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SEMESTER : 5TH

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SUBJECT : LAW OF PROPERTY

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**DADABHOY
INSTITUTE
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Q2: Define license and explain the difference between lease and license.

➤ **DEFINITION**

License is defined in the section 52 of Easement Act 1882, section whereof defines license as "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license".

Moreover, "A licence is a personal right granted to a person to do something upon immovable property of the grantor and does not amount to the creation of interest in the property itself. It is purely a permissive right and is personal to the grantee. It creates no duties and obligations upon the persons making the grant and is, therefore, revocable except in certain circumstances expressly provided for in the Easements act, 1882 itself".

➤ **DIFFERENCE BETWEEN LEASE AND LICENSE**

The line of demarcation between a lease and a licence will sometimes be a very thin though there is no doubt as to the principle applicable. A lease as will appear from section 105 of the Transfer of Property Act is a transfer of an interest in immovable property. Ownership of physical property consists of a number of rights and the owner of such property when he creates a lease, transfers to the lessee a part of the rights of ownership, i.e., the right of enjoyment of the property, for a period, for consideration. During the continuance of the lease the right of enjoyment of the property belongs to the tenant and not to the landlord. The right of ownership as well as the rights of which it is composed are rights in rem and not in personem and by the lease a right in rem is transferred to the lessee. On the other hand a "licenee" as will appear from its definition in section 52 of the Easements Act is merely a competence to do something which except for this permission would be unlawful. It does not confer any rights in physical property. There is in the case of a licence only a personal agreement between the licensor and the licensee whereby the licensor agrees not to interfere with the doing of particular acts on property which is in his possession. No right in rem passes to the licensee. Examples of a licence are a

permission to cut grass from the land of another or to hold fares or run stalls on land in the possession of another. The right to cut grass from land belongs to the owner of land, being a part of the right of ownership. When the owner grants to another person a licence to cut grass, it does not even mean that the right to cut grass in so far as it is a right in the land (a right in rem) passes to the licensee. If a right in the land itself passed an interest in the land would pass and it would not be a licence. When the owner of land grants licence to another to cut grass there is a simple personal contract that the owner will not interfere with the cutting of grass by the licensee. This contract may be specifically enforced, but it grants only a right in personam.

As will appear from what is stated above the criterion for distinguishing between a lease and a licence is simple, i.e. whether any right in immovable property itself, a right in rem, has passed to the person concerned, but the determination of this question may be difficult in the circumstances of a particular case. It will be a matter of an inference from all the attendant circumstances.

The most distinctive feature between a lease and a licence is that, in the former there is a transfer of interest in immovable property whereas in the latter that element is expressly excluded. The transfer of interest in a case of a lease consists of the grant to the lessee the exclusive right of possession of the demised premises. This right, in the first instance, vests in the lessor and is one of the most important incidents of ownership. In granting a lease the lessor transfers this important right / title to lessee. The right of exclusive possession involves an element of ouster and when the lessor grants this right to the lessee; he totally excludes himself from that right, though it may be only for a certain time. This right is assignable and heritable and constitutes property. On the other hand, in the case of a licence there is a total absence of transfer of interest in the immovable property. A licence is a personal right granted to an individual or to an ascertained number of individuals, to do or continue to do something in or upon the immovable property of the grantor, which in its absence would be unlawful. It is purely a permissive right and is neither assignable nor heritable. Notwithstanding the permission the grantor retains control over the property. The fact that a licensee occupies the property, that occupation does not confer upon him the right of exclusive possession as understood in law. Under the Transfer of Property Act, apart from the transfer of the right to enjoy property, there has to be also a consideration paid or promised and the lease has to be for a certain time. But these elements may often not be inconsistent with a case of licence. The mere fact that the occupant under the

agreement pays a monthly sum to the owner may not be conclusive because a licence may be for consideration. Similarly, the mere fact that he was to cease to occupy the property by a certain date may not be decisive because a licence may be for a term. Therefore, when both these elements are present the factor which will decide the question whether the grant is a lease or a licence, would be the right of the grantee to exclusive possession of the property in the sense indicated above. If there is such a right then the transaction is clearly one of lease because in it there has been a transfer of interest in the property. When there is a written instrument recording the transaction it is the substance of it and not the form which will govern the case. The question of intention arises only when the terms whether written or oral are not clear or when they are consistent both with the existence of a lease or a licence. It is only in such cases that the matter has to be decided with reference to the true intention of the parties deduced from all the circumstances of the case. The use of certain technical expressions in a document cannot turn a lease into a licence. Where, therefore, the nature of the transaction presents some difficulty in construing whether it amounts to a lease or a licence, the question, to be asked is, has the occupant acquired an "interest in land", that is, has the owner transferred a certain right of ownership in a way which extinguishes the enjoyment by him of that right and vests the same exclusively in the transferee. If he has then it is a case of a lease and not of licence.