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SOME PHASES OF CONDITIONS AND WAR- RANTIES IN THE LAW OF SALES OF GOODS.

CONDITIONS.

In the early days of the common law, sales of chattels were absolute. The only purpose of a sale was to transfer the ownership of a chattel from one person to another. This was effected by delivery of the possession of an existing, specified chattel.¹ Sales of goods were for cash or by barter. The buyer always had the privilege of inspection, and the rule of *caveat emptor* was rigorously applied. It doubtless often occurred that the seller of an article had no title to convey; that the buyer's inspection failed to disclose the defective quality of the thing sold; or that the thing was unfit for the use intended. In such cases a transfer of the ownership of the chattel did not effectuate the intent of the parties or secure to the buyer a fulfillment of his real purpose. So, the courts, in the interest of trade and fair dealing, early began to recognize exceptions to the rule of *caveat emptor*, and to raise obligations by implication, especially on the part of the seller, which they called implied warranties. Again, it is obvious that frequently a transfer of a chattel would be desired only in the event of the happening of a certain thing, or on condition that it might be returned, if not satisfactory to the buyer. For example: A desires to purchase B's horse, but A desires also that the horse be first prop-

¹2 Pollock and Maitland's Hist. of Eng. Law, 179.

erly shod, and that the horse may be returned to B within thirty days, if A be not elected a member of the Royal Hunting Club; and, furthermore, A being mistrustful of his own judgment wants B to promise specially that the horse is sound and suitable for use in hunting. The primary obligation of A's proposed contract of purchase is the transfer of the general property in the horse, but he wishes to condition the obligation and to protect himself by a collateral agreement. Stipulations in a contract of a sale of goods which modify, suspend or rescind the principal obligation are either conditions or warranties.

There is a marked difference between a condition and a warranty both as to their nature and their effect upon the primary obligation of a contract of sale; and yet it is often difficult to determine whether a clause in a contract of sale is one or the other. This difficulty is ascribable to the confusion caused by some courts calling various stipulations conditions, other courts calling them warranties; while still other courts seem to use the words condition and warranty as synonyms. Thus, that an article shall conform to the description under which it was sold is held to be, in this country, by a decisive preponderance of authority, a warranty;² in England, and some of our states, a condition.³ In the case of a sale of five hundred tons of pig iron to be shipped from Glasgow, the court said that the stipulation, "to be shipped from Glasgow" was a warranty or a condition precedent;⁴ but in another case the court recognizes that conditions and warranties are not the same in the statement that a certain provision is not "a mere warranty but a condition precedent."⁵ And it has been decided that certain stipulations in a contract of sale were both conditions and warranties; that is, the buyer could regard them as conditions and refuse the goods, or he could waive them as conditions by

² Gould vs. Stein, 149 Mass. 570, 22 N. E. 47; Whittaker vs. McCormick, 6 Mo. App. 114; Hawkens vs. Pemberton, 51 N. Y. 198; Cordage Co. vs. Rice, 5 N. D. 432, 67 N. W. 298; Fogel vs. Brubaker, 122 Pa. 7; Sales Act, Sec. 14.

³ Nichols vs. Godts, 10 Ex. 191; 23 L. J., Ex. 314; Shand vs. Bowes, 2 App. Cas. 455; Chanter vs. Hopkins, 4 M. & W. 399; Sales of Goods Act, Sec. 13; Fogg's Adm'r vs. Rodgers, 84 Ky. 588; Columbian Iron Works vs. Douglas, 84 Md. 44; Patrick vs. Lumber Co., 81 Neb. 267, 115 N. W. 780; Springfield Shingle Co. vs. Edgcomb Mill Co., 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (N. S.) 258; and Wolcott vs. Mount, 36 N. J. L. 262, in which the court said: "It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy by rescission, than he would have on a simple warranty."

⁴ Filley vs. Pope, 115 U. S. 213. See also Norrington vs. Wright, 115 U. S. 188, where the same expression occurs.

⁵ Pope vs. Allis, 115 U. S. 363.

accepting the goods and treat the stipulations as warranties.⁶ Some of this confusion has been eliminated by arbitrary legislative pronouncement as to what stipulations shall be conditions and what shall be warranties;⁷ and the remainder of the confusion would soon disappear if the fundamental distinction between a condition and a warranty were observed by the courts generally. Indeed, the greatest uniformity, simplicity and certainty in the law of this topic would be attained by the adoption of the view that all collateral promises in contracts of sales should be distinguished from true, or contingent, conditions, and be treated alike as to interpretation, effects and remedies. In our American Sales Act, and Prof. Williston's profound and scholarly exposition of it, a promise in relation to goods sold is never treated as a condition.⁸

The term condition was very likely imported into the law of sales of goods from the law of conveyancing,⁹ and it is to the decisions relating to wills, deeds and leases, that one may turn for able discussions of conditions and expositions of the legal principles underlying them. Conditions in sales of goods are identical in form and essence with conditions in sales of land and other forms of contract, and there is no reason why they should not be construed by the same rules of interpretation and be given the same legal effect.

A condition is something which is to happen or be performed by one party to a contract of sale as a prerequisite to a right to performance by the other; or as a prerequisite to the right of retention of the fruits of a performance by the other. It is a substantive part of the contract of sale, and not a representation or an independent agreement.¹⁰ Conditions are often spoken of as collateral provisions or stipulations; but this is not quite accurate, for neither the main obligation nor the condition can survive their disassociation. A condition is a vital part of the sale, and a buyer or seller is as much bound by it as by any other part of his bargain.¹¹

Conditions are, as to form, express or implied; as to their nature, contingent or promissory; as to time of occurrence or performance, precedent and subsequent. They have also been classified with respect

⁶ *Accumulator Co. vs. Dubuque St. Ry. Co.*, 64 Fed. 70; 12 C. C. A. 37.

⁷ See the English Sale of Goods Act, Sec. 11.

⁸ Williston on Sales, Sec. 180, n. 6.

⁹ *Chalmer's Sale of Goods Act*, (5th ed.) 174.

¹⁰ *Davison vs. Von Lingon*, 113 U. S. 40.

¹¹ *Smith vs. Brady*, 17 N. Y. 173.

to remedies for their non-fulfilment, as follows: First, those which are available as defenses, but not as causes of action; second, those available to the party in whose favor they were made, as defenses, or as causes of action; third, those which are never available as defenses to the primary obligation, but are causes of action for damages only.¹²

A contingent condition in a contract of sale is a casual event, or something which will or will not happen independently of the power or will of the buyer or seller. A has a cow with calf, and B obligates himself to take the calf when dropped and pay fifty dollars therefor, *if it be a heifer calf*. This sale is contingent on the sex of the calf, a thing beyond the control of the parties. The condition suspends the obligation of each party to the contract until the condition is fulfilled; and if it be not fulfilled, the contract becomes a nullity, and neither party can maintain an action against the other. A more classical illustration of a contingent condition is the case of the sale of thirty-two tons of hemp on arrival per ship Fannie. In this sale there were two such conditions, namely, the arrival of the ship, and the hemp on board.¹³ When the price of goods is to be fixed by a third person, action by him in that regard is a contingent condition, and if he refuse to fix the price, there will be no sale.¹⁴ So, in the case of a sale of two hundred tons of potatoes to be raised on a certain sufficient piece of ground, but which quantity was short eighty tons because of a potato blight, it was held that the growth of the potatoes was a condition of the seller's liability for non-delivery.¹⁵

A promissory condition is a promise which, until performed, suspends, modifies or rescinds the contract of sale. A offers to B for sale a fire proof office safe, which B agrees to buy, if A will paint B's name on the safe in gold letters free of charge, to which A assents. In such a contract of sale there are two obligations, one, called the main obligation, which binds A to transfer the general property in the safe to B, and binds B to accept and pay for the safe; and another, called the collateral obligation, which binds A to paint B's name as above stated. These two obligations are indissolubly connected, and A's failure to perform his collateral promise will excuse B's rejection of the safe, if delivered, and will also enable him to sue A for damages for a breach of his obligation to furnish the safe

¹² Burdick on Sales, (2nd ed.) 87.

¹³ Boyd vs. Siffkin, 2 Camp. 326.

¹⁴ Fuller vs. Bean, 34 N. H. 290; Davis vs. Davis, 49 Mo., 282.

¹⁵ Howell vs. Coupland, L. R. 92 B, 462; Dexter vs. Norton, 47 N. Y. 62.

contracted for, namely, the safe with B's name painted thereon in gold letters. Contingent conditions may not be waived by one party without the consent of the other; but promissory conditions may be waived by him in whose favor they were made, and he may then call for the performance of the main obligation. The chief distinction, however, between contingent and promissory conditions is that the latter, if unperformed, are not only a defense to him entitled to performance, but are also a basic part of his cause of action for damages.

A promissory condition should be carefully distinguished from a warranty. Every collateral engagement which is an integral and essential part of the contract of sale, and is not in itself a cause of action, is a promissory condition; while every engagement collateral to the main obligation which is not so indissolubly united with it but that it may, if unperformed, constitute a cause of action in itself, is a warranty. The difference between promissory conditions and warranties will be more obvious on a consideration of warranties in the second part of this paper.¹⁶

Again, the main obligation should not be mistaken for a promissory condition. It is often said that there is an implied warranty or condition that the buyer shall receive the precise thing purchased. If there be a sale of a specific, designated article, and some other article be delivered, the substitution is a breach, not of a condition or warranty, but of the primary contract.¹⁷ The writer submits that the same is true in sales by description. If one buy by description and an article of a different description is supplied, the main obligation is broken. "If a man offers to buy peas of another and he send him beans, he does not perform his contract, but that is not a warranty; there is no warranty that he should sell him peas, the contract is to sell peas, and if he sell him anything else in their stead, it is non-performance of it."¹⁸ Promissory conditions are declared by Professor Williston to be promises only and not true conditions, and, if not performed, should be treated like other broken promises.¹⁹ There is no reason apparent to the writer why a promise and performance of it may not be a condition as well as a casual or natural event, and

¹⁶ See *Williams vs. Robb*, 104 Mich. 242, 62 N. W. 352, as to the difference between a condition and a warranty.

¹⁷ *Columbian Iron Works vs. Douglas*, 84 Md. 44.

¹⁸ This famous illustration now widely quoted was given by Lord Abinger in *Chantry vs. Hopkins*, 4 M. & W. 399, with respect to warranties. It is equally pertinent to promissory conditions.

¹⁹ Williston on Sales, Sec. 179.

be attended by the same consequences. If the courts would unite in granting the same remedies for broken warranties and unfulfilled promissory conditions, the law in the application and practice of it would be greatly simplified; but even in such an event, it would still be necessary to determine whether collateral engagements would, if broken, justify rescission of the primary contract, or be only causes of action for damages.

A condition precedent is something that is to happen, or a promise that is to be performed by the plaintiff before the accruing of the defendant's liability under his contract.²⁰ It calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect.²¹ Such a condition fixes the beginning of a right, and performance or happening of the condition secures the subject matter of it. Ordinarily conditions precedent are precedent to the passing of the property in the goods bargained for; but they may be precedent to the buyer's right to possession after title has passed, or to the seller's right to the purchase price. Sales on approval, or to the buyer's satisfaction,²² and delivery by the seller at a designated place,²³ are common illustrations of such conditions. One who is to perform a condition precedent can not maintain an action against the other party without pleading and proving performance on his part.²⁴

A condition subsequent relates to a future event or performance, upon the non-happening of which the obligation ceases to be binding on that party who may avail himself of the benefit of the condition, if he choose to do so.²⁵ A condition subsequent, if performed, terminates a right in one party and makes it absolute in the other.²⁶ A condition subsequent is quite invariably subsequent to a transfer of the property in the goods sold, and on the happening or not happening of the condition as the case may be, the property reverts in

²⁰ 2 Chitty on Contracts, (11th ed.) 1083.

²¹ 8 Cyc. 558.

²² O'Donnell vs. Wing, 121 Ga. 717; Mowbray vs. Cady, 40 Ia. 604; Osborne & Co. vs. Francis, 38 W. Va. 312.

²³ Savage Manf. Co. vs. Armstrong, 19 Me. 147.

²⁴ Gouverneur vs. Tillotson, 3 Edw. (chanc.) 348; Wiley vs. Athol, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342.

²⁵ Words and Phrases, 1402.

²⁶ Redman vs. Insurance Co., 49 Wis. 431; 4 N. W. 591.

the seller, the risk in the meantime being in the buyer.²⁷ A common example of a condition subsequent is found in a sale or return.²⁸

A condition may present a double aspect, being both precedent and subsequent. Thus in a sale of goods with reservation of title in the seller as security for the payment of the purchase price, and possession in the buyer, payment according to the terms of the contract is a condition precedent to the vesting of title in the buyer, and subsequent as to the buyer's right of possession.

Whether a condition be precedent or subsequent is determined by the intent of the parties making it. The best evidence of intent is the terms of the contract which relate to the character of the condition; but intent of the parties may also be gathered from the circumstances and purpose of the transaction, and from the application of common sense to each particular case.²⁹ In the absence of direct evidence the law supplies presumptions of intent. Thus, if any part of a defendant's promise is to be performed on a day that must or may occur before the time fixed for plaintiff's performance, then performance by defendant is a condition precedent to performance by plaintiff, and plaintiff may recover without proving performance or tender of performance³⁰ on his part. For example, plaintiff agreed to convey to defendant a certain tract of land when paid for, payment to be made in four years, with interest payable semi-annually. In an action for the first installment of interest it was held that plaintiff could recover without a tender of a deed.³¹ If in such a case, however, it should appear that defendant relied on conveyance rather than on the promise to convey, then payment of the interest sued for and conveyance would have been mutual conditions, and neither party could maintain an action against the other without having tendered performance.³²

²⁷ *Strauss Saddlery Co. vs. Kingman & Co.*, 42 Mo. App. 208; *Sturm vs. Boker*, 150 U. S. 312.

²⁸ *Gay vs. Dare*, 103 Cal. 454; *Scroggin vs. Wood*, 87 Ia. 497; *Foley vs. Falrath*, 98 Ala. 176; *State vs. Bets*, 207 Mo. 589; *House vs. Beak*, 141 Ill. 290; ³⁰ N. E. 1065.

²⁹ *Griggs vs. Moors*, 168 Mass. 354; *Leonard vs. Dyer*, 26 Conn. 172.

³⁰ The word tender as here used does not mean the same kind of offer as when it is used with reference to the payment or offer to pay an ordinary debt due to a creditor. "It only means a readiness and willingness, accompanied with an ability on the part of one of the parties, to do the acts which the agreement requires him to perform, provided the other will concurrently do the things which he is required by it to do, and a notice by the former to the latter of such readiness." *Smith vs. Lewis*, 26 Conn. 110.

³¹ *Wilks vs. Smith*, 10 M. & W. 355.

³² *Larimore vs. Taylor*, 88 Mo. 661.

It is also a presumption of law that a promise which goes only to a part of the consideration for the defendant's promise will not be regarded as a condition precedent, if plaintiff's breach of such promise can be remedied by payment of damages. Plaintiff agreed to sell and ship to defendant ten car loads of barley, the sale being by sample, for seventy cents per bushel, on board of cars at shipping point. On receiving the first car load, defendant found that the barley was not equal to the sample, and refused to pay for it. Thereupon plaintiff declared the contract at an end and refused to ship the remaining nine car loads. In an action for the price of the first car load, the court decided that the contract was divisible and that defendant's promise to pay for the car load did not go to the whole consideration of the contract, and that non-payment of the first car load did not justify plaintiff's refusal to deliver the remainder of the barley.³³

Where the reliance of a promise is based on a remedy for damages for non-performance of a condition rather than on performance itself, performance will not be regarded as a condition precedent. A sold five hundred bales of cotton to B, he agreeing to pay one hundred dollars as part payment for each fifty bales procured by A, and to pay interest on delayed payments. In an action for non-delivery A defended on the ground that B failed to make payments. It was decided that payment by B was not a condition precedent to his right to the cotton, for A had agreed to accept interest as a remedy for B's failure to make payments when due.³⁴ When, however, time of performance of a condition is of the essence of a contract—and it is so in the contracts of merchants³⁵—the condition will be held to be precedent, even though the contract is severable, and payment of damages would suffice.³⁶

³³ Meyer vs. Wheeler, 65 Ia. 390; Hansen vs. Heating Company, 73 Ia. 77, 34 N. W. 495; Holt vs. United Security Life Ins. Co., 76 N. J. L. 585; 72 Atl. 301, 21 L. R. A. (N. S.) 691; Newton vs. Winchester, 16 Gray, 208; Bettini vs. Gye, 45 L. J. Q. B. 209; DeKay vs. Bliss, 120 N. Y. 91; Ritchie vs. Atkinson, 10 East. 295.

³⁴ Benj. on Sales, Sec. 562.

³⁵ Pope vs. Porter, 102 N. Y. 366; Norrington vs. Wright, 115 U. S. 188. At law the time fixed for the performance of a condition is deemed to be of the essence of the contract. Shinn vs. Roberts, 20 N. J. L. 435. Time is usually of the essence of an executory contract for the sale and delivery of goods, where no right of property in the same passes on the bargain from the vendor to the purchaser. Jones vs. United States, 96 U. S. 24; 24 L. Ed. 644.

³⁶ Roberts vs. Brett, 18 C. B. 561; 11 Eng. Reprint, 1363; 84 E. C. L. 533; Tompkins vs. Elliot, 5 Wend. 496.

A condition precedent may change to a warranty. "Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet if he has received and accepted a substantial part of that which was to be performed in his favor, the condition precedent changes its character, and becomes a warranty or an independent agreement, affording no defense to an action, but giving a right to counterclaim for damages."³⁷ It is impossible to determine from the authorities just what will constitute a substantial performance. The true test ought to be, and very probably is, the inability of him who has received the benefit to rescind the contract because he cannot place the other party in *statu quo*.

That performance of a condition precedent may be waived by him entitled to it, is unquestioned law; as to what is the effect of such a waiver, the decisions are hopelessly contradictory. Some courts hold that when a buyer accepts goods which he might have rejected because of the seller's non-performance of a condition precedent, he waives the condition and with it a right to recoup or sue for damages;³⁸ for conditions precedent do not survive acceptance of the goods as do warranties.³⁹ Other courts, however, hold that a waiver of a condition changes it into a warranty with a consequent right to damages; in other words, a waiver of a condition in his favor by one party is not a performance of that condition by the other,⁴⁰ and damages may be had for such non-performance.⁴¹ The latter rule is sounder on principle, is approved by text writers, and is undoubtedly sup-

³⁷ *Morse vs. Moore*, 83 Me. 473; *Wiley vs. Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342; *Avery vs. Burrall*, 118 Mich. 672, 77 N. W. 272; *Swobe vs. Electric Light Co.*, 39 Neb. 586; *Morse vs. Union Stock Yards*, 21 Ore. 289, 28 Pac. 2, 14 L. R. A. 157; *Tacoma Coal Co. vs. Bradley*, 2 Wash. 600, 27 Pac. 454; *Kaufman vs. Roeder*, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247. In *Griggs vs. Moore*, 168 Mass. 363, the terms of the contract were such that the court refused to turn a condition precedent into a warranty, even though the plaintiff had performed a substantial part of his part of the contract.

³⁸ *Atkins & Co. vs. Cobb*, 56 Ga. 86; *Theater Co. vs. Sigel*, 221 Ill. 145, 77 N. E. 588; *Jones Bros. vs. McEwan*, 91 Ky. 374, 16 S. W. 81; *Lee vs. Bangs*, 43 Minn. 23, 44 N. W. 671; *McClure vs. Jefferson*, 85 Wis. 208, 54 N. W. 777; *Schopp vs. Taft & Co.*, 106 Ia. 612, 76 N. W. 843; *Henderson Elevator Co. vs. Milling Co.*, 126 Ga. 279, 55 S. E. 50; *Hazen vs. Wilhelmie*, 68 Neb. 79.

³⁹ *Maxwell vs. Lee*, 34 Minn. 511, 27 N. W. 196.

⁴⁰ *Mehurin vs. Stone*, 17 O. St. 49.

⁴¹ *Morse vs. Moore*, 83 Me. 473, 22 Atl. 362, 13 L. R. A. 224; *Brown vs. Weldon*, 99 Mo. 564; *St. Louis Brewing Ass'n vs. McEnroe*, 80 Mo. App. 429; *Redlands Orange Growers' Ass'n vs. Gorman*, 161 Mo. 203, 54 L. R. A. 718; *Cordage Co. vs. Rice*, 5 N. D. 432, 67 N. W. 298.

ported by a decided weight of authority.⁴² Where a condition may be waived without prejudice to an action for damages for its non-fulfillment, it is immaterial whether the action be based on a broken warranty or a breach of the original contract of sale.⁴³

Conditions have thus far been viewed in their relations to the primary obligation of the contract of sale, and may be now considered in their relations to each other under the head of dependent and independent conditions. A condition which is independent of the primary obligation is not a true condition, but a warranty; and therefore the descriptive words independent and dependent are used only in cases of mutual conditions.

Dependence or independence of conditions, as of covenants, is to be construed according to the intention of the parties.⁴⁴ Mutual conditions which are to be performed contemporaneously are dependent or concurrent;⁴⁵ if to be performed at different times, they are independent.⁴⁶ If promissory conditions are mutual and each goes to the whole consideration, they are dependent;⁴⁷ but if such a condition goes to a part only of the consideration, and a breach of it may be redressed by damages, the condition is independent.⁴⁸ A promissory condition with a penalty annexed is independent.⁴⁹ In cases of mutual dependent conditions neither party can maintain an action against the other until he has performed or tendered performance.⁵⁰ But if considerations and conditions are independent, although mutual, either party may recover damages for non-performance by the other, even though he himself has failed to perform on his part.⁵¹

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⁴² Mechem on Sales, Sec. 1393; Williston on Sales, Sec. 488, Sales Act, Sec. 49.

⁴³ Wolcott vs. Mount, 36 N. J. L. 262; Bagley vs. Cleveland Rolling Mill Co., 21 Fed. 159.

⁴⁴ Loud vs. Pomona Land Co., 153 U. S. 564; Griggs vs. Moors, 168 Mass. 354; Kaufman vs. Roeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Freeland vs. Mitchell, 8 Mo. 487.

⁴⁵ Pavell vs. Ry. Co., 12 Ore. 488, 8 Pac. 544; Phillips Construction Co. vs. Seymour, 91 U. S. 646. Justice Miller said: "Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual and are dependent, if they are to be performed at the same time."

⁴⁶ Mayers vs. Rogers, 5 Ark. 417; Davis vs. Heady, 7 Blackf. 261; Turner vs. Millier, 59 Mo. 526; Sawyer vs. Christian, 40 Mo. App. 295; Tompkins vs. Elliott, 5 Wend. 496; Goldsborough vs. Orr, 8 Wheat. 217.

⁴⁷ Butler vs. Manny, 52 Mo. 497.

⁴⁸ Turner vs. Millier, 59 Mo. 526; Smith vs. Crews, 2 Mo. App. 269.

⁴⁹ Freeland vs. Mitchell, 8 Mo. 488; Gates vs. Ryan, 115 Mass. 596.

⁵⁰ Southwestern Freight and Cotton Press Co. vs. Stanard, 44 Mo. 71.

⁵¹ 11 Cyc. 1054; Benson vs. Hobbs, 4 Har. & J. (Md.) 285; Cook vs. Johnson, 3 Mo. 239; Huffcut's Anson on Contracts, 368.