CHAPTER VI

IMPLIED UNDERTAKING AS TO TITLE, QUIET POSSESSION
AND FREEDOM FROM ENCUMBRANCE

I

INTERPRETATION

"Unless the circumstances of the contract are such as to show a different intention", Pollock and Mulia state that the above phrase applies to very few cases namely seller executing an authority by law which overrides the true owner's title, as on the sale of a forfeited pledge of a pawn broker, or the goods taken in execution by a sheriff or receiving title through a sale under such authority. The authorities cited therein need scrutiny and examination under the changed circumstances. Almost all the eminent authorities and text book writers unanimously quote the case of Morsley v. Attenborough on the point. The facts of the case briefly are:

1. Opening words of Section 14 of S.G.A.
4. (1843-1860) All E.Rep. 1045
"the plaintiff alleged that the defendant had caused to be sold to him by auction a harp to which he had no title whereby the plaintiff had suffered damage through having to restore the harp to its rightful owner. It was held that in absence of an express warranty, the seller was not liable to restore to the buyer the consideration money."

Baron Park observed that in cases of unascertained goods, the purchaser could not be bound to accept the goods, if he discovered the defect of title before delivery, and if he accepted them but the same were recovered from him, he would not be bound to pay or if he had paid for them but could not get the delivery of them, he could still recover the price as on a consideration which had failed.

In the second para his Lordship discussed the position of Warranty of title relating to specific or ascertained goods. In this connection, he raised two questions:
(1) did the contract necessarily import, unless the contrary was expressed, that a vendor had a good title? or (2) had it merely the effect of transferring such title as the vendor had? He discussed the issue at length and

5. Id. at 1047
said "Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale, and hence the plaintiff's action, for recovery of the money paid as consideration for the price of harp failed.

It is submitted that the decision is open to objection on the following grounds:

1. How does his Lordship make distinction with regard to warranty of title in cases of unascertained and ascertained goods? What is the rationale for recovery of the price as on a total failure of consideration in cases of the goods of former type but not of the latter type? So far as the right to use and enjoy the same is concerned, it is all the same under both the types and hence the distinction is not warranted. This is no argument to plead that in the former, as the goods were not present, so the buyer had no opportunity to ascertain the title etc. It might have been one of the essentials of unascertained goods in good old days that they were not present at the time of contract of sale. But this notion is totally absent now in the present definition of unascertained goods.  

6. Id. at 1048
7. Ref. Chap. VII for a discussion on the definition of unascertained goods (or goods sold by description).
His Lordship's remark that "and if he did, (accept) and the goods were recovered from him, he would not be bound to pay" or if he paid will be entitled to recover back his money, is not sustainable. Once the buyer receives the goods after the same have been ascertained and appropriated to contract, they are as good as the goods of other type. This rule was good in a primitive society where buyers and sellers used to buy and sell in market overt and the rule of Caveat Emptor was the dominant feature of such sale. The prevalence of the rule under English Law may be justified on the ground that the buyer received a better title to the goods than what the seller, if he purchased them in good faith in market overt, without notice of the defect of the title of such seller. But in India where the rule of market overt has no statutory recognition, it will be fatal indeed to accept it. Take for instance, if certain goods with defective title are sold in London, in market overt, the buyer got better title than what the seller had. But in India the buyer could, under no circumstances, acquire such title.

8. Moreley v. Attenborough, Supra n. 4 at 1047
9. Refer Sec. 22(1) of E.A. Also refer the case of Market Overt (1896), 5 Co.Rep. 63 h., Benjamin on Sale 8th Ed. P. 17; Daniel E. Murray "Sale in Market Overt"(1963) 9 Int. & Comp. Law Qt. 24
(2) Once the goods have been sold without express stipulation as to title, the presumption is that the seller is the owner. But if the seller does not guarantee a title, it should mean that his title was defective, but not that he had no title at all.

(3) If a person sells the goods to another without any title therein, it is just as if the goods were stolen. The rule in such cases is that if the buyer is compelled to surrender them to the true owner, he has suffered a total loss. He has not received anything in return of his bargain. Therefore, the simple rule will be that he is entitled to a return of the price paid as consideration for the goods.

4. If a person sells goods, he is deemed to have property therein. If he does not have that which he purports to sell, he does not sell at all. This is the fundamental feature of Contract of sale and there is abundance of authority for this proposition.

In Walker v. Harris, Blackstone J. says "In contracts for sale, it is constantly understood that the seller undertakes that the commodity he sells is his own".

10. Section 4
11. (1587) 3 Co. Rep. 22a - Moore K.B. 351
Lord Holt says "where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to warranty." Buller L.J. observes that where the seller affirms certain goods to be his own, this affirmation amounts to warranty of title and it is immaterial whether the goods are in his possession or not.

Chancellor Kent of New York says "In every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of Caveat Emptor applies, and the party buys at his own peril; but if the seller has possession of the article and he sells it as his own, and for a fair price, he is understood to warrant the title."

Woodadeson declares that the rule of Caveat Emptor is exploded altogether. The vendor was always liable if there was no express warranty and in early periods the affirming of those goods by vendor as his own and in his possession was always treated to be equivalent to a warranty. Further Blackstone, observes:

If a man sells goods as his own and title is deficient, he is liable to make good the loss.

12. Medina v. Stoughton (1700) 1 Salk 210; 91 E.R. 188;
14. 2 Kent's Commentaries, 478
15. Woodadeson's Lectures vol. 2 p. 415
16. 2 Blackstone's Commentaries, 451 (citing Furniss v. Leicester (1618), Cro.Jac. 474 as an authority for this proposition).
If we observe the state of law in continental countries, the authorities tilt against the rule of Caveat Emptor. According to Roman, French, Scottish and partially American Law "there is always an implied contract that the vendor has the right to dispose of the subject which he sells." 

5. Now a days, a theory of Fundamental Breach of contract has emerged as an instrument to enforce the contract against the party seeking exemption from liability under an exemption clause. Under this theory also, the buyer is entitled to recover the consideration money.

In an Indian case, the appellant had purchased certain properties belonging to the judgment-debtor in execution of money decree against him. A third party brought a

17. Domat, Book 1 tit, 2,5.2 Art.3
18. Code Civil Chap. IV S.1.Art. 1603
19. 1 Johns Rep. 274, Broom's Legal Maxims, 628
20. Bell on Sale, 94 (Quoted from Chalmers"Sale of Goods" 16th Ed, P. 88 F.N. (a)
21. It is known as theory that of Fundamental breach of contract for the reason that breach affects the core of contract. As a result of which, there is a fundamental change in the position of buyer which he impliedly did not contemplate, while making the contract. Refer....Francis Dawson 'Fundamental Breach of Contract,'(1975) 91 L.Qty. Rev. 380;Drake C.D.'Fundamentalism in Contract,'(1967)30 Mod. L.R. 531 Guest A.C.'Hire Purchase And Fundamental Breach' (1961) 77 Qty.Rev.327,Atiyah P.S.'The Sale of Goods' (4th Ed.) P.P. 121 et. seq.
22. Ram Saran v. Dalpat Rai (1921) ILR 43 All. 60
suit and dispossessed him of such property. The appel­
lant filed a suit for recovery of his purchase money
from the judgment-creditor. It was held that he could
neither recover the purchase money nor could have the
sale set aside.

The decision is open to question on the following
grounds:

The argument on summons has two branches (1) as
to the general law of Warranty of title on sale of
personal property and in particular on execution- sales
by Sheriff and (2) on the effect of provisions of civil
procedure code with regard to sale in execution of decrees
of courts. So far as general law relating to warranty of
title is concerned, it has been discussed in some detail
while commenting upon Moreley v. Attenborough. So far
impact of sale by sheriff at the instance of judgment-
creditor is concerned, it requires scrutiny and re-
thinking.

It was observed by Green J. "that it seems pretty
clear that in case of sale by a Sheriff in execution in
ordinary course, there is nothing from which according to

23, Supra n. 4 id.
English law, any intention to warrant the title of the execution-debtor can be inferred; or, in other words, that a purchase of goods seized and sold in execution in ordinary course by the sheriff, cannot recover the purchase money he has paid by reason that it turns out that the goods did not belong to the execution-debtor.  

In support of his contention, he cites the authority from Erie C.J. in Eichhiz v. Bannister as saying "the fact of the sale taking place under such circumstances" (i.e., the case of the sale, by sheriff, of goods seized under a fi.fa) is a notice to buyers that the sheriff has no knowledge of the title to the goods, and the buyers consequently buy at their peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty.  

It is submitted that the statement of Erie C.J. is open to question on the ground that the Sheriff is an agent of the execution-creditor, and not merely a court official.

25. 17 C.B. N.S. 708  
26. Supra note 24 at 264
It is the judgment creditor who puts the law in motion and the office of the sheriff in action. True, the sheriff is not supposed to know and it is impossible for him to know as to who is the owner of what. But under such circumstances, the law of Principal and agent must be applied. The office of the Sheriff is informed that such and such properties belong to the judgment-debtor. On this particular representation, the Sheriff advertises the properties to be sold either by auction or through private sales. Once all this is done, every honest person, having faith in courts of justice will be induced to purchase the subject matter of advertisement. This is very irresponsible or no way of telling that I am selling this thing but I am not responsible for any defects in its title, or I say that the goods belong to X and I am selling them to satisfy my debts from the sale proceeds thereof but I cannot say whether they belong to my debtor or not. It is suggested that for the following reasons, the judgment-creditor should be held responsible invariably for return of money whenever judgment-debtor does not possess any title in the subject matter of sale and as a reason thereof the bonafide purchaser for value is deprived of his money or goods.
(1) It is the judgment-creditor who causes the subject matter of sale to be advertised for sale alleging that it belongs to so and so his judgment-debtor. This statement should be taken as an offer to purchase. The purchaser being induced to do so purchases the property. Hence the judgment-creditor must be held responsible for such sale.

(2) It is a very healthy policy of law that the person affirming the existence of certain fact should be estopped to deny it at least if it did not exist at all. However, if it substantially existed, it should be deemed to have existed.

(3) The rule of Caveat Emptor generates lethargy on the part of the judgment-creditor in not causing the property to be advertised for sale with all precautions. Even if he took the precaution and could not detect the defect in title, how does law justify such lapse as against the bona fide purchaser for value in good faith without notice of the defect of the title of the judgment-debtor.

(4) The judgment-creditor, who dealt with his debtor is deemed to have better knowledge about the state of affairs of his debtor and hence if any untoward incident takes
place, he has reason to blame himself for this lapse than the third party purchaser who had no such opportunities to investigate into these matters. A few cases are being mentioned hereunder relating to insolvency legislation in support of the contention and they afford a very sensible relief to the buyers in cases where the title to the goods, belonging to judgment-debtor, prove to be defective. In Dayal Singh v. Kenyan Insurance Ltd. N. owned a motor omnibus which he mortgaged to the respondent, under registered deed for 3600 on 12.2.1946. This vehicle was sold by court broker to the appellant on 3.2.1948 in execution of decree of court at the instance of judgment-creditor of N. for £2000. On 29.4.1958, respondents seized the vehicle from the possession of appellant, under rights which they claimed to possess under their chattel mortgage and registration. Section 4 of the chattel's Transfer ordinance provided:

"All persons shall be deemed to have notice of an instrument and of the contents thereof when and so soon as such instrument has been registered as provided by this ordinance...."

27. (1954) 1 All. E.R. 847 (an appeal from Supreme Court of Kenya)
However the appellants contended that under Section 45(3) of the Bankruptcy ordinance, they were entitled to the possession of the vehicle to which the reply of the respondents was that as per Section 13(2) of the Chattel's Transfer Ordinance, they were deemed to be in possession of the chattel as it was not to be deemed to be in possession, order or disposition of the grantor within the meaning of Bankruptcy ordinance. To this, their Lordships refused to agree and said that the phrase "possession order or disposition" is only one phrase to which the very famous doctrine of Reputed Ownership under Bankruptcy laws applies.

28. Sec. 45(3) of the Bankruptcy Ordinance (1930) provides:
Where any goods in the possession of execution debtor at the time of seizure by a bailiff are sold by such bailiff without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to such goods, and no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority, for any sale of such goods or for paying over the proceeds thereof prior to the receipt of a claim to such goods, unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable enquiry have ascertained that such goods were not property of the execution-debtor. Provided that nothing in this sub-section contained shall affect the right of any claimant, who may prove that at the time of sale, he had a title to such goods, to any remedy to which he may be entitled against any person other than such bailiff.

29. Section 42(c) id.
Lord Reid observed that it was proper, in order to construe section 43(3), to bear in mind the position before passing of section 15 of the English Act of 1913 from which it has been copied. The position was that if a bailiff or Sheriff sold out the goods of execution-debtor, it was difficult for him to ascertain as to who was the real owner of the goods in possession of the execution debtor. He might sometimes seize and sell goods under belief that they belonged to the execution-debtor which in fact did not belong to him. The purchaser was also taking the risk of title to such goods as his position was hardly any more comfortable in matters relating to ascertainment of ownership than such bailiff or sheriff. Hence he had the risk of losing his money.

So far as the liability of bailiff is concerned, it was discussed in *Jalke v. Hayward*. Then his lordship proceeds to say "Section 15 of the Act 1913 must have been enacted to deal with this position and it does, in fact, purport to confer rights on both purchaser and the officer". Then His Lordship's argument and interpretation to section 43(3) of said sub-section proceeds in a

30. Supra n. 27 at 849
31. *Crane & Sons v. Ormerod* (1903) 2 K.B. 307; 72 L.J.K.B. 507
32. (1905) 2 K.B. 480
33. Supra n. 30 id.
wonder-dully logical manner and he says that while interpreting "the purchaser of the goods so sold shall acquire a good title to such goods unless it is proved that the person from whom recovery is sought had notice....

The underlined words "clearly relate back to: "no person shall be entitled to recover against such bailiff or any other person lawfully acting under his authority", but it will not relate back to the "purchaser". His Lordship is convinced that it is the only reasonable interpretation of this sub-section. Then he says that there is a principle of construction which requires general words to be limited, if otherwise the enactment would produce highly unjust results and that it is a very salutary general principle that a purchaser who knows that the seller is not entitled to sell should not be allowed to insist on his bargain. So it was argued that "purchaser" must, be held here to mean purchaser without notice of the true owner's rights. This argument was notacceptable in the present case. The rights conferred are upon the bailiff or a purchaser. The provision is expressly made for taking away this right of the sale by bailiff but not the purchaser. The reason for this unusual right to the purchaser:

34. id. at 850
"may have been thought necessary to give every encouragement to bidders at such sales by auction. There would be very few cases where a bidder in fact had notice of the true position, and the possibility of constructive notice may have been neglected. It may have been thought advantageous to assure all purchasers that they could buy without risk, even if that meant that in some cases, the true owner would be deprived of one of his remedies."

His Lordship, while interpreting the proviso, says that apart from the bailiff and purchasers, there may be other persons like the execution-creditor and the judgment-debtor against whom the true owner may have his remedy. This is a sensible interpretation of the sub-section and confers the most suitable remedy under the facts and circumstances of this situation.

There is another interesting case, _Curtis v. Palones_, relating to sale by sheriff. The facts briefly were:

"In 1948 the plaintiff left a motor cabin in the care of C who subsequently got into financial difficulties with the result that a judgment was obtained against him and the boot of the plaintiff was sold by sheriff on 25.1.1949, in execution of decree by judgment-creditor. The plaintiff did not claim the boot at the time of execution of decree but did so on 25.2.1949. It was held that the plaintiff had no right against the bonafide purchaser at the auction sale by sheriff under sec. 15 of Bankruptcy and Deeds of Arrangement Act, 1913."

35. Supra n. 27 p. 850
36. (1950) All E.R. 982
37. Sec. 15 is similar to Sec. 45(3) of Bankruptcy Ordinance (1930) (Nigeria) quoted above.
Somerwell L.J. observed "protection of purchasers for value without notice against the legal owner is a principle well known in both law and equity." If he wanted to claim relief, he could press his claim against the judgment-creditors or could recover the boat on return of full money consideration to the purchaser. But taking away the boat without return of consideration money will be flagrant breach of all the canons of equity.

It is justified indeed to pass such a law for the reason that it is the true owner who is instrumental in perpetuating a fraud over the third party purchaser and does not take precaution in seeing the financial position and other circumstances of the person in whose hands the goods are lying and which people in general feel belong to the execution-debtor. There is already a provision under section 30(1) of S.C.A which says that where the owner of goods after having purchased it is in possession of them, he confers a good title to a bona fide purchaser for value without notice of first sale. It is submitted that this case is similar to that and hence an explanation at the end of section 14 of S.C.A. may be added.

38. Supra n. 36 id. at 984
39. See the rule of Market Overt infra part IV
40. For Wordings of explanation refer p. infra
5. On the principles of justice, equity and good conscience, it is unwarranted that one should be enriched at expense of another. In Bank of Hindustan v. Prem Chand Rai Chand, Sergent J. observed in connection with the right of a purchaser of property to seek return of his money consideration in execution sale by court against the judgment-creditor where such purchaser was dispossessed of the subject matter of purchase and said that there must be an equity on the part of the purchaser to recover back his purchase money, as the consideration for it has failed. This depends on the general principles of equity and it also appears that it is so under section 28 of the Code of Civil Procedure (1861). In the opinion of his lordship, the section being general in terms, applies to all cases in which sale is set aside, and not merely when it is set aside by reason of some irregularity in the proceedings; and it would appear to have been decided by the High Court of Calcutta.

41. 5 Bom. H.C. Rep. 83 C.C.C.
42. id.
43. The section reads as follows "whenever sale of immovable property is set aside, the purchaser shall be entitled to receive back his purchase money without interest in such manner as it may appear proper to the Court to direct in such instance".
44. Bank of Hindustan v. Prem Chand Rai Chand n. 41 id. at 96
It is submitted that the observations of Sergent J. in the case cited above are most reasonable and in consonance with justice, equity and good conscience. Wherever law is harsh, equity steps in to mitigate that rigour of law. One of the cardinal principles of interpretation of legislation is that if a clause is made for the benefit of any party, it must be given a most beneficial interpretation in favour of such party. Here the interpretation is not merely favourable but reasonable and equitable too. Then there are cases of Green Chandur Potter v. Lockhooa Malee Dabee and Brojendur Roy v. Jugunath Roy.

It is a pity that in Krishnappa Valad Santu v. Panchapa Valad Gurpada etc., the plaintiff was purchaser at a Court's auction sale of the right, title, and interest of one Hanumanta's house and he was put in possession. One Baba filed a suit, obtained decree and dispossessed the plaintiff of the house. Gills J. gave a very narrow interpretation to section 258 of the Civil

45. Maxwell on the Interpretation of Statutes
11th ed., 1962 P.F. 66 to 70
47. 6 Cal. W. Rep. Civ. R. 147
48. 6 Bom. H.C. Rep. 258
Procedure Code (1861) and said that it did not permit interpretation, as given by Sergent J. He questioned "what did Krishnappa purchase at the sale? The right, title and interest of Hanumanta in the house and nothing more". Then he proceeds to say that as there was no warranty of title, the plaintiff could not sue the judgment-creditor for recovery of money consideration. It is submitted that his Lordship and Llyod J. both being British Nationals felt themselves bound by English rule of Caveat Emptor and hence they gave that interpretation to the Code. With utmost regard to the ruling of their lordships in the case, it may be said that by that time perhaps equity had not well entrenched itself into law. But now it is well settled rule that the plaintiff could recover the purchase money under the rule of total failure of consideration.

In this connection a brief history of the relevant provisions of civil procedure codes in force from time to time is given hereunder.

As per regulation VII of 1825, the relevant provision read as under:

49. *Bank of Hindustan v. Fream Chand Fai Chand*, Supra n. 41 id. at 96
50. Supra n. 48 id. at 262
In all cases of public sale of property under this regulation, it shall be clearly explained to the bidders at the sale, that nothing is guaranteed to them in the land or other property sold, beyond the rights and interest therein of the individuals answerable for the amount of the decree, or other process in execution of which the sale is made.  This regulation was based on the rule of English Law that there is no warranty of title in auction sale. However the courts jurisdiction to sell the property was assured.

This rule was enforced before passing of the Act VIII of 1859. Two important decisions precede this enactment. First one is Dost Mohamed Khan v. Prosunnonath Roy in which the rule was laid down as follows:

"A purchaser at a sale in satisfaction of a decree of a party's right and interests, is not entitled to the recovery of his purchase money, on the rights and interest sold turning out to be without title."

The second case is that of Raghonath Sahay v. Brijbehari Lal in which the auction sale was set aside in a regular suit and the conclusion arrived at by the learned court

51. Section 3 (7)
52. Compare this rule with Art.935(2) of German Civil Code where a vendee at "public auctions" acquires good title.
54. (1855) S.D.A. (L.P.) 549
55. Quoted from ILR 43 All 60 at 73
56. (1857) S.D.A. (L.P.) 486
was same. Keeping in view the hardships created by these rules, Section 258 was enacted.

Under this section, in a few cases, the purchaser was entitled to return of his purchase money if the sale was set aside. It was open to the Court to direct the auction purchaser to recover his money by an application in the court or by a regular suit.

For the first time in 1877 due recognition was given to the right of auction purchaser when the consideration failed for want of title on the part of judgment debtor.

The relevant section of the Act reads as follows:

"When it is found that the judgment-debtor had no saleable interest in the property which is purported to be sold, and the purchaser for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest as the court may direct) from any person to whom the purchase money has been paid..."

57. Act VIII of 1859
58. Gresh Chander Potter v. Lookhoda Moyee Daboo, Supra n. 46
Brajendra Nath Choudhry v. Jugar Nath Roy, Supra n. 47
59. Section 313 of Civil Procedure Code (X of 1877)
60. Section 315 id.
Similar were the provisions of Civil Procedure Code 1882 (Act XIV). Ultimately came the Act of 1908 which does not appear to contain such provision at all. Since then, the poor purchaser, under an auction sale, is deprived of this equitable relief. Coming back to the decision in case of Ram Sarup v. Dalpat Rai, it may be mentioned that the right of the auction purchaser is clearly recognised. That is, if the sale is set aside, he is entitled to a refund of his purchase money. It is submitted that the same result follows i.e. deprivation from property purchased on the ground that in one case the Court itself sets aside the sale as a result of which the purchaser is directly asked to surrender whatever he has purchased. Under the other, indirectly court asks him to surrender what he had purchased, by enforcing the claim of a third party at a later date and thereby the poor purchaser is deprived of his legitimate right sometimes after many years. His Lordship, Sulaiman J., while justifying this inequitable rule in the instant case observed that it might be after a very long period that it is discovered that the judgment debtor has no

61. ILR 43 All. 60
saleable interest at all. The sale proceeds might be distributed among a number of decree holders and it might be very hard on the decree holders to be called upon to refund the amount after several years. 62

Is the reverse equally not true? Is it not so, that, after many years, the purchaser is being routed out of such property? Is it not equally true that his sub-purchasers may also suffer the loss and inconvenience? The Court is apathic to the problems of everyone except the judgment-creditor who is the main architect of the whole design and then he is not being asked to refund even though there is a contractual relationship between him and the purchaser. It is a pity that our laws are such as to be instrumental in perpetuating fraud over the purchaser by providing fake and fictitious claims by third party in collusion with the judgment-debtor. Take for instance, a person is in possession of jewellery and other moveable property. After it has been sold, all the brothers and sisters or other relatives come forward to claim that the properties and

62. id. at p. 69
goods belong to them or the judgment-debtor fraudently induces them to lay a claim over those goods. The judgment-debtor will never bother to contest the claim but rather acquiesce in what they say and hence the purchaser of house or property may be doomed. Hence such a rule is unwarranted. Apart from this, it is the most inequitable rule of law to allow one to thrive at the expense of others.

Under, Indian Contract Act (1872), there are provisions under which it has been provided that if the plaintiff's goods were threatened to be sold in execution of decree of sale against the defendant, and if plaintiff has paid the money to the Court officials, in order to avert sale of his own goods and property, he is entitled to recover it from the defendant.

63. Section 69
64. Tulsa Kunwar v. Jagessor Prasad (1906) 28 All. 563;
    Abid Husain v. Ganga Sahai (1928) (1928) 26 All. L.J. 435
"Right to Sell": It means in fact power to sell the goods. The seller must have power to pass general property in the goods. Section 4(1) of S.C.A. defines Contract of sale as a contract whereby the seller transfers or agrees to transfer property in the goods to the buyer for a price. Property means general property or the right of ownership. Mere ownership is not sufficient. One must have power to transfer such ownership. Power is equivalent to legal right to transfer that what one has in oneself.

In J. Barry Winsor & Associates Ltd. v. Bego Canadian Manufacturing Co., Ltd., a more comprehensive interpretation was given to Section 18(a) of Sale of Goods Act 1960 (B.C.) by Supreme Court of British Columbia in which it was held that right to sell "extends to a case where the sale of goods is prohibited by law". Thus where the seller sells sub-standard electrical goods to the buyer, knowing fully well that its sale or resale is unlawful, he commits a breach of this condition.

65. Atiyah Op. cit ,supra n. 21 at 43
66. Section 1(1) E.A.
67. Section 2(11)
68. Niblett v. Confectioner's Materials Co. (1921) 3 K.B. 387
70. Corresponding to Section 14 of S.C.A.
In a number of situations, it may be that seller has no right to sell. Still, he is not liable for an action from the buyer, under Section 14, as no loss or damage has been sustained by him. However, in a case where the buyer is not in a position to acquire such title as in Hire-purchase agreement, he should be entitled to reject the goods and recover his purchase money. But if he insists upon purchasing the goods from the hirer with no perfect title, he is only entitled to do so on paying the remaining instalments to the owner of such goods. In such cases, the buyer from the hirer is put under a disadvantageous position. He pays first to the hirer, the value of goods who pretends to be the owner of them and then pays back to the owner who brings an action against him. However, he can bring an action against the hirer under Section 14(2) and (3) for breach of warranty of Quiet possession and Freedom from Encumbrance.

71. Refer Sections 27 to 30 of S.C.A.
72. Refer the Report of Growthor Committee on Consumer credit (Commd. 4596) paras 5,7,32
73. Whiteley v. Hilt (1918) 2 K.B. 808
The Effect of Breach of Condition as to title:

The remedies open to an innocent buyer for breach of this condition are (a) Repudiation of Contract, or (b) claim for damages. Apart from it, the buyer is also entitled to recover his price for total failure of consideration. So in the case of Rowland v. Diwall when buyer, the plaintiff purchased a car from the defendant and after having used it, had to surrender to the true owner, for want of title on the part of seller, the Court rightly held that there was a total failure of consideration. Atkin L.J. observed:

"The buyer has not received any part of that which he contracted to receive, namely, the property and right to possession and that being so, there has been a total failure of consideration".78

74. Section 12 of S.G.A.
75. Section 13 of S.G.A.
76. Sections 64 & 65 of Indian Contract Act (1872) and Section 61 of S.G.A.
77. (1923) 2 K.B. 500
78. Id. at 507 Also refer karflex ltd. v. poole (1933) 2 K.B. 251
Rowland v. Diwali was followed by Hudson J in Margolin v. Wright Pty. Ltd., in which subsequent to purchase of a car by plaintiff, it was seized by Commonwealth authorities for contravention of Customs Act, by a previous owner. It was held that the plaintiff was entitled to rescind the contract and recover back his consideration money. Divesting of title related back to the date of contravention of the rule of Custom Act.

Atiyah, while criticising the judgment in Rowland v. Diwali supra observes as follows:

"It is indeed possible to imagine circumstances, by no means unrealistic which are far more extreme than those in the above cases. For example, suppose that A buys a crate of Whisky from B. Suppose further, that after consuming the whisky, A discovers that it never belonged to B but that B had bought it in good faith from a thief. Is it to be said that A can recover full purchase price on the ground that there has been a total failure of consideration". 82

It is submitted that the passage from the learned author is open to question on the following ground:

79. Supra n. 77
80. (1959) Arg. L.R. 988
81. Supra n. 77
82. Atiyah, Op.cit, Supra n. 21 at p. 46
The author compares durable goods with consumable ones. The facts and circumstances of the case warrant that the author's comparison should relate to durable goods only. The Courts of law must do justice according to the facts and circumstances of a particular case. If the seller sells goods, he takes money in exchange for passing of property in goods to the buyer. If he could not pass that, he must pay back what he has received in lieu of that. Suppose, the seller is asked to return the purchase price to the buyer, after deducting any amount commensurate to the benefit received by him (buyer) then what is he to do with the true owner taking proceedings against him for conversion and damages sustained? In other words, naturally he should be liable to him and him only for the reason that it may encourage dishonesty and lethargy on the part of the seller. It is not for the seller to seek deduction for use of those goods. If any one is entitled for damages, it is the true owner only. Hence, it is not understood as to how the learned author pleads for payment to the seller of a sum, after deducting it from the price of motor car for benefit so derived. In so far as the buyers and sellers are concerned, there is a total failure of consideration. This disposes of the
argument of another learned author Fridman, who remarks:

"Suffice it to say here that the approach of the Court of Appeal in Rowland v. Diwell leads to great difficulty. It might have been better if the court had either adopted the view that the delivery of goods, and not transfer of property, was the consideration for the payment of the price, or had refused the plaintiff a remedy on the basis of failure of consideration, permitting a remedy only on footing that what was involved was the breach of a condition, implied by statute under section 12".83

Now we shall further examine the example of Atiyah of consumable item like whisky. Suppose whisky has been consumed by the buyer and later on if he discovers that it was stolen and the true owner demands the whisky which he cannot return to him, he will unlike car in Rowland v. Diwell not return the whisky but the price for it for conversion under the Law of Torts. If so, he will recover the price from the seller to whom he had paid it. This will sway the balance of justice in favour of equity and good conscience. There will be

no chance for anyone to unjustly enrich himself on the expense of the other. Under these circumstances, the buyer returning the money in the true owner may have to face a practical difficulty i.e. he may not be able to trace his seller for realising the price of goods. It is open to the purchaser from the thief to recover it, if he can do so. If he cannot, it is submitted that such accidental transactions are liable to take place in life of a human being, but such person has more reason to blame himself than anybody else because he had better chances of ascertaining the honesty of his transferor.

In view of the above, argument of Atiyah holds no ground when he says:

"The object of a contract of sale is surely to transfer to the buyer the use and enjoyment of the goods from any adverse third party claims. If the buyer has such use and enjoyment and no third party claim is made against him, it is submitted that it is quite unrealistic to talk of a total failure of consideration".84

The learned author accepts that the object of sale is to transfer use and enjoyment of goods without any

adverse claim from any one. It is submitted that it is only warranty. The main object and basic one is to transfer property in goods. If that is not achieved, consideration will fail. If the true owner does not demand damages for such use and enjoyment, how does the seller become claimant to it? On the same ground, Law Reform Committee's recommendation is not correct when it recommends that in Rowland v. Divall situation, the buyer should not be allowed to claim the return of whole price.

Feeding title: There are several authorities in support of the view that the principle in Rowland v. Divall, will not be applicable if the buyer's title has been "fed" by subsequent acquisition by the seller of a good title to the goods sold, provided he has not repudiated the contract before such acquisition by the seller. In Putterworth v. Kinga Motors Ltd. Pearson J. held that the plaintiff had rightly repudiated the Contract and could recover his purchase price for the reason that he repudiated it at a time when the defendant had no

86. (1923) 2 K.B. 500
87. (1954) 1 V.L.R. 1286; 2 All E.R. 694
title in the car. However, Pearson J. considered a situation where the hirer acquired title in the goods before repudiation of contract by the plaintiff and observed that he could not say "There has been total failure of consideration by purchase of this car, although there is the car in my possession and I am entitled to retain it against the world." Hence a buyer whose title has been fraud cannot elect to subsequently rescind the contract for breach of section 12(1)(c).

In [West (N. I.) Ltd. v. McBlain], Sheil J. said that "you can never revivify that which never had life." Hence, the observations of Pearson J., mentioned above were incorrect, according to him. It is submitted that the remarks of Sheil J. are open to objection for the following two reasons:

(a) A literal interpretation of Section 12(1)(c)(E.A.) will mean that where the seller agrees to sell the goods, it is not essential that he should have title in the goods at the time of making the contract of sale but he should have that title only at the time of transferring the property in the goods to the buyer.

88. id. at P. 1295
89. (1950) P.I 144 Also refer Karflex Ltd. v. Coates (1933) 2 K.F. 251
90. Supra, n. 88 id.
(b) Under Section 30(2) of S.C.A., a buyer purchasing the goods in good faith from a person who, having agreed to buy them, has obtained their possession with the consent of the true owner and subsequently sold them, gets a good title to them. Though the agreement to buy, coupled with delivery does not transfer any property in the goods to the vendee, still if such vendee sells it to a bonafide purchaser in good faith without notice of the defect of the title of his transferor, he acquires a better title than what his transferor has. If such is the rule under Sale of Goods Act, why should the lot of poor purchaser, buying the goods in good faith from a hirer should be decided on a different footing?

It is argued that the buyer from a hirer gets no title because his transferor has sold them without an option to purchase. This argument is fallacious. It is well settled that the hirer is not merely bailer of the goods hired. But "bailment for hire is coupled with an element of sale." Hence, the hirer purchasing the goods

92. Per Godard J. in Karflex Ltd. v. Poole, Supra n. 89 id, at 252. Also refer Instalment Supply Ltd. v. C.I.O. Ahmedabad, A.I.R. 1974 S.C. 1105
under ostensible sale must confer a good title upon
his transferee for value, purchasing in good faith.

Coming back to the observations of Shell J.
in West (H.W.) Ltd. v. McBlain supra, in view of the
foregone discussion, we cannot say that the seller
purchasing the goods under hire purchase agreement has
no title at all. But he has a defective title which
is perfected by subsequent acquisition.

**Infringement of trade mark:**

It is felt that in order to cope up with the
growing need of commercial community and to protect
the interest of the buyers which may be adversely
affected due to the seller infringing the trade mark
of a third party, there must be some provision under
S.C.A. by which adequate relief may be granted to the
vendee in a situation like Niblett v. Confectioners'
Materials Co., Ltd. supra. In order to meet the ends
of Justice, their Lordships had to unduly strain the
language of the section relating to merchantable quality
so as to treat it as breach of that condition. As a
matter of fact, it should have been treated as breach
of condition as to title. For a business community, it
should be imperative that a merchant selling the goods/warrant
that they do not infringe the trade mark of any other person. Such a provision does exist under Uniform Commercial Code, Art. 2-312(3) which reads as follows:

"Unless otherwise agreed, a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications".

It is suggested that the above provision beginning with "unless otherwise...infringement of the like" may be incorporated as section 14A of S.G.A. However the words "a merchant regularly dealing with goods of that kind" needs amendment to fit in our own pattern of terminology. These words are proposed to be replaced by "is a dealer in goods of that kind". The residue of the section relating to specifications provided by the buyer should be linked with the provision relating to merchantable quality.
Implied Warranties of Quiet Possession and Freedom from encumbrance: It has already been mentioned that this section is based upon conveyancing Act (1881) (Law relating to realities). In continental system of laws, warranty of title is equivalent to a covenant for quiet possession. Pollock and Mulla question the propriety of the warranty of quiet possession on the ground that once there is breach of implied condition as to title, the buyer's possession is liable to be disturbed and hence this provision becomes superfluous. In other words, unless the title is defective, there is no question of breach of this warranty. N.P. Agrawala also concurs with this view. It is submitted that the

93. Chalmers Op. cit, Supra note 3 id. at 88
In Howell v. Richards (1809) 103 ER 1150 Lord Ellenborough observed "distinction between condition as to title and warranty of quiet possession is similar to that between a covenant for title and for quiet enjoyment. The former is the assurance by the grantor that he has the very estate in quantity and quality which he purports, to convey, the latter is an assurance to the grantee against the consequences of a defective title". Also refer the observations of Atkin L.J. in Biblett v. Confectioner's Material Co. Supra N. at P. 398 where he observes "probably this warranty resembles the covenant for quiet enjoyment of real property".

scope of this warranty is wider than the condition as to title, as is clear from the case of Llyods and Scottish Finance Ltd. v. Modern Cars and Caravans (Kingston) Ltd. In this case, there was no breach as to right to sell the goods but there was breach of this implied warranty. As a result thereof, the buyer was entitled to be reimbursed for having sustained financial losses.

It may be observed that the wordings of the section are that the buyer shall "have and enjoy". "Have" is meant here for obtaining possession of the goods. This is superfluous as the word "enjoy" presupposes possession.

Lord Russel C.J., while explaining the scope of old section 12(2) of E.A. observed that this warranty really means that nobody shall interfere with the possession of the buyer for want of title on the part of seller or any act committed by a third person under the authority of such vendor. It is more than covenant for title. "It is a warranty that the vendor shall not, nor shall anybody claiming under a superior title, or under his authority, interfere with the quiet enjoyment of the vendee".

96. (1964) 2 All E.R. 732
98. Corresponding to Section 14(2) of Indian Act
This clause protects the buyer, where through he has a right to sell the goods, but they are subject to the right of a third party. It also affords relief in those cases where the seller himself wrongfully seizes the goods.

Benjamin observes that implied warranty of Quiet possession is only broken where such possession is disturbed and should be construed in a manner so as not to include the tortious acts of an stranger. What amounts to disturbance of Quiet possession was explained by Atkin L.J. in Niblett v. Confectioners Materials Co., Ltd., where he said that the buyer's possession was disturbed when he had to strip off the labels from tins, before assuming possession thereof. Scrutton L.J. said that this warranty protects buyer from the lawful acts of a third person, tortious acts of the seller and breaches of contract for sale. Apart from these, the buyer is also entitled to recover any damages arising in a natural course, consequential upon breach of this condition. These damages may be in addition to those recoverable for breach of implied condition under old section 12(1) of the E.A. The seller cannot plead that the

100. Llyod's and Scottish Finance Ltd. v. Modern Cars and Carvans (Kingston) Ltd., Supra n. 96
101. Healing (Sales) Pty., Ltd. v. Inclis Electric Pty., Ltd. (1968), 42 A.L.J. 280
102. Benjamin on Sales 8th Ed., P.P. 681, 682
103. Supra n. 68 id.
104. Mason v. Birmingham (1949) 2 K.P. 545
disturbance of possession has taken place by title paramount. Lord Greene M.R. pointed out that covenant for quiet enjoyment, as mentioned in the Second Schedule of Law of Property Act (1925) contained words which excluded disturbance from the title paramount. But no limitation appeared under Section 12 of E.A.

Distinction: In breach of condition as to title, the time of action under Limitation Act runs from the date of sale, whereas in both the warranties, it runs from the date when the buyer's possession is disturbed. Further, there are circumstances where no remedy may be available under Section 14(1) of S.C.A. because the seller has perfect title to the goods but it may be available under Section 14(2) & (3). For instance in Llyods & Scottish Finance Ltd. v. Modern Cars & Carvans (Kingston) Ltd., the debtor had sold the goods (already seized by Sheriff but not removed physically) to a third party which he had right to sell. But his right was subject to the right of Sheriff and if the vendee had to surrender the goods to the Sheriff, he was entitled to recover damages under old Section 12(2) and (3) of E.A.

105. Mason v. Birmingham, id. at 563
106. This is based upon the principle relating to transfer of immovable property that the vendor does not warrant title to such property. Bain v. Fothergill (1874) 7 H.L. 158
107. Atiyah, op.cit at Supra n. 21 and Chalmers, Op.cit Supra n. 3 at 87
108. Supra n. 96 id.
The other implied warranty is freedom from encumbrance. It is well recognised in other European countries like Scotland, Italy and France. In Steinke v. Edwards (a South Australian case) it was held that where a tax is levied by government on a motor vehicle coupled with a right to distraint on the goods of the owner of such vehicle for the purposes of enforcing collection, it amounts to a "charge or encumbrance" under section 17(3) of Sale of Goods Act of South Australia.

It means that the goods shall be free from any charge or encumbrance in favour of any third party not known to the buyer before or at the time when the contract is made. If his possession is disturbed as a result of such encumbrance to the third party, he is entitled to recover the damages or the money so paid from the vendor as it is not a voluntary payment.

Benjamin says that this warranty has no reference to the position at the time of delivery. It only comes into operation when the buyer is disturbed or affected subsequently due to such charge or encumbrance. It may

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109. Section 14(3)
110. Italian Civil Code, Arts. 1476, 1482-1489, French Civil Code Arts. 1625, 1626
111. (1935) 8 A.L.J. 368
112. Corresponding to Section 14(3)
113. Art. 3-312 of U.C.C. says that it is an implied warranty that the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.
114. Sec. 69 of Indian Contract Act (1872)
116. Llyods & Scottish Finance Ltd. v. Modern Cars & Caravans (Kingston) Ltd. supra n. 96
It may be noted that both the sub-sections are couched in words like "shall be" and not "are" which indicate to future position.

In Krishna Chand v. Ram Pratap where there was sale of shares of a company, it was held that this warranty was implied under Section 14(c) unless a different intention could be inferred from the fact and circumstances of the case. The onus to prove lied on the seller that he sold them not as owner but as a pledgee. The buyer of the shares of a particular company, under the rule of constructive notice, is deemed to have knowledge of the provisions of company's Articles of Association but under the doctrine of Indoor Management, he is not bound to know more. Hence, if the articles of a company provide that the directors of that company will have right to refuse the registration of transfer of shares in case they are encumbered and also that they will have a right of lien on such shares, the seller must disclose this fact to the buyer that his shares are actually encumbered. If

117. 44 C.W.N. 505

118. Under this rule, every person dealing with the company is deemed to have knowledge of the content of Articles or Memorandum of Association of a company, whether he has read them or not.

119. Under this rule the outsider is not bound to know as to what is going on within the four walls of the company.
he does not do so, he is liable to the buyer for breach of this implied warranty.

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Atiyah observes that there seems to be little need for this section for the reason that law does not recognise encumbrances over goods by persons not in possession of them and equity only steps in to intervene where bad faith is proved against third party purchaser. He further says that the sub-section may be useful where the owner of encumbered goods obtains possession thereof for some limited purposes and sells them fraudulently against the wishes of the pledgee. The buyer, being disturbed, can invoke the breach of this warranty. Apart from what the learned author says, this provision is beneficially invoked in cases like Krishna Chand v. Ram Pratap and Llyods Scottish Finance Ltd. v. Modern Cars and Carvans(Kingston Ltd.). The usefulness of this provision, is borne out of the fact that under Section 12 (1) (a) and (b) read with Section 55(3) of E.A. such encumbrances cannot be contracted out by the seller, if they are known to him.

120. Op.cit, Supra n. 21 at P.P. 50-51;
121. However the provisions of equity are now codified under law, Refer Sections 27 to 30 of S.G.A.
122. Supra n. 117
123. Supra n. 96
Exemption from Liability

The two major issues being debated under section 14 of S.G.A. are whether a seller of goods who is not owner thereof or is holder of limited interest and purports to sell that interest can be brought within the ambit of the implied condition as to title and secondly whether a seller can contract out the implied conditions as to title.

So far as the exemption of condition as to title is concerned, various authorities and quotations from eminent text book writers and law reports will be examined thoroughly in the following pages so as to see whether its exclusion is possible or not.

Cheshire and Fifoot, while mentioning about the condition as to title observe that

"But it is difficult to believe that the seller who avails himself of this indulgence, will escape liability if he delivers to the buyer goods which belong to a third party. He will be caught by the definition of contract of sale which defines it as "a contract whereby the seller transfers or agrees to transfer property in the goods to the buyer for a money consideration called the price". 125

If in purported pursuance of his contracts, he delivers goods which, though he is ignorant of the fact, are owned by some one else, he does not and cannot transfer property in them. There is complete failure of consideration, and no excluding words, however comprehensive will excuse him.

The author is quite clear in his mind that this, being a fundamental term of contract, cannot be excluded. 126

While discussing the case of Andrews v. Singer,(dealing with condition as to Description of goods where the seller did not deliver the "new singer Car" at all but a used one)

125. Section 1(1) of E.A.
126. Cheshire and Fifoot on Contract 4th Ed. P. 137
127. (1934) 1 K.B. 17
they proceed to say that it did not amount to performance of contract at all. The authors argue that "if a seller agreed to sell peas and expressly excluded "all conditions and warranties express or implied" could he escape liability by delivering beans? Certainly not. They proceed further on the same analogy and express themselves as saying that selling goods by seller as his own but having no title to it amounts to that.

Chalmer says the cases in which an implied condition as to title has been negatived have mainly arisen out of sales by Sheriff or forced sales by public auction, where from the circumstances of the case, it appeared that the seller was only selling such right as he might have in the goods. This means that the opening words of the relevant section are not meant to protect a seller selling goods without title under the circumstances of a particular case where the buyer is also not aware thereof. There is fundamental mistake as to title of the subject matter of contract, and hence the contract is void and the money paid as price is recoverable.

129. Chalmers Op.Cit, Supra n. 3 at 86
130. Section 20, Indian Contract Act 1872
130a. Section 65 of Indian Contract Act 1872
In Rowland v. Diwall, Atkin J. observed that there can be no sale at all of goods which the seller had no right to sell, the object of sale was to transfer property from the seller to the buyer. "... In fact the buyer has not received any part of that which he contracted to receive, namely, the property and the right of possession and that being so, there has been a total failure of consideration." His lordship observed that no doubt de facto possession was delivered by the seller to the buyer but there was no lawful transfer of it. Hence the buyer was always liable for conversion during his tenure of possession to the true owner. Therefore, whatever benefit has been actually derived by the buyer due to use of it, while in such possession, he is accountable to the true owner and hence the seller could not plead under the purported sale that as the Car was not returned in the position in which it was delivered to the buyer, he should be deemed to have accepted the goods, and under section 11(1)(c), he was bound to treat the breach of

131. (1923) 2 K.B. 500
132. id. at p. 507
133. Supra n. 131 id at 506
134. Corresponding to Section 13(2) of Indian Act
condition as a breach of warranty and rest content by claiming damages. Scrutton L.J. vehemently refuted the plea of non rescission for impossibility of restitutio in integrum. His lordship observed that

"to that the buyers answer is that the reason of his inability to return it namely, the fact that the defendant had no title to it is the very thing of which he is complaining and that it does not lie in the defendants' mouth to set up as defence to the action, his own breach of the implied condition that he had a right to sell."

His lordship further observed that before passing of the English Act, there was a good deal of confusion in the authorities about the exact nature of vendor's contract with respect to his title to sell. It was originally thought that a vendor did not warrant his title. But gradually a number of exceptions crept in, till at last the exceptions became the rule, the rule being that the vendor warranted that he had title to what he purported to sell, except in certain special cases such as that of a sale by a Sheriff, who does not so warrant.

135. Supra n. 133 id.
136. Supra n. 131 at 505
Then came the Act of 1895, which re-enacted that rule, as a condition but not as a warranty.

In a contract of sale, transfer of ownership is of essence of contract and hence it is one of fundamental terms that the vendor must be owner of goods he sells. Hence any exclusion by an express clause from the vendor will not absolve him of this liability. Sutton & Shannon on contract remark that

"there is a rule of construction that normally an exemption clause should be construed as not applying to a situation created by a fundamental breach of contract or a breach of a fundamental term." 138

So far as the opening words of old Section 12 of E.A. are concerned, they were only intended to cover the cases of sale by Sheriff but not the one where seller had nothing to sell but to transfer a worthless possession in which the buyer might be even held liable for conversion to the true owner. Hudson observes that core concept will not operate when a

137. id.
138. 7th Ed. Art. 30, Clause, 5 P. 105
purchasing party is purchasing a chance. The author has however not been able to find such a remark by Melville. He quotes Halsbury as saying

"where the parties clearly intend it there may be an 'emptio spei', that is to say, the sale and purchase of chance of obtaining goods, rather than of the goods themselves. Such a contract is contingent on the part of the seller but absolute on the part of the buyer". 140

He says that this passage has been cited for Baqueley 141 v. Hawley which is an old authority on exclusion of title and Benjamin is also cited as favouring in making contract of sale of a chance. 142

Let us examine the case on contingent contract. 143

Section 1(2) of E.P. says that a contract of sale may be absolute or conditional. Now conditional contracts are in a way contingent, the peculiar feature of these contracts is that they depend upon certain contingencies or uncertain specified events. If the events mentioned

139. A.H. Hudson—"The 'Exclusion of Condition as to title in Sale of Goods" 20 Mod. L. Rev. 236 at 239 (Note 12)
140. Id. (n. 13)
141. (1867) L.R. 2 C.P. 625
142. Hudson A.H., Supra n. 139
143. Corresponding to Sec. 4(2) of Indian Act.
144. Refer sections 31-36 of Indian Contract Act (1872)
therein occur, the contract may become operative and the parties may become bound to perform the contract. But if the event specified does not happen, the contract may become void. These are the broad general principles of contingent contract. So far as sale of goods are concerned, buying and selling may take place, subject to the condition that if the seller acquires the title to the goods, he may sell them. If not, the contract may be rendered as void. Once the contract is rendered void, the consideration will fail and the buyer will become entitled to return of his purchase money.

Purchasing the chance will not mean purchasing the chances of purchasing the goods but rather goods themselves. Otherwise, it will amount to gambling. This will not be covered by sale of goods Act, as chances are intangible whereas goods are always tangible.

From the above, it is clear that contracts for buying and selling of goods may depend upon chances of acquiring title in them, rather it is one of the inherent

145. Section 65 id.
146. Section 65 id.
conditions of a sale of such type. But once the contract falls short of such expectation, it becomes void and the consideration is liable to be returned as money had and received to the benefit of plaintiff and therefore it must be returned to avoid unjust enrichment on the part of defendant.

An old case Chapman v. Speller has been cited by Champion of Exclusion clauses, in which the defendant at a sheriff's sale, under a writ of fi fa, bought goods from the sheriff for £ 18, and the plaintiff who was also present at the sale gave £ 23 "to stand in his shoes", when the goods were paid for, the sheriff started delivering them to the plaintiff. In the meanwhile, the true owner claimed the goods. Held, under the circumstances of the case, it could not be implied that the defendant warranted the title to the goods and hence the plaintiff failed.

It is submitted that under the circumstances of the case, it is equitable to hold on that line, because the plaintiff and defendant both were present at the auction sale and the knowledge of both was equally defective. Hence the plaintiff could not demand warranty of

147. (1850) 14 Q.B. 621
148. Hudson, A.H. Supra n. 139 at p. 239
title from the defendant. However, it would have been more equitable, had the Court ordered the defendant to pay the difference between the auction sale price i.e. £18 and actual price £23, being £5 to the plaintiffs for total failure of consideration. In Warming's used cars v. Tucker whose problems were identical to the above case was decided on similar lines. The facts of the case were:

One T, a second-hand car dealer was offered a Holden Car by one A, a small businessman, was unable to purchase himself and went to the manager of the plaintiff, U, a Big business-man. After inspection of car by manager, A purported to sell it to T and T to the plaintiff U. Later on it was revealed that as A had no title to the Car, it was to be surrendered to the true owner, U, having paid off the claim of their customer, brought a suit for recovery of his amount from T. Napier C.J. held that circumstances of the sale from T, to plaintiff were such as to show no intention on his part to guarantee such title.

From the evidence and circumstances of the case, it was clear that T did not deal with the plaintiff in ordinary

149. (1956) S. A.S.R. 249
150. id. His Lordship though regarded T as seller vis the plaintiff but accepted him in the position of a quasi-agent of the plaintiff and the profit of £55 from the plaintiff in the nature of commission, the consideration for which was passing of a good title to the plaintiff. "On that footing there was a
course of business as a seller. For example where a purchaser goes into a shop and purchases an article offered for sale or where a seller brings a car and asks the dealer to put a price on it. Here, in these circumstances, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale. But under the instant case, T and plaintiff both were present and the knowledge of the fact of both was equally defective like that in Chapman v. Speller. Hence it was very much in consonance and accord with equity, justice and good conscience, that his lordship avoided unjust enrichment by T solely at the expense of plaintiff. Thus the ends of justice were met. The plaintiff could recover the rest of the amount from A. Hudson quotes Chalmers as making brief reference to the fact that implied undertakings as to title have been held to be negatived in case arising out of sales by sheriffs or forced sales by public auction. Old

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151. Supra n. 147
152. Hudson, Supra n. 139 at 241
pre-code cases have been quoted there. This indicates that the opening words of Sec. 12(1) were used simply to accommodate such cases at the most and not to show that the very thing which is implied under the act and the ownership which is inherent in every sale can be so easily excluded by shrewd and dishonest sellers and cheats in the garb of sellers. In this direction some legislative changes though not far reaching, have taken place. It may not be out of place to mention briefly the historical background under which such amendments were introduced.

The opening words of old Section 12(1) of E.A. clearly indicated the possibility of the parties contracting out the implied condition as to title. The pre-code development of law is on those lines. Therefore, the Act and post-Act development is also resting on those precedents. Even though the courts do not favour these exemption clauses, yet their power to regulate them is very restricted. 154

153. "Unless the circumstances of the contract are such as to show a different intention" See Sec. 14(1) of S.C.A.
Looking into the hardships faced by the buyers due to severe blow to their interest by well organised sellers and manufacturers, two enquiry committees were constituted in England, namely Molony Committee and Law Commission on Exemption Clauses. Molony Committee recommended that exclusion of implied warranties and conditions under Sections 13-15 of English Act should be declared as void under consumer sales but they did not recommend that exclusion of section 12 should also be declared void in such cases. However Law Commission proposed restrictions on contracting out of implied terms under Section 12 of C.A. The Commission further clarified a controversy raging round sale of limited title or interest. They further proposed that wherever a person was selling a limited interest or when any agent was selling such interest which a third person had, he must disclose this fact and also the fact whether such interest was encumbered to the knowledge of seller but not known to the buyer, i.e. hirer's interest. The newly amended

156. Exemption clauses, First Report, paras 17-18 and Part V
157. See Hudson, 24 Mod.L.R. 690, Supra n. 139, Reynolds, 79 L.Guar. Rev. 542
Section 12 by Supply of Goods (Implied Terms) Act 1973 is largely based upon the Law Commission's Recommendations relating to old section 12 of E.A. It reads as follows:

Section 12: Implied Undertakings as to title, etc.-

(1) In every contract of sale, other than one to which sub-section (2) of this section applies, there is-

(a) an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods and in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass; and

(b) an implied warranty that the goods are free, and will remain until the time when the property is to pass from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

(2) In a contract of sale, in the case of which there appear from the contract or is to be inferred from the circumstances of the contract an intention that the seller
should transfer only such title as he or a third person may have, there is-

(a) an implied warranty that all charges or encumbrances known to the seller and not known to the buyer have been disclosed to the buyer before the contract is made; and

(b) an implied warranty that neither-

(i) the seller; or

(ii) in a case where the parties to the contract intend that the seller should transfer only such title as a third person may have, that person; nor

(iii) anyone claiming through or under the seller or that third person otherwise than under a charge or encumbrance disclosed or known to the buyer before the contract is made; will disturb the buyer's quiet possession of the goods.

As per the amended Act, generally the implied undertaking as to title cannot be excluded. But if one looks to the language of New Section 12(2) i.e. if the

158. New Section 55(3) read with section 12(1) Refer Atiyah P.S. Op.Cit. Supra n. 21 at P.339-40 and Cristopher Carr ,Supra n. 124 at F.F. 520-23
contract or circumstances indicate "an intention that
the seller should transfer only such title as he or a
third person may have there is no implied condition
that the seller has a right to sell but only implied
warranties with regard to disclosure of charges or
encumbrances known to him but not known to the buyer
and that neither the seller nor a third party nor any
person deriving title through or under him will
disturb the buyer's quiet possession.

Comparison of the provisions relating to a true
sale, (New Section 12(1) and such title as the seller
has (new Section 12(2)) produces an odd result. Under
the former, the seller is liable for defects of title
(absence of "a right to sell the goods"), adverse en-
cumbrances and failure to give quiet possession despite
ignorance of his own inability to satisfy these re-
quirements. Under the latter, the seller's ignorance of
adverse encumbrances excuse him, although he must dis-
urb buyer's quiet possession. "But apparently the
seller need not disclose that he does not have right to
sell, even though he knows this to be the case." The

159. Christopher Carr, id. at p. 521
only way to overcome this difficulty is (1) to construe freedom from encumbrances as embracing right to sell— a meaning which it normally would not have, (2) to fall back upon a Common Law attack on the exclusion of liability in respect of title—a course which the 1973 Act was designed to obviate; or (3) to construe restrictively the circumstances in which an intention to transfer a limited title is exhibited—an approach which must at some point exhaust itself. This is an obvious defect of the new amendment. Further, in conditional sale agreement, the buyer has no remedy where he discovers that the seller does not own the goods he is purporting to sell. Under similar circumstances a hirer of goods under hire-purchase transaction is entitled to rescind the contract and to claim back what he has paid against them. The buyer has been seen meeting the same fate in cases of sale by Sheriff or other auction sales. Hence the following amendment to section 14 is suggested:

160. Mercantile Union Guarantee Corporation Ltd. v. Wheatly (1939) K.B. 490
"Notwithstanding the provisions any law for the time being in force, the buyer shall be entitled to return of his purchase money for reason of total failure of consideration, under whatever circumstances*. Another amendment is required to be made by adding "which will include sale of limited interest in the goods" at the end of new Section 12(1) (a). This will cover the case of true sale and sale of limited interest also.

The provision "except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known " (Sec. 12 (1) (b) seems to rob the potence of the Warranty of Quiet Possession, since if the seller turns out not to be the owner, the true owner's disturbance of the buyer's quiet possession will not be a breach of warranty. The Law Commission had suggested the words "except so far as it may be disturbed by the owner of any charge or encumbrance so disclosed or known". In order to achieve proper result, the words of statute
should be punctuated as follows "except so far as it may be disturbed by the owner, or other person entitled to the benefit, of any charge or encumbrance so disclosed or known". It is submitted that the suggestion of the learned author is a wise one and the Indian Act should be wedded with that.

Again provision of Section 12 (2) (b) also suffers from the same type of defect. In the words of Professor Craig "It would not provide him with a remedy if the inter-fERENCE was from the true owner, not being the seller or third person". But Atiyah says "it is now clear that the warranty of Quiet possession protects the buyer if he is evicted by title paramount..." which includes the superior title of the true owner. It is submitted that the interpretation given by Craig is correct for the reason that there is no

161. Cristopher Carr, Supra n. 158 at 523
mention in the section of title paramount or true owner. It is therefore better to clarify this position. It is no consolation to the buyer that the true owner has interfered with his possession and not any other person. This confusion can be clarified by adding the words "or the true owner" under New section 12(2) (b) (iii) which may read "anyone claiming through or under the seller or that third person or the true owner otherwise than under a charge or encumbrance disclosed or known to buyer before the contract is made, will disturb the buyer's quiet possession of the goods.

Sale of a limited interest: New section 12 (2) of the English Act incorporates a new provision where the sale of a limited interest is intended to take place. Before the Amending Act of (1973), it was not clear whether such interest could be sold out. Section 2-312 of U.C.C. contains similar provisions.
IV

Rule of Market Overt

As pointed out at the outset, the rule of market overt is not applied in India. Though our Act is broadly based on English Act, but we are badly missing it from our Statute book for no obvious reasons. It is essential to have this rule in order to protect the interest of innocent purchasers of goods in market overt and fairs and also for growth of trade and commerce.

This doctrine was very much present in Ancient India, Manu says:

Section 201 "He who obtains a chattel in the market before a number (of witnesses) acquires that chattel with a clear legal title by purchase".

164. Every shop within narrow confines of one squire mile area in the city of London is a market overt for those things which the shop customarily sells. Refer in general, Daniel E. Murray, Sale in Market Overt; 9 Int. & Comp. Law Ctly. 24; Market Overt case (1996) 5 Rep. 83-b discussed by Scrutton J. in Clayton v. Leroy (1911) 2 K.B. 1031, also known as The Bishop of Worcester's case; Pease "Market Overt in City of London" (1915) 37 L. Ctly. Rev. 270 Atiyah P.S. Ordin. Supra n. 21 at P.P. 194-95

165. This rule is contained in Section 22

166. 2 Black Stones' Commentaries, 449

167. Translation from Kocorek and Wigmore 'Sources of Ancient and Primitive Law' (1915) 485
Section 202 "If the original (Seller) be not producible, (the buyer) being exculpated by a public sale, must be dismissed by the King without punishment, but (the former owner) who lost the Chattel shall receive it (back from the buyer).

The combined effect of these two rules was that the buyer purchasing the goods in a market overt was protected fully if he could produce the seller. His title was unimpeachable. Otherwise, he was to surrender the article to the true owner without any penalty. In the contemporary period of Manu, such laws were current in Jewish Babylonia in which the buyer enjoyed complete protection. The minimum was that he had to be restored his purchase price.

Section 9 of the Hummarabic Code provides that buyer of a stolen property in market overt shall receive back his purchase price from the seller if he proves its bonafide. 168 This concept of return of purchase price

168, id., at 391-392
169. Huebner, History of Germanic Private Law (1918) 417
170. Burgandanian Code (Additional Enactment) XXI (1949) at 94
171. Huebner supra n. 169
172. Visigothic Code, Book XI, Title III, I.
173. Lawson, A Common Lawyer Looks at Civil Law (1953) 176-177
Swiss Civil Code says that the bonafide purchaser for value can only surrender the subject matter of sale to the true owner on receipt of purchase price.

Italian Civil Code treats every vendor as a market overt and abolishes distinction between stolen, lost or wrongfully sold movables and between public and private sales. The only requirement is purchase in good faith.

Under Spanish Civil Code a bonafide purchaser under "public" sale obtains defeasible title subject to the return of purchase price by the true owner. This is subject to the provisions of Article 85 of Code of Commerce which says that if the purchase was made in "warehouses and shops open to public" the vendee obtains absolute "prescriptive" title to the goods at the moment of sale. The original owner can only proceed against the vendor. Similar are the provisions of civil Code of Puerto Rico. Such rights are recognised by many codes and

174. Art. 934
175. Arts. 1153 and 1155
176. Art. 464
177. Art. 393 of Civil Code of 1931, Title 31
178. Mexican Civil Code Art. 799, Civil Code of Chile; Arts. 2571, 2799, 2800, 2802
they recognise and protect the interest of bonafide vendee for value. Chilean Civil Code gives an additional right to the vendee to charge repair expenses from the owner of the article.

Under German Law, if a person deposits an article with another and he sells it to a transferee then such transferee becomes owner even though he had no authority to do so unless he is in bad faith at the time of acquiring ownership. Further, the vendee purchasing the article at "public auction" and in good faith acquires an impeachable title.

The Japanese Civil Code is generally modelled after German Civil Code but it grants better protection to the bonafide purchaser. If a sale has taken place by auction in a public market or from the trade dealing with goods of same kind, the owner of the stolen article cannot recover it unless he repays the price paid by the possessor.

179. Art. 890. 180. German Civil Code Art. 932 (1)
181. Bad faith arises when there is gross negligence on the part of transferee or defect of title of his transferor is known to him.
182. Supra n. 180 Art. 932 (2)
183. Public auctions in Germany are equivalent to execution sales in India and England.
184. Japanese Civil Code Art. 194
Thus, it will be noticed that the rights of a bonafide purchaser for value in market overt are recognised by almost all the civilised nations of the world for the reason that it is essential for proper growth of Commerce and protection of legitimate interest of the purchaser. However, no areas or localities are known as market overt in India. Hence, it is essential that sale by public auctions, execution sales and sale by dealers in a particular class of goods be protected under the rule of market overt.

In view of the above, it is suggested that a new section may be added which may read as follows:

(1) Where goods are sold by public auctions, or under execution sales or by dealers in a particular class of goods, the buyer acquired a good title, provided he purchases them in good faith, without notice of any defect or want of title on the part of seller.

185. Section 30A
(2) Notwithstanding any thing contained in this Act or any other law for the time-being in force, the buyer will not be deprived of subject matter or sale unless he is paid back his purchase price either by the seller or true owner of the goods as the case may be.

This will, it is hoped, go a long way in improving the lot of the buyer of goods in good faith. Of course bad faith buyers should not be encouraged to insist on the bargain. This will also include sale by bailees of goods.

186. Refer Section 148 of Indian Contract Act, 1872 on bailees of Goods.