

This principle of mutuality applies both in the case of immoveables and moveable.

Doctrine of mutuality— This means, that at the time of making of the contract, there must have been consideration on both sides or promises mutually enforceable by the parties. Hence specific of performace of a gratuitous promise under Seal will not be granted nor can an infant enforce a contract by this remedy. His promise is not enforceable against himself and it is a general principle of Courts of equity to interfere, only where the remedy is mutual.

Section 13

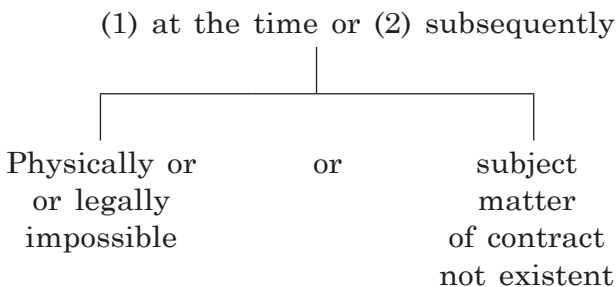
Specific performace of contract and impossibility of performance. *Section 56* of the Contract Act.

Section 56 clause 2 enacts a general rule. It lays down when a contract becomes void.

This rule covers every ground of impossibility and is based on the assumption, that there is, in all cases of contract, an implied condition that performance shall be possible.

Impossibility in relation to contract.

Impossibility



Subsequent Impossibility

Whether a party can be relieved upon discovery, subsequent impossibility depends upon—

- (i) Whether the contract is conditional or unconditional.
- (I) If unconditional— must perform
- (II) If conditional—on three circumstances
 - (i) Continuing legality.

(ii) Conditional by express terms—

(iii) Conditional by implication—continued existence of the subject-matter of the thing in Sec. 56 Contract Act.—subsequent in possibility—the Contract is *void*.

might on two grounds.—

(i) The thing agreed to is physically or legally impossible.

(ii) The subject matter of the contract is non-existent.

Such Impossibility might be either.—

(i) *Initial or subsequent*.

If impossible, the contract is void and no question of Specific Performance arises whether the impossibility is initial or subsequent.

Section 13 of the Specific Relief Act establishes an exception to *Section 56* of the Contract Act in respect of one species of impossibility i.e. *impossibility by reason of non-existence of the subject-matter*.

Section 13 says that Specific Performance of a contract may be enforced even though the subject-matter is partly destroyed.

Sale of a house—Destruction by cyclone—purchaser may be compelled to perform.

Section 13 enacts an exception

It deals with the case where a *portion* of the subject matter ceases to exist.

The rule shortly expressed.—

Because A, owing to special inevitable circumstances, is unable to perform his promise, it is no reason why B should not perform his, especially as he might have protected himself by making the performance of his promise conditional upon performance by A. Having made an unqualified promise he must stand by it.

Specific Performance of a Part of a Contract

Can the Court decree the performance of a part of the contract? This question is dealt with in *Section 14-17*.

Section 17 enacts a general rule. It lays that the Court will not, as a general rule, compel specific performance of a Contract, unless it can execute the whole contract. Specific performance must be of the whole or nothing.

Sections 14, 15, 16 form exceptions to the rule.

Exceptions: The promises undertaken—may be divisible or indivisible.

I. *Divisible promises* i.e. promises—one part stands on a separate and independent footing from another part. If the former can and might be specifically performed it will be so enforced, although the latter cannot or ought not to be specifically enforced—Section 16.

II. *Indivisible promises.*—The part which cannot be performed may—

- (i) Admit of compensation by money or,
- (ii) It may not.

(A) Admits of compensation—Two cases

It may bear—

- (i) A small proportion to the whole undertaking,
- (ii) A large proportion to the whole undertaking.

If—(i) it bears *a small proportion*, then a party sue for specific performance of either part and for damages for non-performance of the balance—Section 14.

If—(ii) it bears *a large proportion*, then the promise may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages.

(B) Part which cannot be performed, does not admit of compensation

Then the promisee may sue for Specific Performance of the remaining part, if he relinquishes all claim to further performance and all right to damages—Section 15.

Illustration

A contracts to sell to B an estate with a house and garden for 1 lakh. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden.

Can B obtain specific performance to the contract?—Yes, if B is willing to pay the price agreed upon and to take the estate and house without garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default.

There are *thus* four exceptions to the rule.

1. Where parts are divisible—Specific Performance can be decreed of one part though not of all parts—Section 16.

2. Where parts being in divisible part which *cannot* be performed admits of compensation and bears a small proportion to the whole, the party may sue for Specific Performance—Section 14.

3. Where parts being indivisible, part which *cannot* be performed admits of compensation and bears a large proportion to the whole undertaking, the promisee may sue for Specific Performance of the remaining i.e. of the part which can be performed provided he relinquishes all claim to further performance and all right to damages—Section 15.

4. Where parts being indivisible, the part which cannot be performed does not admit of compensation and bears a large Specific Performance of the part which can be performed may be decreed within the terms mentioned in Section 15.

Specific Performance of a Contract

Where the Vendor or Lessor has an

Imperfect Title

1. The rule as to this is contained in Section 18. This Section deals with four clauses:—

(i) Where Vendor/Lessor has acquired good title *after* the contract.

(ii) Where procuring of the consent of other persons is necessary.

(iii) Where encumbered property is sold as though it was unencumbered.

(iv) Where *deposit* has been paid and the suit for Specific Performance has been dismissed.

Clause (a).—Is based on the undeniable proposition that when a person enters into a contract without the power of performing that contract, and subsequently acquires the power of performing that contract, he is bound to do so.

Illus. An heir apparent, who contracts to sell the property to which he is heir, will be compelled to specifically perform such contract if and when he succeeds to the property.

Whatever interest the seller acquires in the property subsequently to the contract, he will be compelled to convey to the purchaser.

Clause (b).—Is based upon the proposition that where the validity of a contract is dependent upon the concurrence of a stranger to the contract, and the stranger to the contract is bound to convey at the request of the Vendor or lessor, the Vendee and the lessee can compel him to obtain such concurrence.

Clause (c).—Is based upon the proposition that where the property sold or leased is represented as being free from encumbrance but is *encumbered*, the Vendor shall be compelled to free it from encumbrance sale of property which is mortgaged—Provided the price is not above the mortgage money.

Clause (d).—Clauses (a), (b) and (c) cover cases where the purchaser or lessee is the plaintiff suing for perfection of title.

Clause (d) covers a case where the suit is brought by the Vendor or lessor for Specific Performance and it fails because of his not being able to perfect the title.

In such a case the Court cannot only dismiss the suit with costs, but proceeds to award to the defendant purchaser a special relief *viz*—the return of his deposit with interest and his cost and a lien for all these on the property agreed to be sold or let.

General Rule regarding deposit.—Deposit is paid as a guarantee for the performance of the contract and where the contract fails by reason of the default of the purchaser, the vendor is entitled to retain the deposit.

Rights of Parties to a Contract to sue for Specific Performance

Four cases to be considered:—

- I. For whom contracts may be specifically enforced.
- II. For whom contracts cannot be specifically enforced.
- III. Against whom contracts may be specifically enforced.
- IV. Against whom contracts cannot be specifically enforced.

I. For whom contracts may be specifically enforced.

Section 23 deals with the question Who may obtain *Specific Performance* ?

Clause (a) any party thereto.

Clause (b) (i) an assignee from a promisee.

(ii) Legal representative of a promisee after his death.

(iii) an undisclosed principal of a promisee.

Each of these may obtain Specific Performance of a contract in which he is interested, but each is subject to the proviso that the contract must not be a personal one, nor must the contract prohibit the assignment of the interest of the Promisee.

(c) Persons entitled to the benefit of a marriage contract or compromise of doubtful rights between members of the same family.

(d) Remainder man on a contract made by a tenant for life.

(e) Reversioner in possession.

(f) Reversioner in remainder.

(g) New company on amalgamation.

(h) Company on a contract made by the promoters.

Cases where contract cannot be specifically enforced except by varying it—Sec. 76.

(1) By mistake or fraud the contract is in terms different from that which the Deft, supposed it to be.

(2) Deft, entered into contract under a reasonable misapprehension as to its effect between Deft, and Plff.

(3) Enters into a contract relying upon some misrepresentation by the Plff.

(4) Where the object is to produce a certain result which the contract fails to produce.

(5) Where Parties have agreed to vary it.

Comment.

Sections 91, 92. Evidence Act.— A plff. cannot give oral evidence to make out a variation. It does not debar a deft, from showing that by reason of fraud or misrepresentation, the writing does not contain the whole contract; he can under provision 1 to S. 92 give oral evidence to prove that there is variation.

Plff. in that case cannot have a decree unless he submits to the variation; the Plff. is put on his election either (1) to have his action for Specific Performance dismissed or (2) have it subject to variation. If he elects not to accept the variation, he does not lose his remedy of damages.

II. Persons for whom contracts *cannot* be specifically enforced. This is dealt with in Sections 24 and 25.

Section 24

- (i) Who could not recover compensation for its breach.
- (ii) Who has become incapable of performing or violates any essential term of the contract.
- (iii) Who has already chosen his remedy and obtain satisfaction for the alleged breach.
- (iv) Who, previously to the contract had notice that a settlement had been made and was in force.

This Section is distinguishable from Section 23 in that the defence to Specific Performance is not founded on anything *in the contract itself* but is based solely upon the *acts or conduct* of the Plff.

Section 24 is a general Section. While Section 25 is a Section which is a particular one and is limited in its application to two kinds of contracts only:—

(i) Contract to sale and (ii) Contract to let property whether movable and immovable,

Sec. 25 says that such a contract cannot be specifically enforced in favour a Vendor or Lessor, i. e. in the following cases:—

- (i) Knowing not to have any title to the property, has contracted to sell or let the same.
- (ii) Who cannot give a title free from reasonable doubt at the date fixed by parties or Court.
- (iii) Who, previous to entering into the Contract has made a settlement of the subject-matter of the contract.

Settlement is defined in Section 3 and means any instrument—where by the destination or devolution. Successive interests in movable and immovable property is disposed of or is agreed to be disposed of.

III. Persons against whom contract may be enforced

Section 27.

- (i) Either party.
- (ii) Any other person claiming under a party by a title arising subsequently to the Contract, [except a transferee for value without notice].
- (iii) Any person claiming under a title which prior to the contract voidable and known to the plaintiff, and might have been displaced by the defendant.
- (iv) New company after amalgamation.
- (v) Company in respect of the contract made by promoters.

IV. Against whom contract cannot be enforced

Section 28.

- (i) Where consideration is grossly inadequate as to be evidence of fraud.
- (ii) Where assent is obtained through misrepresentation; unfair practice or other promise not fulfilled.
- (iii) Where assent is given under the influence of mistake of fact, misapprehension or surprise.

Specific Performance and Discretion of the Court

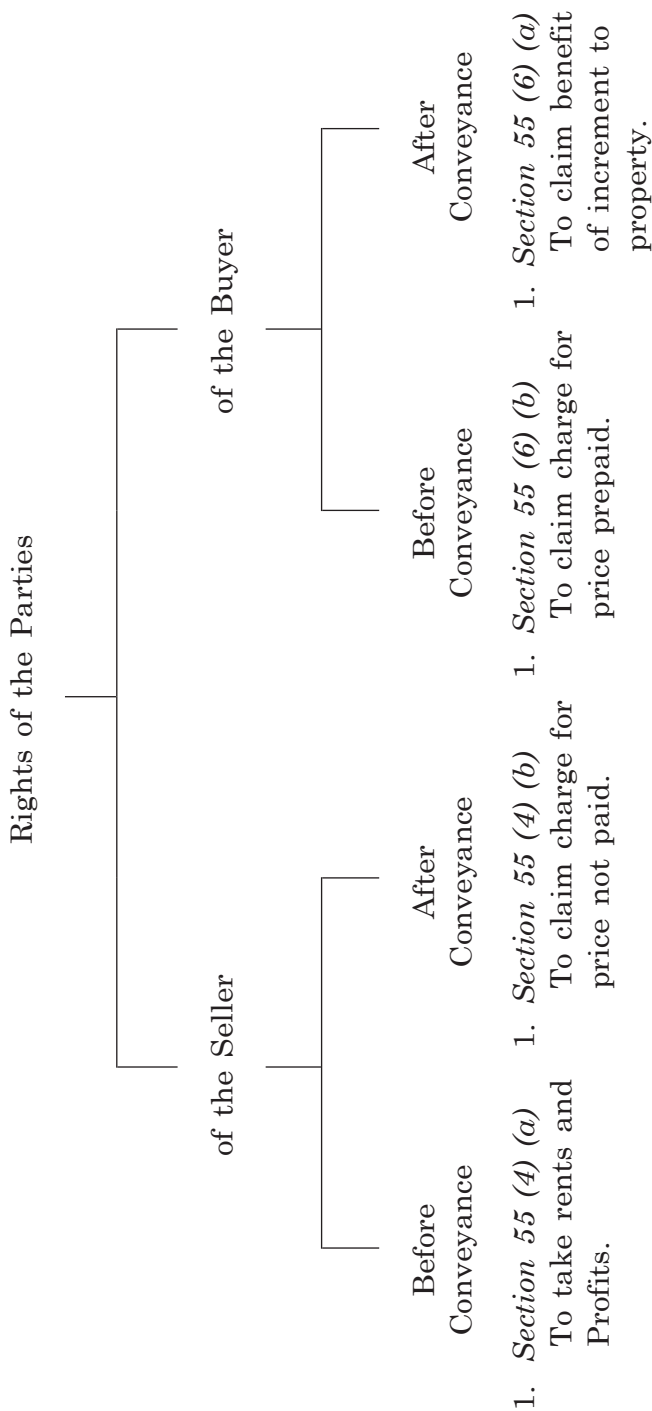
In granting Specific Relief, the important point is—When is the Court bound to grant Specific Performance Relief? Obviously the Court cannot grant Specific Performance Relief in cases where the law provides that no Specific Performance Relief shall be granted. Such cases fall under three classes:

- (i) Where the nature of the contract is such that law does not allow it to be specifically enforced.
- (ii) Where the Plff. is a person in whose favour a contract cannot be specifically enforced.
- (iii) Where the Deft. is a person against whom a contract cannot be specifically enforced.

There remain the following three cases in which a contract can be specifically enforced:—

- (i) Where the contract is of such a (*further pages not found—ed.*)

Liabilities of the parties			
of the seller		of the buyer	
Before Conveyance	After Conveyance	Before Conveyance	After Conveyance
1. <i>Section 55 (1) (a)</i> To disclose material defects.	1. <i>Section 55 (1) (b)</i> To give possession.	1. <i>Section 55 (5) (a)</i> To disclose facts materially increasing value.	1. <i>Section 55 (5) (c)</i> To bear loss or injury to property.
2. <i>Section 55 (1)(b)</i> To produce title deeds.	2. <i>Section 55 (2)</i> Implied covenant for title.	2. <i>Section 55 (5) (b)</i> To pay price.	2. <i>Section 55(5) (d)</i> To pay outgoing.
3. <i>Section 55 (1) (c)</i> To answer questions as to title.	3. <i>Section 55 (3)</i> To deliver title deed on receipt of price.		
4. <i>Section 55 (1) (d)</i> To execute conveyance.			
5. <i>Section 55 (1) (e)</i> To take care of property.			
6. <i>Section 55 (1) (g)</i> To pay outgoing.			



Uberrima fides= (most abundant faith)

Contracts said to require *uberrima fides* are those between persons in a particular relationship, as

- (i) Guardian and ward.
- (ii) Attorney and client.
- (iii) Physician and patient.
- (iv) Confessor and penitent.

Complete disclosure necessary.

● ●

Liabilities of the Parties

A. Liabilities of the Seller

I. BEFORE CONVEYANCE

1. SECTION 55 (1) (A)—TO DISCLOSE MATERIAL DEFECTS.

(1) A contract for the sale of land is not a contract *uberrimal fidei*: The duty of disclosure is not absolute. *The duty to disclose is an obligation to disclose latent defects.*

(2) A latent defect is a defect which the buyer could not with ordinary care discover for himself. There is no duty to disclose defects of which the buyer has actual or constructive notice.

(3) As to patent defects of which the seller is unaware, the maxim *caveat emptor* applies. But a mutual mistake as to a matter of fact essential to the agreement will render the agreement void.

(4) *A latent defect whether of property or of title must be material.* A defect to be material must be of such a nature that it might be reasonably supposed that if the buyer had been aware of it, he might not have entered into the contract at all, for he would be getting something different from what he contracted to buy.

(5) Whether a defect is material or not must depend upon the circumstances of each case. When land was sold for building purposes, an underground drain was held to be a material defect, but not when a house or land were sold mainly for residence.

(6) Defects may be Defects in property or Defects in tide.

2. SECTION 55 (1) (B)—PRODUCTION OF TITLE DEEDS

(1) The obligation is to produce title-deeds for inspection and not for delivery.

(2) The documents of title required to be produced for inspection are not only documents which are in the possession of the seller, but also includes documents which are in his power to produce.

(3) There is no obligation *to produce* title deeds unless the buyer makes a requisition.

(4) The Buyer however must not omit to take inspection, otherwise he will be held to have constructive notice of matters which he would have discovered if he had investigated the title.

3. SECTION 55 (1) (c)—SELLERS DUTY TO ANSWER QUESTIONS

(i) When the documents of title are produced, the buyer examines them and if he is not satisfied makes requisitions. These requisitions are.—

- (i) Requisitions relating to title.
- (ii) Requisitions relating to Conveyance.
- (iii) Other enquiries.

(2) Requisitions on title are objections that the documents do not show the agreed title or that the documents are not efficacious i.e. not duly attested.

(3) Requisitions on matters relating to conveyance refer to such matters as the joinder or concurrence of parties to the conveyance.

(4) Inquiries are for the protection of the buyer, and call attention to possible omissions of disclosure by the seller, and seek information on such points as easements, party walls and insurance.

(5) The Seller is bound to answer all requisitions which are relevant to the title and which are specific.

(6) The duty to answer requisitions is altogether distinct from the duty of disclosure under Section 55 (1) (a) of a defect, for, the omission of the buyer to make a requisition will not absolve the seller if he has not made a full disclosure.

(7) A buyer may waive requisitions. Waiver may be express or may be implied.

(8) Waiver is implied from conduct.

- (i) When a buyer does not press a requisition that has been made.
- (ii) When a buyer asks for time to pay the price.
- (iii) When a buyer enters into possession.
- (iv) When a buyer pays the whole or part of the price.

4. SECTION 55 (1) (D)—EXECUTION OF CONVEYANCE

(1) The execution may be to the purchaser or to such person as the purchaser shall direct. Consequently, on a resale by the buyer before conveyance, the conveyance may be direct to the sub-purchaser. The seller may require the original buyer to be a party to the Conveyance if there is a difference of price but not otherwise.

(2) It is the duty of the buyer to tender to the seller a proper draft—*31 Cal. L.J. 87*.

(3) This duty of the buyer is subject to a contract to the contrary.

(4) The execution of the conveyance and the payment of price are reciprocal duties to be performed simultaneously. They are concurrent promises. If either party sues for specific performance, he must show that he was ready and willing to perform his part.

(5) *Proper time for execution:—*

(i) The section is silent as to what is proper time.

(ii) The time is usually settled by the contract of sale.

(iii) If time is fixed, and an unreasonable delay occurs, the proper course is to give notice making time the essence of the contract.

(iv) If time is not settled, the proper time is the date when the seller makes out his title.

(6) *Proper place for execution:—*

(i) The Section is silent.

(ii) Since it is the buyer who has to tender the draft conveyance to the seller, the proper place for execution would be the Seller's residence or his Solicitor's office.

(7) *Cost of Conveyance :—*

(i) The Section is silent.

(ii) This is usually settled by the terms of the contract.

(iii) In the absence of any express term, the buyer has to pay the cost of the Stamp—Section 29 (c) Indian Stamp Act.

5. SECTION 55 (1) (E)—CARE OF PROPERTY

(1) The contract of sale does not give to the buyer any interest in property. But it imposes upon the seller a personal obligation to take care of the property.

(2) The seller must also take care of the title deeds. The loss of title deeds depreciates the value of the property and damage done to the estate.

(3) To take care means to do what a prudent owner ought to and keep the property in reasonable repair and protect it from injury by trespassers.

(4) The obligation to take care is one collateral to the contract and does not merge in the conveyance. The duty to take care continues even after completion of the sale and the buyer is not responsible for any loss caused by the seller. If the seller neglects his duty, the buyer is entitled to compensation to be deducted from the purchase money; after the completion the buyer may recover damages.

6. SECTION 55 (1) (G)—MEET OUTGOINGS

(1) It is the duty of the seller to pay what are called under English Law outgoings. In India they include—

- (i) Public Charges
- (ii) Rent
- (iii) Interest
- (iv) Incumbrances.

(i) Public charges over

- (i) Government Revenue.
- (ii) Municipal Taxes.
- (iii) Payment charged upon land by Statute either expressly or impliedly by reason of their being recoverable by distress or other process against the land.

(ii) Rent—The payment of rent is a question which arises when the property sold is leasehold property. The seller of the leasehold property is bound to pay rents accruing due up to the date of the sale.

(iii) Interest.

(5) Incumbrance—

(i) Incumbrance means—a claim, lien, or liability attached to the property.

(ii) The seller's duty is to discharge all incumbrances. It is immaterial that the buyer was aware of the incumbrances when he contracted to buy.

(iii) The sale is not subject to incumbrances, unless there is an express provision to that effect.

(iv) If the incumbrance is a common charge on the property sold and other properties of the seller, the buyer may insist on its being discharged out of the other property.

(6) This liability imposed upon the seller is collateral to the contract and may be enforced even after conveyance.

Seller's Liabilities**II. AFTER CONVEYANCE****1. Section 55(1)(b)—To give possession**

1. It is the duty of the seller to give possession after conveyance and not to leave the buyer to get possession for himself.

2. This liability may be enforced by a suit for Specific Performance.

3. Time for giving possession—

(i) The Section does not say when the seller should give possession.

(ii) Reference to Section 55 (4) (a) shows that possession be given when ownership passes to the buyer. This would be at the time of the execution of the sale-deed—6 *Lah.* 308.

(iii) The seller cannot refuse possession because price has not been paid unless there was intention to the contrary.

(iv) The buyer's right to possession and the seller's right to unpaid price may be enforced in the same suit.

4. Nature of Possession—

(i) Possession does not mean actual occupation.

(ii) Physical possession in the case of tangible and symbolical possession in the case of intangible property is enough.

(iii) Symbolical possession is enough in the case of property which is in the possession of tenants or mortgagees.

2. *Section 55 (2)—To assure that the interest subsists.*

1. There are two views as to whether this liability of the seller is one which arises before conveyance or after conveyance.

(i) *Calcutta view*. This clause contemplates a *completed contract* and corresponds to covenant for title in an English conveyance.

57 Cal. 1189.

(ii) *Madras view*. This clause contemplates cases, where the transaction has not progressed beyond the stage of contract. *40 Mad. 338(350)*:

38 Mad. 1171.

(iii) *Lahore view*. Follows Madras.

6 Lah. 308.

(iv) *Bombay view*. It pertains to liability *after conveyance*

18 Bom. S. R. 292; 52 Bom. 883; 31 Bom. LR. 658.

(a) The provisions of Section 55 (1) enable the buyer before completion, to ascertain if the title offered is free from reasonable doubt. Once he has accepted the conveyance and the sale is completed, he has no remedy on the contract except for fraud.

(b) The covenant for title implied by Section 55 (2) gives the buyer a further remedy in case of defects discovered after conveyance.

(v) Another view which probably is the correct view.

(a) In the matter of Title, the liability of the seller is twofold.

(i) He must pass to the buyer a title free from reasonable doubt.

(ii) He must pass to the buyer a title which he professes to pass and nothing less. He must make good his representation.

Under (i) he must prove that he has acquired his title in any one of the recognized ways: such as prescription, possession, inheritance, purchase, etc.

Under (ii) if he professes to transfer a full proprietary interest, then interest transferred must be full proprietary interest and not merely occupancy interest: Sale of free from incumbrances land which is subject to incumbrance : Sale of non-transferable land as transferable.

(b) Section 55 (1) relates to liability for a title free from reasonable doubt: Section 55 (2) relates to liability for passing title which he professed to pass.

2. Section 55 (2) relates to misrepresentation or misdescription as to title. A distinction must be made between misdescription of title and misdescription of property.

(i) Misdescription of title is a breach of the covenant for title under Section 55 (2) and gives right to damages.

(ii) Covenant for title does, not extend to misdescription of property i.e. as to the extent of the land sold.

(iii) A covenant for title is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed. It is merely a contract with the purchaser of the validity of the sellers' title. Consequently if the purchaser finds a deficiency in area his, suit must be based not on the covenant for title, but for part failure of consideration.

3. Express covenant for title. Every conveyancer has an implied covenant for title. But parties may enter into an express covenant relating to title. The points to be noted in regard to an express covenant are:

(a) If overrides and does away with the effect of all implied covenants.

(b) Although an express covenant alone can govern the rights of the parties, yet an implied covenant cannot be got rid of except by *clear* and *unambiguous* expression.

4. *Who can claim the benefit of the covenant:* The benefit of a covenant for title can be enjoyed not only by the purchaser and his representatives, but also subsequent alienees, who claim under the purchaser, can enforce it as against the seller.

5. Under this clause the vendor is presumed to guarantee his title absolutely to the property. If he wishes to contact himself out of the covenant he must do so expressly or by necessary implication.

6. The implied covenant for title has nothing to do with the question, whether the buyer has or has not notice of the defect of title and the buyer's knowledge of the defect does not deprive him of the right to sue for damages and can claim a return of the purchase-money if he is dispossessed by reason of a defect in title.

7. *Covenant for title—what does it include.* The covenants for title implied in an English conveyance, include.—

(i) Right to convey,

(ii) Right to quiet enjoyment,

(iii) Right to hold free from incumbrances,

(iv) Right to further assurance.

Under the covenant for further assurance, the seller is bound to do such further acts for perfecting the buyer's title as the latter may reasonably require. Thus, if a seller has, after the sale perfected an imperfect title by the purchase of an outstanding interest, he can under this covenant, be compelled to convey it to the buyer.

(2) The English covenants are more extensive as they include the covenant for quiet enjoyment, for freedom from incumbrances and for further assurance. Under Indian Law they are not included.

8. Covenant for title is a covenant for a title free from reasonable doubt. It has been held by the Privy Council that an absolute warranty of title cannot be insisted upon by the purchaser. *9 I. A. 700 (713)*.

9. The implied covenant for title does not apply in the case of a trustee :

(i) A trustee is only deemed to covenant that he has done no act whereby the property is incumbered, or that whereby he is hindered from transferring.

(ii) If a trustee conveys without disclosing his fiduciary character, he could no doubt be required to convey "as beneficial owner" so as to become subject to the usual covenants for title.

10. The implied covenant for title does not apply in the case of a guardian selling on behalf of the minor.



