initio. Normally, POAs that are pre dated or post-dated are not acceptable at the time of registration of POA with concerned authorities.

(7) If the POA is being executed abroad, ensure that it is either notarised or signed before Indian Consulate officials and then duly adjudicated within 120 days from the date of execution of the said POA. This is important since NRIs are those who normally give POAs to operate their local bank account and demat cum online trading accounts.

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(8) Last but not the least, make it a point to verify the availability of the original duly registered General Power of Attorney. The rights should be clear and unfettered.

**Authority of Donee:**

Section. 2 of the power of attorney Act, 1882 (as amended in 1982) provides;

The donee of a power of attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power and every instrument and thing so executed and done, shall be as effectual in law as if it had been exacted or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

Normally after the revocation of the power of attorney, the donee ceases to be an agent of the donor. But Section. 3 protects persons making payment

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and doing acts in pursuance of the power of attorney even after the death etc. of the donor in certain circumstances. This section reads:

“Any person making or doing any payment or act in good faith in pursuance of a power of attorney, shall not be liable on respect of the payment or act, by reasons that before the payment or act, the donor of the power had died, or become of unsound mind, or bankrupt or insolvent, or had revoked the power, if the fact of death, unsoundness of mind, bankruptcy, insolvency or revocation was not at the time of the payment or act, known to the person making or doing the same”.

**Contents of Power of Attorney:**

The Power of attorney Law provides that any “natural person having the capacity to contract may execute a power of attorney”. Legal document of power of attorney includes:

1. It must contain name, age and address of Principal and agent (attorney)
2. It must contain the date and place of execution of Power of Attorney
3. Details of the powers that the principal wishes to delegate and be administered by the attorney-in-fact

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4. The power of attorney must be signed by the principal or by another adult in the principal's presence and under his direction

5. The power of attorney is signed and acknowledged before a notary public or is signed by two witnesses.

A power of attorney has to be in writing and signed by donor. It is executed in the form of a deed poll, a unilateral document, usually in the first person. Moreover no law requires a power of attorney to be attested but it is useful to have it attested by witnesses.

Though no law requires a power of attorney to be authenticated it is desirable to have this done so as to avail of the presumption under section 85 of the Evidence Act. The section provides:

“The court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by a Notary Public, or any Court, Judge, Magistrate Indian Counsel or Vice Counsel or representative of government was so executed and authenticated”.

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**Registration and stamp duty of Power of Attorney:**

Any person who is above 18 years of age and of sound mind can appoint an attorney. A minor cannot be appointed as an attorney holder.

To make power of attorney legally valid, it needs to be signed by both the principal and attorney along with 2 witnesses. The deed shall then be executed on a stamp paper of appropriate value depending upon the state in which it is made. Stamp duty on power of attorney is payable under article 48 of the Stamp Act. It is not necessary to register the power of attorney deed unless it involves transfer of property rights/titles.

Both the parties to the power of attorney deed must fully understand what their rights and obligations are under the deed and should act accordingly.

The principal shall ratify i.e. consent to the acts of the attorney which he has done in his course of duty as an attorney.

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## **CHAPTER 7: WILL**

A Will or Testament is a legal document that expresses a person's (testator) wishes as to how their property is to be distributed after their death and as to which person (executor) is to manage the property until its final distribution.

Though it has at times been thought that a "will" historically applied only to real property while "testament" applied only to personal property, but the historical records show that the terms have been used interchangeably. Thus the word "will" validly applies to both personal and real property.

The law relating to wills is contained in part VI of the Indian Succession Act, 1925. But this is not applicable to wills made by Mohammedans. They are governed by the Mohammedans Law under which wills maybe made orally or in writing and formalities of signatures, attesting witnesses etc. are not required to be followed. There is however, nothing to prevent Mohammedans from execution a written will duly signed and attested as required by the Act. All the provisions of part VI do not apply to Hindus, Buddhists, Sikhs and Jains. The provisions of this part which apply to Hindus, Buddhists, Sikhs and Jains are enumerated in schedule III to the

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Act. But by virtue of Sec. 30 of the Hindu Succession Act, 1956, a Hindu, Buddhist, Sikh or Jain may execute a will in accordance with the provisions of the Indian Succession Act.

"Will" defined in Sec. 2 (h) of the Act mean the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. The fundamental idea of a will is that the testator should thereby dispose of his property or such part of it as his personal law permits him to bequeath by will, in such a manner as seems to him best. The two essential characteristics of a will are that:

- (1) It must be intended to come into effect after the death of the testator, and
- (2) It must be revocable by the testator at any time.

Though usually wills are made for disposing property they can also be made for appointing executors, for creating trusts and for appointing testamentary guardians of minor children.

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**It is pertinent for the draftsman to study the following provisions before incorporating a Will:**

- Will is a legal document through which a person decides how his/her property would be distributed, allocated and spent after his death. A person who dies without creating a will is called dying intestate. Dying intestate forces the relatives of the deceased to spend additional time and money for acquiring the estate of the deceased, which could have been easily done by creating a will. Dying intestate does not distribute the assets of the deceased according to his wish and will rather its done according to the law. As it is only logical to distribute your hard earned money according to your wish and the way you want it and this can be easily done by creating a will.
- Section 59 says that every person of sound mind not being a minor may dispose of his property by will. Even a married woman may dispose by will any property which she could alienate by her own act during her life. Person who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they are doing. A person who is ordinarily insane may make a will during an

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interval in which he is of sound mind. No person can make a will while he is in such state of mind, whether arising from intoxication or from illness or from any other cause that he does not know what he is doing.

- All property, moveable or immovable of which testator is owner and which can be transferable can be disposed by a will. Property which is legally non-transferable cannot be bequeathed. If a person has only a life interest in a property, he cannot make a will in respect of it.

Section 30 of Hindu Succession Act, 1956 provides:

“Any Hindu may dispose by will or other testamentary disposition of any property, which is capable of being disposed by him in accordance with the provision of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus.

- Different types of Will that can be incorporated are:

(1) Privileged and Unprivileged Will: Indian Succession Act, 1925 provides certain privileges to a soldier, an airman and a mariner at sea employed in an expedition or engaged in actual warfare. These privileges are enacted keeping in mind the complicated predicament a

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soldier is in during the tenure of his service. Provisions pertaining to such privileges are mentioned under section 66 of the Act and such wills are called Privileged Wills. Provisions allowing word of mouth in presence of witnesses to be considered as valid will and written instructions to be considered as a valid will after the death of a soldier are some of the prime examples of such privileges. A privileged will can be oral or in writing. The formalities prescribed for unprivileged wills like signature and attestation do not apply to privileged wills.

Wills created by a testator not being a soldier, an airman and a mariner at sea employed in an expedition or engaged in actual warfare are known as Unprivileged Wills. Unprivileged Wills are governed under section 63 of the Act.

(2) Contingent / Conditional Wills: Execution of these wills are dependent on happening of an event and if that event occurs in the future only then the will is to become effective. These wills are created for multiple purposes. If the testator wants to motivate a loved one for doing something good, like 'my son will get my property only if he graduates from his law school with a 70% score or want to make

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safe appropriations of his property in case of his death while touring abroad, he can make a contingency regarding the same in his will. Any condition which is contrary to the law or is invalid in nature cannot be incorporated in a will.

(3) Joint Wills: When two or more people agree to make a conjoint will, such testamentary documents are known as Joint Wills. These are generally created between married couples, with an intention to leave the property to their spouse after one of them dies. A joint will can also be created with an intention to take effect after the death of all the testators. In such Joint will till all the testators are alive, a single testator cannot revoke the will alone. He /she would require the consent of other testators to revoke their joint will. Only when all other testators have died, the sole surviving testator can revoke the will alone.

(4) Mutual Wills: Mutual wills are the kind of wills in which two people agree to formulate a will on the mutually agreed terms and conditions. The testator creates the other person as his/her legatee in these wills. Generally, married couples who have children from their

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first marriage create such wills to ensure the interest of those children. The terms and conditions of the will remain binding on the surviving partner after the death of first partner. Mutual will helps to ensure that the property passes on to the children of the deceased and not a new spouse of the surviving partner in case they remarry.

(5) Duplicate Wills: As the name suggests, when there are two copies of a will, then those wills are called Duplicate Wills. There are two copies of the will although it is considered as a single will. It is very simple to create a duplicate of the will. The testator has to make a second copy of the will and shall sign it and get it attested in the way that he did for the original will as per Section 63 of the Indian Succession Act, 1925. One copy can be kept with the testator and the other might be kept in safe custody somewhere like in a bank locker, with a trustee, the drafting attorney or with the executor. The testator with an intention to protect the execution of the will after his death makes a copy of the will. If the testator destroys the copy of the will that he has in his custody then, that would automatically revoke the other will.

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Duplicate wills are strong and valid proof of the testamentary objectives until the original will is not on record. Otherwise, the authenticity of the duplicate will remains questionable. Presumption that the original will stands revoked will prevail in case original will is not filed with the duplicate copy in petition for probate.

(6) Holograph Wills: Wills which are handwritten by the testator himself are known as Holographic Wills. These kinds of will have their own merit. Due to the fact that they are completely handwritten by the testator himself, raises a strong presumption pertaining to their regularity and execution

(7) Concurrent Wills: Normally a testator prepares a single will for his/her testamentary declarations. The testator according to his wish or for the sake of convenience can make different wills for the property located in different geographical locations. Hence, co-existing wills, dealing with testamentary declarations of a single testator are known as Concurrent Wills.

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(8) Sham Wills: These wills are created for an ulterior motive which is not the testamentary operation and execution of the will. Rather in most cases, these wills are created for an immoral purpose like acquiring a property that does not belong to the claimant, deceiving someone etc. One of the essential features of a valid will is the intention of the testator. These wills are supplemented with all the necessary documents to duly execute the collateral purpose and not to execute the will according to the testamentary operations.

- The following are the conditions and requirements which have to be complied with in executing a valid will as per section 63 of Indian Succession Act.

(1) The testator should sign or affix his mark (e.g. Thumb or signature)

(2) The will must be attested by 2 or more witnesses

(3) The witnesses must have seen the testator sign or affix his mark to the will

(4) Each witness shall sign the will in the presence of the testator

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(5) The witness should not be beneficiary under the will

No particular form of will is prescribed by law. It is not necessary that any technical words or terms of arts be used in a will, but only that the wording be such that the intention of the testator can be known there from. A will or bequest not expressive of any definite intention is void for uncertainty.

- “Codicil” is defined under section 2(b) of the Indian Succession Act which is an instrument made in relation to will and explaining altering its dispositions and shall be deemed to form part of the will. When the alteration and additions are minor, codicil is the proper thing but if substantial changes are to be made in the will it is desirable to execute a fresh will and to revoke the earlier one. If there is inconsistency between the will and the codicil, the codicil will prevail. A codicil requires the same formalities as a will.

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**Contents of Will:**

Any person over the age of majority and having ‘testamentary capacity’ can make a will with or without the aid of lawyer. Preparation of will does not require any specific legal language. Any form of writing or writing or printing may be employed. However the language should be simple as possible and free from technical words and easily intelligible to layman. But he should carefully study laws relating to Real Properties and the provisions of Part VI section 57 to 120 of the Indian Succession Act.

Required content varies, depending on the jurisdiction but generally includes the following:

- (1) Mention the name and address of the Testator
- (2) The Testator must clearly identify themselves as the maker of the will.

The will should be typically satisfied by the words “last will and testament” on the face of the document.

- (3) The testator should clearly declare that he or she revokes all previous wills and codicils
- (4) The testator may demonstrate that he or she has the capacity to dispose of their property and does so freely and willingly.

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(5) Details of procedure of making bequests

(6) Appointment of executor

(7) The testator must sign and date the will, usually in the presence of at least two disinterested witnesses (persons who are not beneficiaries). The testator's signature must be placed at the end of the will.

**Signature and Attestation:**

The testimonial Clause (signature) and the attestation clause (witnesses) are the most important parts of a will. If these are not made strictly in accordance with the requirements of law it will not be a valid will.

The testator and all the attesting witnesses must sign on every page of the will in presence of the testator. The attesting witnesses need not know the contents of the will. Each of them must have seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator. An executor is charged with the duty and conferred with the power to carry out the directions contained in

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the will. He has to collect and realise the estate of the deceased pay his debts and distribute the legacies.

**Registration and Stamp Duty on Will:**

No stamp duty is chargeable on will and registration of Will is not mandatory. It is optional (Section 18(c), Registration Act, 1908). However a registered will has certain advantages. Any testator may either personally or by duly authorized agent deposit with any registrar his will in a sealed cover super scribed with name of testator and that of his agent if any and with the statement of the nature of the document as per section 42 of Registration Act, 1908. The testator or after his death any person claiming as executor or otherwise under a will, may present it to any Registrar or Sub Registrar for registration under section 40 of the Registration Act, 1908.

**Revocation of Will:**

Section 62 of the Indian Succession Act provides that a will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will. Section 69 enacts that every will shall be

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revoked by the marriage of the testator. A will may also be revoked by the execution of a new will. The mode of revocation of unprivileged wills or codicils is laid down in section 70 and that of privileged will in section 72.

**Probate and Letter of Administration:**

Section 213 of the Indian Succession Act enacts that no right as executor or legatee can be established in any court of justice unless a court of competent jurisdiction in India has granted probate of the will under which the right is claimed or has granted letters of administration with the will or with the copy of an authenticated copy of the will annexed.

Probate is a certificate granted under the seal of competent court certifying the will as the will of the testator and granting the administration of the estate of the deceased in accordance with that will to the executor named under the will.

Letter of Administration can be obtained from the court of competent jurisdiction in cases where the testator has failed to appoint an executor under will or where executor appointed under a will refuses to act or where

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he has died before or after proving the will but before administration of the estate. A Letter of Administration is always necessary where a person governed by the Indian Succession Act dies intestate.



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## **CHAPTER 8: CONCLUSION**

Technically speaking, conveyancing is the art of drafting of deeds and documents whereby land or interest in land i.e. immovable property is transferred by one person to another. Conveyance is an act of conveyancing or transferring any property whether moveable or immovable from one person to another permitted by customs, conventions and law within the legal structure of the country.

Both the terms 'drafting and conveyancing' provides the same meaning although these terms are not interchangeable. Conveyancing gives more stress on documentation much concerned with transfer of property from one person to another whereas drafting gives general meaning synonyms to preparation of drafting of documents.

Hence it becomes very important for the draftsman to be aware of all relevant provisions and procedures to be followed for drafting any deed or document. Apart from that he/she should have good command over language to prepare a decent deed or document. It should be supported by the schedules, enclosures or annexures in case any reference to such material has been made in that.

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This information is obtained from following sources:

- (1) [https://www.academia.edu/36562375/Drafting\\_Pleading\\_and\\_Conveyance](https://www.academia.edu/36562375/Drafting_Pleading_and_Conveyance)
- (2) LexisNexis text book on Drafting, Pleading and Conveyancing
- (3) <https://blog.ipleaders.in/essential-elements-of-mortgage-deed/>

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