THE OPERATION OF DESCRIPTION IN A CONTRACT OF SALE OF GOODS

PART I

The Distinction between Description Operating as Definition of the Contract Goods and Description which does not Form Part of the Definition

Conveyance and Contract.—Sec. 1 of the Sale of Goods Act 1893 recites "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price". This exhibits an unhappy confusion of the concepts of contract and conveyance. It is true that what distinguishes a contract of sale from other contracts is the fact that the parties enter into the contract of sale with the intention that property in goods should be transferred from the seller to the buyer. But the transfer though part of the entire transaction which includes the contract is not part of the contract; it is a conveyance; and moreover it is not an act of the seller. Title to goods is essentially a rational or legal concept as opposed to an empirical phenomenon, though of course whether title exists in a particular case is dependent on prescribed phenomena.[1] In English Law the mere agreement of the parties is sufficient in some cases to effect a transfer of the property. But the transfer is an "act of the law" : the state of mind of the seller or the act of delivery by him is but a phenomenon required by law — the antecedent on which the legal consequence is dependent.

A contract consists of promises by which the parties undertake to do certain acts. Since the passing of property is not a physical act it cannot be the direct subject of a promise. It is, however, an event, and may like any other event operate by way of limitation or condition, *e.g.*, the seller may promise to accept certain goods provided that the title to them has passed to him. In English law the passing of property is generally dependent on the seller's having a title to the goods; consequently a term referring to the existence of a title in the seller will usually operate in the same way as one referring to the passing of property. Limitations and conditions referring to the existence of a title in the seller are quite common, *e.g.*, sec. 12 of the Sale of Goods Act enacts implied undertakings as to title.

[1] See KANT, PHILOSOPHY OF LAW (tr. HASTIE) pp. 101 *ff.*

Limitations and conditions referring to title are not essential to a contract of sale. What is essential is that there should be a transfer of possession and an arrangement as to the price. Where there are no accounts between the seller and the buyer so that the arrangement as to price cannot be by way of set-off or compromise of a claim by the buyer the arrangement must be by way of a promise by the buyer to pay the agreed price. In an executed contract the transfer of possession may take place in the formation of the contract, the delivery of the goods constituting the offer and the receipt of them the acceptance of the offer. But in an executory contract there will have to be a promise of the seller as the delivery of the goods and a promise of the buyer as to the receipt.

Fundamental Terms of an Executory Contract of Sale: Definition of Contract Goods.—The following three physical acts are necessarily involved in a contract of sale : the delivery [2] of the goods to the buyer, the receipt of the goods by the buyer, the payment of the price by the buyer. It follows that in an executory contract of sale the minimum contractual requirements are : (1) a promise by the seller to deliver goods; (2) a promise by the buyer to receive goods; (3) a promise by the buyer to pay the agreed price. There may be other promises in addition, *e.g.*, warranties; but they are not necessary. On the other hand there cannot be an executory contract of sale without these promises.

The two first promises must be rendered explicit. One must know what are the goods which the seller is to deliver and the buyer to receive. The seller promises to deliver not any goods but certain defined goods. He commits a breach if he delivers any other and will not deliver the contract goods. The buyer's promise must be directed to the same goods as the seller's. This does not follow from the requirements of agreement for any contract, but from the particular character of a contract of sale. There could be an agreement for the seller to deliver peas and the buyer to accept beans. The buyer would be under no obligation to accept peas. He would be physically unable to accept beans, of course, unless there were a delivery of beans

[2] "Delivery" is used here instead of "tender" because the latter might connote the taking of the goods by the seller to the buyer: whereas the place of delivery may be the situation of the goods at the time of the sale. As s. 28 of the Sale of Goods Act says, "delivery" is only a parting with the possession. A promise to deliver may be merely not to interfere with the buyer's act of taking possession. Later in this article "tender" and "delivery" are used as synonyms, the distinction here adverted to not being material to the discussion.

by the seller; but the seller would be under no obligation to deliver them. The payment of a sum of money could be made dependent either on a delivery of peas or on an acceptance of beans. But such a contract, it is submitted, would not be a contract of sale. A contract of sale assumes a conveyance, present or future, absolute or conditional, of certain goods and the promises of the seller and buyer are directed to these goods. Thus both promises must relate to the same goods.

It is always, therefore, necessary to examine the contract to discover what is the definition of the contract goods. One would expect this to appear in the forefront of any treatise on the sale of goods. A possible explanation of the absence of a discussion of the definition of the contract goods is the reliance by jurists on Roman Law for their essential concepts. Roman lawyers had to deal with a simple state of commerce. Business appears to have been carried on mainly by the sale of goods actually present to the parties. The definition of the goods was assumed to be by demonstration : the question was of an elementary character which did not give rise to any difficulty. Thus the discussion of the case *si aes pro auro veneat* appears to proceed on the basis that a specific article present to the parties was the contract goods : there is no consideration of the question whether "gold" formed part of the definition of the contract goods. Even where the goods were not actually present they were deemed to be defined by some reference to their position in time and space. Goods had to be in existence. *Nec emptio nec venditio sine re quae veneat potest intelligi.*[3] Pothier in order to make the sale of an indeterminate thing consistent with Roman Law is forced to resort to the stratagem of calling it the sale of a *res incorporalis.*[4]

[3] D. 18. 1. 18. 1. Moyle thinks there could be no sale unless the goods were in the possession of the vendor at the time of the sale. (MOYLE, CONTRACT OF SALE IN ROMAN LAW, p. 30.)

[4] OBLIGATIONS (tr. EVANS) part 2, par. 283. "An obligation may be contracted of an indeterminate thing of a certain kind: therefore where a person promises to give another a horse, the furniture of a bedchamber, a brace of pistols, without reference to any horse, furniture or pistols in particular, the individual thing which is the object of these obligations is indeterminate: but the kind to which it belongs is certain and determinate. In these obligations every individual comprised in the specified class, is *in facultate solutionis*, provided it is good, lawful, and merchandizable, but it is not *in obligatione*. There is indeed one thing of that kind due; for the obligation must have an object: but that thing is not any individual in the concrete; it is only a thing of that kind in the abstract according to the transcendent idea which makes an abstraction from the individuals that compose the kind: the thing is uncertain and indeterminate, and can only become determinate by the actual payment of a particular individual. It is true that the thing so considered until it is determined by payment, only subsists intellectually, but intellectual things may be the objects of obligations, obligations being in their nature intellectual."

Modes of Definition.—Commerce to-day is of a very complex character; business people have to buy well ahead of the time when they will actually need the goods and they have to buy from all parts of the world. Instead of referring to specific goods existing somewhere in time and space they may define the contract goods by enumerating the qualities they require them to possess. The position goods occupy in time and space can be said to be a "quality" of the goods, and so may "quantity". The categories of logic, however, draw a distinction between "space", "time", "quality", "quantity", and these distinctions will be observed in this article.

The various ways of defining the contract goods fall into four classes :

(1) The goods are defined by an enumeration of qualities, and certainty obtained by a reference to quantity : *e.g.*, four tons of potatoes, one hundred standards of red wood. The reference to quality may be to some class, some genus; or there may be further qualities stated so that only a particular species is the subject of the sale. There may be a sale of hops, or of Kentish hops free from sulphur. There may of course be a sale of all the goods in existence of a particular species.

(2) The goods may be defined solely by a reference to position in time and space. Such a case would arise where the subject of the sale is present before the parties and all reference to quality excluded from the definition. Presence however is not absolutely necessary : there may be a sale of "all the goods in a certain house", or "the cargo of a particular ship" or "the casting of a net". The reference may not be to present time. A proper name is a reference to a thing which was at a given place at some past time. A sale of "all my goods" may involve a reference to future time.

Generally where the goods are not present there is a reference to their nature as well as a spatio-temporal reference. The reference to quality may be a part of the definition as in the following cases "the furniture in my house", "the wheat in the ship", "the fish in the net". Even when goods are sold over a counter a reference to quality is usually involved, *e.g.*, "half a pint of beer". On the other hand the reference to quality is not necessarily part of the definition. Thus the sale of "the ship Sarah" *may* be the sale of an article which at a particular

VENTE (tr. CUSHING) Pt. 1. s. 26. "It is not necessary that the thing sold should be a physical being. An incorporeal thing . . . . . may be the object of this contract."

place at a particular time was called the "Sarah", and its being a ship may be only a condition or warranty. But generally, of course, "ship" will be considered part of the "definition".[5]

"Specific goods" within the meaning of the Sale of Goods Act are not necessarily goods exclusively defined by a spatio-temporal reference; there may be also a reference to some quality which forms part of the very definition of the goods.

(3) As we have already seen a spatio-temporal reference may be combined with a reference to quality. The spatio-temporal reference will make the goods precise even though the qualitative reference is to a wide class, *e.g.*, the animal in the last stall in my stable. But the qualitative reference may be more detailed, *e.g.*, "the black horse in the last stall in my stable",[6] where the qualities "black" and "horse" form part of the definition. If the only animal in the last stall is not a horse, or, though a horse, is not black, the seller, if the sale be unconditional, would necessarily commit a breach of contract, for he is unable to deliver what he promised to deliver. In the case of a sale over a counter the contract goods may be defined as "the diamond ring produced", not merely the "ring produced" or "the article produced".

(4) There may be a reference to quantity in addition to a spatio-temporal reference, or in addition to spatio-temporal and qualitative references. This is necessary where part of a larger thing is being sold, *e.g.*, 100 quarters of wheat ex S.S. Mary. But a quantitative reference may be part of the definition though the goods are ascertainable without such a reference, *e.g.*, "all the wheat ex S.S. Mary amounting to 1000 quarters".

Description[7] *and Definition.*—Any reference to any characteristic of goods is a description of them. Even a reference to position in time and space is a description. The name of a thing is a description of it.[8] All the above modes of definition are the result of description. *But all description of goods does not necessarily operate as a definition of the goods.* Some description may not be part of the contract at all. It may occur in the

[5] See the discussion in *Barr* v. *Gibson*, 3 M. & W. 390.

[6] An example given by Channel J. in *Varley* v. *Whipp*, [1900] 1 Q.B. 513.

[7] It must be emphasized that "description" is used in its ordinary meaning. I shall discuss in a later article the meaning of "description" in sec. 13 of the Sale of Goods Act; I do not accept the view that it is there confined to definition.

[8] "There was a description of the specific chattel sold; it was described as the 'S.S. War Column'," per Scrutton L.J. in *Lloyd de Pacifico* v. *Board of Trade* (1930), Ll. L. Rep. 217.

preliminary negotiations and not be incorporated in the actual contract. Some description may operate only as a warranty. Even where the description is part of a fundamental term it may not be part of the description. It may operate merely as a condition of the seller's promise to deliver or of the buyer's promise to accept or of both.

The definition of the goods does not exhaust the definition of the seller's promise to deliver or the buyer's promise to accept. The definition is part of the limitation of either promise—but there may be further limitations. The date of delivery or acceptance is a further limitation.[9] There may also be conditions annexed to the promise. For example the buyer's promise to accept may be subject to a condition that the S.S. Mary has arrived from New York before the date of acceptance. The condition may be one involving a description of the contract goods, *e.g.*, the buyer promises to accept "wheat ex S.S. Mary" provided it is Manitoba wheat. "Manitoba" is not part of the definition but is a condition annexed to the buyer's promise to accept the defined goods. Such a condition, as already stated, may be annexed to the seller's promise or to the buyer's promise or to both promises.

The distinction between description forming part of the definition and description operating only as a condition of the seller's promise to deliver or the buyer's promise to accept is of fundamental importance. Yet it is not clear how far it has been appreciated by the courts. The courts do sometimes distinguish between differences in kind and differences in quality or degree : but it is not clear, however, whether the distinction thereby indicated is the one just stated : the courts sometimes use "difference in degree" in cases where a breach of warranty is alleged.

Even if the phrases "difference in kind" and "difference in degree" are used to indicate the distinction between description operating as definition and description operating as a condition they must be carefully used. They must not lead one to the view that some qualities are absolutely of kind and others of degree. No quality has the inherent characteristic of being one of kind or of degree. The definition of the contract goods is a matter entirely for the parties to the contract. There is no absolute method for determining what qualities are definitive and what are not : the question depends on the circumstances of

[9] A description which operates by way of limitation of the promises to deliver or accept is necessarily part of the definition. If it operates by way of condition it is not part of the definition.

each contract. Qualities which in one contract are matters of definition may not be so in others. In one contract for Kentish hops free from sulphur, "free from sulphur" may be part of the definition : and the delivery of hops containing sulphur would constitute a delivery of goods different in kind from the contract goods. In another contract though "free from sulphur" was a contractual term it might not be part of the definition. Even though it were a condition of the buyer's promise to accept it could be said that a delivery of hops containing sulphur did not constitute a delivery of goods different in kind from the contract goods. But as already indicated there does not appear to be any consistent judicial usage and courts might in such a case say there was a difference in kind, reserving the phrase "difference in degree" for cases where there was only a breach of warranty and the buyer was bound to accept the hops containing sulphur.

That the terms "genus", "kind", "class", on the one hand, and "species", "quality", "degree", on the other are all relative to each particular contract is also seen by a consideration of the possibility of the infinite divisibility of matter. Each species logically constitutes a class which can be divided into sub-species also forming classes. No species has identical members, they must all differ in position. In order to arrive at a species whose members differ in position it may be necessary to have an infinite enumeration of qualities. Even peas in a pod do not differ merely in position : though they may all be the same for culinary purposes they may differ in efficiency for pea-shooting.

Where there is a spatio-temporal reference it is possible to arrive at a unique thing without including all the qualities actually enumerated in the contract. If the parties after arriving at a unique thing refer to further qualities then, unless the enumeration of those qualities has a retroactive effect, it can logically be said that they operate at most as a condition. For example, suppose there is only one second-hand reaper at Upton, and the parties negotiate for the sale of "the second-hand reaper at Upton". The terms used define a unique thing and if subsequently there is reference to the fact that the reaper had cut only fifty acres that would appear to operate at most as a condition. But the chronological order is not necessarily the logical order. The parties may intend the later reference to be part of the definition as well : the class of contract goods may be "second-hand reapers which have cut only 50 acres", the subject of the sale being the particular one at Upton.

The practical importance of the distinction between description operating as a definition and description operating as a condition is fully discussed in Parts II and III. It is useful however to contrast now some of the consequences of the difference.

Let us assume that the description is made up of the qualities wheat, ex S.S. Mary, Manitoba. If all form part of the definition then the seller commits a breach of contract if he does not deliver Manitoba wheat ex S.S. Mary. If "Manitoba" operates only as a condition of the seller's promise, *i.e.*, his promise is to deliver wheat ex S.S. Mary provided the cargo is of Manitoba wheat, then if the cargo is not Manitoba he performs his actual promise by delivering either the actual wheat ex S.S. Mary or by not delivering anything. If Manitoba is part of the definition the buyer has no claim under the contract to the actual cargo if it is not Manitoba. If, however, the buyer's promise is to accept wheat ex S.S. Mary provided the cargo is of Manitoba wheat then he has a claim to the cargo even if it is not Manitoba. He may, on the other hand, refuse to take delivery of the contract unless it is Manitoba and he performs his promise in such a case though he does not accept any wheat.

If the only point at issue between the parties is whether the buyer is bound to accept the goods delivered by the seller it is immaterial whether the goods are not in conformity with a description which is either part of the definition or only a condition of the buyer's promise. The buyer is not bound to accept the wheat ex S.S. Mary if it is not Manitoba, whether Manitoba is part of the definition or only a condition annexed to his promise. But this similarity must not be allowed to hide the real distinction. In the former case the buyer is not bound because his promise is to accept Manitoba wheat : in the latter case the buyer is not bound because he has the option of not accepting anything if the wheat is not Manitoba. When other points are considered the distinction becomes material. Thus where Manitoba is part of the definition, the seller commits a breach of contract by delivering wheat which is not Manitoba; but if Manitoba is only a condition of the buyer's promise there is no breach by the seller when he delivers wheat which is not Manitoba.

PART II

The Operation of Description as Definition

The Effect of the Tender of Goods Not Corresponding with the Definition.—According to the circumstances of each case the tender of non-contract goods will amount to (a) Breach of the contract; (b) The offer of a new contract; (c) An act without legal consequences.

It is possible for the tender to amount to both a breach of the contract and the offer of a new contract.

(a) *Breach of Contract.*—If the tender takes place at a time which does not allow a fresh tender to be made within the contract time for delivery then the tender of non-contract goods necessarily constitutes a breach of contract. If, however, there is opportunity for a fresh tender a breach will only be committed if the tender of the non-contract goods constitutes a repudiation of the promise to deliver the contract goods. It may not amount to repudiation. It may be obviously a mistake, or the offer of a new contract either in addition to or in substitution for the old. If in substitution it will constitute repudiation unless it is clear that if the offer is not accepted the seller will deliver the old contract goods.

Where there is no repudiation the seller may make a fresh tender. This tender must of course be in accordance with the promise: it cannot, for example, be made after the time for delivery has expired.[10]

The buyer can always elect not to treat the tender of the wrong goods as repudiation. He may reject the goods delivered and still hold the seller to his promise to deliver the contract goods. In that case if the seller fails to deliver the contract goods the date of the breach by him will not be the date of delivery of the wrong goods, but the last day for delivery under the contract (or rather the day after). When the tender constitutes an offer of a new contract in addition to the old then of course the buyer may accept the non-contract goods and the seller will still be bound to deliver the contract goods.

Where there is a breach by delivering goods not in accordance with the definition the buyer has a right to damages whether or no he accepts the goods. This is the ordinary contractual remedy for breach of a promise. The buyer's position does *not* depend on the existence of any condition or warranty. His right to damages does not depend on his electing " to treat the

[10] See *Weiner* v. *Brown*, 7 Ll. L. Rep. 49.

breach of a condition as a breach of warranty and not as a ground for treating the contract as repudiated ".[11] He may reject non-contract goods, but this does not depend on a " right to treat the contract as repudiated ".[12] His ability to refuse non-contract goods exists because he has not promised to accept them. This immunity from liability to accept exists even though he elects not to treat the tender of the wrong goods as repudiation.

It is surprising that erroneous views exist as to the buyer's position. The true position was stated clearly almost one hundred years ago by Lord Abinger: " If a man offers to buy peas of another and he sends 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 him peas and if he sends anything else in their place it is a non-performance of it."[13] At that time "warranty" was used in referring to what are now termed warranties and conditions: thus Lord Abinger in the same case speaks of a warranty giving rise in some cases to a right to reject.

Of course the buyer's promises may be dependent on the seller's promise to deliver. This does not mean that the seller's promise is a condition, but that performance of his promise is a condition. By s. 28 of the Sale of Goods Act the seller's readiness and willingness to deliver is, unless otherwise agreed, a condition of the buyer's promise to pay the price.

(b) *The Offer of a New Contract.*—It is not necessary that the seller should actually intend an offer of a new contract. What counts is his conduct, not his intention. It is sufficient if the buyer reasonably believes there is an offer. If, however, the tender is obviously a mistake the buyer cannot insist on retaining the goods delivered.

As already stated the offer may be of an additional or substitutional contract. If the contract is additional the seller is still liable under the old contract: and if he commits a breach thereof he will be liable in damages. The price of the goods under the new contract may be the same as that under the original contract, or what is more likely, it may be a reasonable price. Where the new contract is in substitution for the old then the liability of the seller under the old contract is of course

[11] See sec. 11(1) (a), Sale of Goods Act.
[12] Sec. 11(1) (b), Sale of Goods Act.
[13] *Chanter* v. *Hopkins* (1838), 4 M. & W. 399 at p. 404. This passage is quoted by CHALMERS (10th ed., p. 195). He is one of many who have not learned the lesson it teaches. Unfortunately it is his misinterpretation which he appears to have made statutory.

discharged. The price may be the same as the old contract price or it may be a reasonable price.

It is submitted that where the tender is not obviously a mistake it will ordinarily constitute the offer of a new contract in substitution for the old, the price being a reasonable one.[14]

In order that there be a new contract the buyer must accept the new offer by the seller. Acceptance of the goods is not necessarily acceptance of the offer. The fact that the goods are not in conformity with the definition may not be discoverable by ordinary examination. In such a case the buyer's acceptance of the goods may be in the reasonable belief that they are in conformity with the contract and thus it will not amount to acceptance of a new contract. The legal position in these circumstances is not clear. The buyer, it is submitted, is not guilty of conversion if he deal with the goods as owner. Either the property has passed to him by delivery coupled with the seller's intention to pass the property, or the seller is

[14] The following cases may be considered in this connection:—

Lorni v. *Tucker*, 4 C. & P. 15. Two pictures described as 'couple of Poussins' were sold for £95 and the buyer took delivery and kept them though the seller admitted they were not originals. It was held that the plaintiff was not entitled to £95 but that he was "entitled to recover whatever the jury may think to be their value".

O'Neill v. *Smith*, 1 Starkie N.P. Cases 107. There was a sale of copper pans said to be of proper materials. The purchaser used them and found they were not sound. In his direction to the jury Bayley J. said: "the plaintiff certainly is not entitled to recover the full price stipulated for by the contract, according to which he was bound to furnish pans capable of answering the purposes for which they were ordered. If the defendants after giving them a reasonable trial found them insufficient for the purpose, and gave notice to that effect to the plaintiff, he was bound to take them away and they remained at his risk: but if no notice was given and the defendents retained the pans they are liable to pay as much as the materials are worth." In this case there may have been a warranty of fitness for purpose, damages for breach of which went in diminution of the contract price. The direction of Bayley J. however is clearly based on the view that the pans delivered were not the contract goods and that there was a new contract to pay a reasonable price.

Gabriel Wade and English v. *Arcos*, 34 Ll. L. Rep. 306. Goods not in accordance with the definition were tendered: the sellers paid for them at the contract rate but afterwards sued for the difference between what they had paid and the value of the goods delivered. The claim was rejected. Acton J. said: "The sellers were in effect offering to the buyers a new contract which the buyers in the result, accepted, and the new contract was to sell to the buyers" (non-contract goods), "and to offer it in circumstances which made it plain that both the buyer and seller knew perfectly well these facts. Directly the buyer had accepted those goods at the contract rate, there was a performance . . . . . of the new contract which had sprung into being between these parties." The learned Judge assumed that the new contract supplanted the old and that the price thereunder was the same as the old contract price. He may have been correct in the circumstances, but it is submitted that some consideration should have been given to other possibilities. The mere facts that there was a new contract and no breach thereof are not necessarily an answer to the buyer's claim.

estopped from alleging that the buyer has no right to the goods. Should the buyer sue the seller for breach of promise to deliver, the benefit received by him from the non-contract goods must be taken into account in assessing the damages. A full discussion is beyond the scope of this paper.[15]

(c) *An Act without Legal Consequences.*—Where the tender of non-contract goods is obviously a mistake it has no legal consequences. If there is no further time available for the delivery of contract goods within the contract time the seller has committed a breach of his promise, but this is due to his omission to deliver the right goods and is not constituted by the delivery of the wrong goods. If there be time available the tender of the non-contract goods cannot be treated as repudiation. The acceptance of the non-contract goods cannot be treated by the buyer as constituting a contract. Whether the buyer be or be not aware of the mistake he will be guilty of conversion if he refuses to redeliver the goods or consumes or transfers them or otherwise deals with them as owner. The seller may still "godlike waive the tort" and sue in quasi-contract for the value of the goods.

If the tender is actually a mistake but the buyer reasonably thinks it is the offer of a new contract, then of course a contract will be constituted by the buyer's acceptance of the goods. According to the objective theory of agreement which prevails in English Law the fact that the seller did not intend to make an offer is immaterial if his conduct reasonably led the buyer to believe he was making an offer.

[15] It is possible that the view stated in this last paragraph is inconsistent with s. 35 of the Sale of Goods Act. This section deals with the "acceptance" of goods. "Acceptance" means apparently more than physical receipt: after acceptance the buyer is unable to reject. It is submitted that the section should be interpreted as being confined to the case of a tender of goods in accordance with the definition but not in conformity with the contract because of a condition attaching to the buyer's promise. However, it may well be argued that the section applies to any goods delivered by the seller. S. 34 speaks of "goods delivered to the buyer" and s. 35 which is consequential in subject matter as well as physical order speaks of "the goods". If the section applies to goods not corresponding to the definition then it produces a statutory reversal of the doctrine of *Felthouse* v. *Bindley*. One of its provisions is: "The buyer is deemed to have accepted the goods . . . . . when . . . . . he retains the goods without intimating to the seller that he has rejected them". Thus a buyer who receives goods in circumstances in which he might reasonably be unaware that they are not in accordance with the definition is after the lapse of a reasonable time bound by a contract relating to them without doing any act showing an acceptance of the contract. Moreover he is bound to pay the original contrace price. The authorities do not deal with these points: see e.g. *Hardy* v. *Hillerns* 1923 2 K.B. 490. *Jordeson* v. *Storn A/B*, 41 Ll. L. Rep. 217.

Exemption Clauses.—In many cases sellers insert clauses in their contracts exempting themselves from liability if the goods delivered do not correspond with the " description " in the contract. The existence of such a clause illustrates the importance of ascertaining the definition of the contract goods. The exemption clause does not exonerate the seller from all liability under the contract. If it did there would be no contract at all. In a contract of sale the fundamental obligation of the seller to deliver the contract goods must exist. The exemption clause operates only on the remainder of the description which does not form part of the definition. Generally every statement in a document setting out a contract is a term of the contract. If the parties, however, show that some statements were not intended to be legally binding then those statements will not operate as terms of the contract. This is what happens where there is an exemption clause. The seller enters into a contract to deliver the contract goods; he makes various statements about those goods, by which, however, he does not desire to be bound even though they are expressed in writing: effect is given to this desire by an exemption clause. *The exemption clause does not extend to that part of the description which forms the definition of the contract goods.* The effect of an exemption clause is that description not forming part of the definition though incorporated in the document of sale is not a term of the contract.

An important question which arises is whether the existence of the exemption clause has to be considered in dertemining the definition of the contract goods. Suppose the goods to be sold are described as " old oats ", and there is an exemption clause excluding errors of description. If old oats be the definition then the exemption clause has nothing on which it can operate. Can it be argued therefore that " old " must be regarded as not being part of the definition *ut res magis valeat quam pereat?* An exemption clause of course makes it clear that all words of description used in the contract are not necessarily part of the definition: but too much emphasis must not be given to the exemption clause. It does not have the effect of necessarily limiting the definition to the minimum amount of description required to constitute a definition. It is very often " common form ". Effect must be given to the intention of the parties by arriving at a definition of the goods without regarding the exemption clause as the controlling factor. The exemption clause will then apply to such part of the description as falls

outside the definition; and in the limiting case there will be nothing to which it applies.

A review of the cases does not disclose any express statement of these propositions. Nevertheless it is submitted that the decisions are not inconsistent with these propositions: and that these propositions may be accepted as the "true ratio decidendi" of some of the cases.[16]

Exemption Clauses: Case Law.—One form of exemption clause consists in stating that the goods are to be taken "with all faults or errors of description". This is the usual form on the sale of a ship. The earliest form of ship exemption clause said only "with all faults". This was treated as meaning with all faults consistent with its being the thing described, so that contractual effect was given to all the description in the contract.[17] In *Taylor* v. *Bullen*[18] the clause became "The vessel

[16] I hope I am not saying that the judgments in the decided cases "enunciate" these propositions. By the "true ratio decidendi" of a case I mean the proposition or propositions of law for which the case is of binding authority. I do not mean the reasoning of the court. I think this is the accepted meaning of the phrase "ratio decidendi". Viscount Dunedin in his speech in *Great Western Rly.* v. *The Mostyn*, [1928] A.C. 57, however, uses the phrase as equivalent to the reasons stated by the judge. Mr. Hamson (53 L.Q.R. 123) objects to the use of the phrase "ratio decidendi" with any meaning other than the reasoning of the court. He says: "It is making nonsense of case law to hold that the 'true reason' so far from being the expressed ratio, was some principle to which nobody in the case, neither judge nor counsel adverted: even if the alleged principle were uncontestably true." His objection is not merely verbal. He says that a case is only authority for the propositions of law enunciated by the judges. He continues: "To depart so frankly from a very deliberately expressed 'ratio decidendi', is merely to cease, pro tanto, to be concerned with actual decided law." This is quite contrary to my understanding of the doctrine of precedent, which attaches binding authority, in my opinion, to the necessary principle of the decision, not to the reasoning of the court. Sir Frederick Pollock says: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given . . . . . but only to the principles recognised and applied as necessary grounds for the decision." The recognition of the principle need not be by the judge who decides the case, but by a later judge who has to consider the authority of the earlier case. The doctrine of *Tulk* v. *Moxhay*, as now understood, is not stated in that case, but recognized as the true "ratio decidendi" by later judges. The phrase "true ratio decidendi" when used with the meaning here given to it is verbally defensible. The reason of a decision is the reason attributed to it by the law (later judges) not the actual reasoning of the judge.

Sometimes judges "feel" for a principle without explicitly framing it: their attitude to the case is based on this unstated principle and their "reasons" attempt to state partial application to the principle. In such a case the judge "recognises" the principle. This is so even though a logical development of some reason given by the judge might be inconsistent with the principle. The decisions as exemption clauses perhaps illustrate this class of case.

[17] *Shepherd* v. *Kain* (1821), 5 B. & Ald. 240. Sale of copper-fastened vessel with all faults. An action for breach of warranty, the ship being only partially copper-fastened, succeeded.

[18] (1850), 5 Ex. 779.

and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality or any defect or error whatever". The contract was for the sale of "the fine teak-built Barque Intrepid A1 286½ tons register . . . . . well adapted for a passenger ship . . . . . now lying in St. Katharine's Dock". The purchasers brought an action for breach of warranty since the vessel was not teak-built nor A1 nor adapted as a passenger ship. They failed. The exemption clause made it clear that some of the description was not contractual. Pollock C. B. said: "The real meaning of the contract is this: 'there is a vessel now lying in St. Katherine Docks: I describe her as being the Intrepid A1 and call her a teak-built barque but I expressly give you notice I do not mean to warranty anything'." Parke B said: "According to the contract it must be a barque that is sold, but if there is any involuntary misdescription of such a vessel that is covered by the word error."[19] Pollock C. B. distinguishes between "vessel now lying St. Katharine's Docks" and description: but "vessel now lying in St. Katharine's Docks" was as much a description as the statement that she was teak-built. Parke B. distinguishes one descriptive term, *viz.*, barque, from the rest. The ratio decidendi of the case is that the exemption clause excluded errors of description from being contractual. While such a clause does not affect the definition of the contract goods the particular errors in the case did not go to the definition. It was not necessary to say what was the definition of the contract goods, it was sufficient to say that the particular matters were not part of the definition. Pollock C.B. seems to have considered "vessel lying in St. Katharine's Dock" as the definition, while Parke B would have included "barque".

The word "error" in the exemption clause in *Taylor* v. *Bullen* having regard to the context meant error of description: and so the modern clause "with all faults or errors of description" has no greater effect than that earlier clause. It is necessary to determine what are the contract goods: to so much of the description as determines that, the exemption clause does not apply. It is submitted that ordinarily on the sale of a ship the definition consists in the generic term "ship" together with the name of the ship. All other description will be caught by the exemption clause. The view of Parke B. that the description

[19] The exemption clause, it is submitted, applies also to "voluntary misdescription", *i.e.*, fraud. It prevents the description having contractual effect, but it does not alter the tortious operation of fraud. An action for deceit will lie notwithstanding an exemption clause. See *Ward* v. *Hobbs*, 4 App. Cas. 13.

of the kind of ship, *e.g.*, barque, or a sailing vessel or a barge, is part of the definition has, however, found support recently.[20] Of course what is the definition is a question of construction in each case, and in some cases even other description might be part of the definition.

The exemption clause operates to confine the liability of the seller to the promise to deliver the contract goods. He is not liable in respect of any express or implied description of the contract goods. This proposition can be stated in another way by saying that the seller is not liable for any express or implied condition or warranty relating to description; provided that warranty and condition are used in a sense which does not include the promise to deliver the contract goods. The words "relating to description" can of course be omitted. The latest

[20] See per Greer L.J. in *Lloyd del Pacifico* v. *Board of Trade* (1930), 35 Ll.L.R. 217.—"We are not concerned very much with a case where it might be alleged that what they got was something entirely different from what they bought: we are not faced with the question as to whether clause 5 would have excused the sellers if they had happened to deliver instead of a steamship, a barque, or a sailing vessel, or a barge. I daresay in those circumstances the court would be inclined to follow the decision in *Shepherd* v. *Kain* and to say that a term of this sort has no relation to the supply of something which is entirely different from that which is mentioned in the description here. It is an actual and admitted fact that the vessel complied with the description: and it seems to me that when a vessel by name is sold with all faults, certainly that covers any faults other than the fault of delivering something which is entirely different from the described subject matter of the sale." In this case a cargo ship was sold fitted with turbine engines which are unsatisfactory for use in a cargo ship. The arbitrator found that there was a sale by description and that the ship was unmerchantable: and accordingly that the sellers were liable under s. 14 (2) of the Sale of Goods Act. It was held that the exemption clause prevented the implication of the condition under s. 14 (2). The word 'faults' in the exemption clause was not confined to 'faults of description', the words 'of description' qualified only 'errors'." Lawrence L.J. said: "Mr. Clement Davies contended that the expression 'with all faults and errors of description' ought to be read as if the words 'of description' had reference to and qualified both words 'faults' and the word 'errors'. In my judgment that contention is not well founded. The natural construction of the expression is that the words 'of description' only qualify the word 'errors'; 'faults of description' and 'errors of description' are synonymous terms, and if the draftsman of this contract had merely intended to be tautologous the form of expression which he would naturally have used would have been 'with all faults or errors of description'; the use of the conjunction 'and' I think bears out what I consider to be the natural construction of the words in question. Mr. Raeburn has called attention to the cases of *Baglehole* v. *Walters*, 3 Camp. 154, *Shepherd* v. *Kain*, 5 B. & Ald. 240. *Taylor* v. *Bullen*, 5 Ex. 779, and *Ward* v. *Hobbs*, 4 A.C. 13 which show the genesis of the expression. The words 'with all faults' were held in the earlier cases not to apply to errors of description, and therefore to fill up that gap it became the practice to add to those words 'errors of description': thus one finds that very expression used as early as the year 1875 in the contract in the case of *Ward* v. *Hobbs*. I am clearly of opinion, therefore, that under the terms of this contract the *War Column* was agreed to be purchased by the appellants with all faults, and consequently, if the fact that this ship had turbine engines instead of reciprocating engines could properly be called a fault, that no breach of contract was committed."

form of exemption clause is in this alternative form. It is: "Any express or implied condition, statement or warranty, statutory or otherwise, not stated herein is hereby excluded."[21] The words "not stated herein" are somewhat inconsistent with the word "express". Doubtless the intention is to attribute to the former words the meaning "not expressly excluded from the operation of this clause". This latest clause has a history which we shall now consider.

In the seed trade the exemption clause took the form, "The sellers give no warranty, express or implied, as to growth, description, or any other matter". This is only an alternative way of stating that goods were to be taken with all faults and errors of description.[22] "Warranty" in commercial circles has been used with regard to all "collateral" terms, all terms other than the promise to deliver the contract goods. That is to say, business men use "warranty" as applying to the two kinds of terms between which the lawyer distinguishes by calling them conditions and warranties.[23] Certainly it is a question of construction what is meant by "warranty" in the exemption clause: and it is a question on which the Sale of Goods Act is silent. The definition section says "*In this Act*[24] unless the contract or subject matter otherwise requires warranty means . . . . .". It does not say "*Wherever* used unless the context or subject matter otherwise requires warranty means . . . . ." Yet the latter meaning was given to the section by Fletcher Moulton L.J. in *Wallis* v. *Pratt*.[25] In interpreting warranty in an exemption clause he said the Sale of Goods Act "must apply since neither the context nor subject matter otherwise requires". His judgment was adopted by the House of Lords.

Wallis v. *Pratt* dealt with precisely the same issues as had been considered by a Divisional Court in *Howcroft* v. *Laycock*.[26] The courts were asked to overrule that earlier decision. The facts in the earlier case were that the plaintiff ordered a species

[21] See *L'Estrange* v. *F. Graucob Ltd.*, [1934] 2 K.B. 394.

[22] The words "or any other matter" give it, perhaps, a wider effect than such a clause.

[23] Throughout the first half of the 19th century "warranty" was used by lawyers as applying to conditions and warranties. It is so used by Lord Abinger in *Chanter* v. *Hopkins*, 4 M. & W. 399 at p. 404. Even after the distinction between warranty and condition became commonplace it continued to be so used by lawyers. See *e.g.*, Williams J. in *Behn* v. *Burness*, 32 L.J.Q.B. 204 at p. 206: and even after the Sale of Goods Act it is occasionally so used by lawyers even when dealing with contracts of sale, see *e.g.*, Hewart L.C.J. in *Weiss* v. *Samargull* (1923), 15 Ll.L. Rep. 134.

[24] Italics mine.

[25] [1910] 2 K.B. 1003: [1911] A.C. 394.

[26] 14 T.L.R. 460.

of cabbage seed called Couve Tronchada. The defendants sent Jersey Kale cabbage seed together with a bill containing an exemption clause. The seed delivered was indistinguishable by ordinary inspection from that ordered. It was accepted and planted. On growth the mistake was discovered and an action for damages brought. The seller's contention that the exemption clause applied was rejected by the Divisional Court. The report is brief. Day J. said "the clause in question could not be considered to mean that no action should be brought. When Crouve Tronchada was ordered the sellers were not entitled to send something different."

This judgment concisely states in effect the propositions submitted here. (1) The definition of the contract goods was, despite the existence of the exemption clause, considered as being Couve Tronchada cabbage seeds and not merely cabbage seeds or seeds. (2) The exemption clause did not touch the seller's liability to deliver the contract goods.

In *Wallis* v. *Pratt* the buyer was assured that a sample produced was common English sainfoin and the sold note was for "27½ quarters sainfoin (common English)" and contained an exemption clause. Giant sainfoin was delivered and accepted. The difference not being ascertainable by ordinary inspection was not discovered until the seeds had come up. The buyers sued for damages and succeeded. The seller's liability was determined once it was decided that "common English" was part of the definition. It could not be said that the delivery and acceptance of non-contract goods effected a rescission of the original contract, for the delivery and acceptance did not constitute a new contract at all, being made in ignorance of the fact that the seeds were not common English. Fletcher Moulton L.J. said : "So soon as it is determined that there is an obligation to deliver common English sainfoin it follows that the other contracting party is at least entitled to damages if he has suffered from a breach of it." This was the true ratio decidendi: "common English" was part of the definition, and therefore excluded from the operation of the exemption clause. It mattered not how widely the exemption clause was construed, the sellers remained liable. They would have been liable even if the clause had read "The sellers give no warranty or condition express or implied." There was no necessity to limit warranty to the meaning it has in the Sale of Goods Act nor to consider the effect of sec. 11 of the Act. Nevertheless most of the judgments are concerned with those questions.

One interpretation of *Wallis* v. *Pratt*, it is submitted, cannot be accepted, namely, that of Bailhache J. in *Harrison* v. *Knowles*.[27] He considered that *Wallis* v. *Pratt* decided that all exemption clauses are confined in their operation to what would otherwise have been warranties and do not extend to conditions. This is quite contrary to the reasoning of the judges in *Wallis* v. *Pratt* which was that the exemption clause in that case could not extend to conditions because in its terms it only extended to warranties, which they regarded as distinct from conditions. The ship exemption clause "not accountable for errors in description" certainly extends to what would otherwise be conditions.

The actual decision in *Harrison* v. *Knowles* was right, though it is submitted the reasons stated for it were wrong. A ship was sold as having a dead weight capacity of 460 tons, and there was a clause "not accountable for errors in description". The dead weight capacity proved to be only 360 tons and the buyers sued for damages. Bailhache J. considered that the discrepancy was one of "degree" not of "kind". He said that the exemption clause would not exclude conditions, but the statement as to dead weight capacity being only a warranty was not excluded. It is submitted that a statement as to dead weight capacity is a condition,[28] but nevertheless it is within the ambit of the exemption clause.

Andrews v. *Singer* [29] introduces us to an exemption clause which is called by Scrutton L.J. "a sequel to *Wallis* v. *Pratt*". "All cars sold by the company are subject to the terms of the warranty set out in schedule No. 3 of this agreement, and all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded." This clause is wider than that in *Wallis* v. *Pratt* where only "warranties" were excluded, in so far as "conditions" and "liabilities" are also excluded. On the other hand it is narrower than *Wallis* v. *Pratt* where "warranties express or implied" were excluded, in so far as the exemption clause only referred to "conditions, warranties and liabilities *implied* by statute common law or otherwise". The plaintiffs had agreed to purchase from the defendants "new Singer cars", the agreement containing the clause set out above. Under the agreement the plaintiffs ordered a car from the

[27] [1917] 2 K.B. 606.

[28] It is curious that s. 13 of the Sale of Goods Act was not considered. Even if ships are not "goods" within the meaning of the Sale of Goods Act (which is doubtful) yet s. 13 is based on a general principle.

[29] [1934] 1 K.B. 17.

defendants. The defendants delivered a car which had already run some 550 miles. The plaintiffs alleged that the car was not a new one and claimed damages. It does not appear from the report whether they had paid the contract price, but presumably they had. The court held that the contract was for the sale of a "new Singer car", and that the exemption clause did not apply for the term "new Singer car" was an express one. The argument did not therefore proceed on the basis of the proposition we are discussing *viz.*, that an exemption clause cannot apply to the definition of the contract goods, but the case is not inconsistent with that proposition. It is submitted that even if the exemption clause had purported to exclude "express and implied conditions, warranties and liabilities" the defendants would have still been liable, insofar as "new Singer car" was a definition of the contract goods and there had been a breach of the defendants' promise to deliver the contract goods.

The sequel to *Andrews* v. *Singer* is *L'Estrange* v. *F. Graucob Ltd.*[30] The exemption clause stated that "Any express or implied condition, statement or warranty, statutory or otherwise, not stated herein is hereby excluded". The main point discussed in the case was whether the clause was a contractual term, and it was assumed that if it was it applied to the "implied condition that the goods shall be reasonably fit for such purpose" of s. 14 (2) of the Sale of Goods Act. However, Scrutton L.J. after referring to the clauses in *Wallis* v. *Pratt* and *Andrews* v. *Singer* said : "The clause here in question would seem to have been intended to go further and to include all terms denoting collateral stipulations in order to avoid the result of these decisions." It appears therefore that he considered that terms which were not "collateral stipulations" would not be excluded. "Collateral stipulations" appears to mean stipulations other than the promise to deliver the contract goods. The dictum therefore supports the proposition that an exemption clause does not apply to the promise to deliver the contract goods.

PART III

The Operation of Description as a Condition.

A Condition Annexed to the Buyer's Promise to Accept.—The most frequent case of the operation of description as a condition is as a condition of the buyer's promise to accept. The condition is inserted in order to give the buyer a right to reject the goods

[30] [1934] 2 K.B. 394.

delivered even though they are in conformity with the definition, and the seller has performed his promise in delivering them and is under no obligation to deliver any other goods. The perception of the possibility of such a condition has been obscured by the terminology which applies "condition" both to a "true" condition and a promise, performance of which is a condition. In *Wallis* v. *Pratt*, for example, it was thought that if the contract (apart from the exemption clause) enabled the buyer to reject seed which was not common English sainfoin then the seller must must have been under an obligation to deliver common English sainfoin. This is not so : the seller may be under an obligation to deliver only sainfoin, and yet the buyer may have a right to reject if the seed is not common English sainfoin, for his promise to accept sainfoin may be subject to a condition that the sainfoin delivered is common English.

The buyer may waive the condition annexed to his promise. Merely taking delivery of goods is not a waiver of the condition: there must be knowledge or means of knowledge of the circumstances before a person can be bound by an election. Secs. 34 and 35 of the Sale of Goods Act deal adequately with the question of the circumstances in which waiver is deemed to have taken place. It is reasonable that if the buyer receives the goods he should, after the lapse of a reasonable time, be deemed to have waived the condition. Waiver of the condition does not give rise to any claim for compensation. The buyer must pay the contract price; his acceptance is performance of his promise, and there has been performance of the seller's promise. There may be a warranty to the seller but that must exist *ab initio:* a warranty does not come into existence as a result of the buyer's waiving a condition annexed to his promise. The warranty may be conditional on the buyer's waiving the condition, but even so it arises from the original agreement of the parties.

Rejection Clauses.—These are quite common in commercial contracts. In timber contracts the form of the clause is : "Buyers shall not reject the goods herein specified but shall accept or pay for them in terms of contract against shipping documents." The mode of operation of such a clause can only be understood by adverting to the distinction between description operating as a definition and description operating as a condition of the buyer's promise. The contract enumerates various qualities : some are part of the definition, others are not. The rejection clause does not affect the buyer's freedom of rejecting non-contract goods. The clause says "buyers

shall not reject the goods herein specified" : it does not prevent buyers rejecting the goods delivered if they are not as specified. All the description, however, is not "specification". Some description though not definition might operate as a condition of the buyer's promise to accept so that if the goods did not correspond with that description the buyer could reject them. It is here that the rejection clause operates. Qualities which do not form part of the definition are not to be considered as conditions : the buyer cannot reject the goods delivered even if they do not possess those qualities. A rejection clause however must be distinguished from an exemption clause : the latter prevents non-definition qualities from having any contractual effect : the former only prevents them from operating as condition. Hence in the case of a rejection clause such description which does not form part of the definition operates as a warranty. If the goods delivered do not possess the enumerated qualities the buyer must accept but he can obtain compensation from the seller.

In commercial documents some clauses are sometimes set out under the heading "specification". "Specification" as used in a commercial document is not necessarily equivalent to the definition of the contract goods. The definition of the contract goods is a question of construction of the contract as a whole. Matters set out under " specification " may not amount to definition, and matters not in the " specification " may. Where there is no " specification " it is clear that the rejection clause applies to description not part of the definition, in other words it is clear that "goods herein specified" means "contract goods". Where there is a "specification" it is more difficult to interpret the rejection clause. The phrase "goods herein specified" appears to refer to the specification. Nevertheless it is submitted that the phrase merely means "contract goods". The rejection clause will not apply to any part of the definition even though not set out under the "specification". *A contra* it may apply to some matters set out under "specification". Though prima facie the "specification" is the definition it is undesirable to construe a commercial document rigidly, and to consider that in every case "specification" is equivalent to definition.

A review of the decided cases shows that the courts have in effect proceeded in accordance with the above analysis, though they have been hampered by the terminology which uses "condition" as applying to the promise to deliver the contract goods as well as to true conditions. The judges have realized

that the clause applies to some "conditions", but they realize it cannot apply to all "conditions"; they say that they are unable to distinguish between the "conditions" to which it applies and those to which it does not. In fact they do distinguish by saying that the rejection clause will not apply where the things delivered are not of the "kind" sold.

Rejection Clauses: Case Law.—It is necessary first of all to deal with a dictum of Bingham J. in *Vigers Bros.* v. *Sanderson*,[31] for that dictum has been a stumbling block in later cases and has resulted in lengthy discussion. Bingham J. said: the "rejection clause does not operate so as to force the buyer to take the goods which are neither within nor about the specification nor commercially within its meaning." The implication is that if the goods delivered are commercially within the meaning of the specification they must be accepted, though not in accordance with the specification. I think Bingham J. is merely pointing out that some matters within the specification do not form part of the definition of the contract goods. He is not saying that non-contract goods must be accepted if they are "commercially" near the definition. "Commercially" it is recognized that all the description in a contract is not part of the definition. This is the law also, though judges sometimes have expressed contrary views. Thus, Scrutton L.J. says in *Ronaasen* v. *Arcos*:[32] "The commercial mind and the legal mind are quite at variance as to the obligation of a seller and a buyer. The legal mind following s. 30[33] of the Sale of Goods Act and interpreting s. 30 says: 'If you the seller have undertaken to deliver goods of a certain description . . . . . you must deliver them, and if you do not deliver them, but deliver something different, the buyer may reject.' The commercial mind does not like rejection and is inclined to take the view 'If I deliver something near the description it could be put right by damages'." If, indeed, the Sale of Goods Act resulted in the law failing to give effect to the intentions of business men it is time the Act was amended. But I think Scrutton L.J. misinterprets the mind of the business man as well as s. 30. Sec. 30 does not give the buyer a right to reject for every discrepancy between the goods delivered and the description in the contract. "Goods of a different descrip-

[31] [1901] 1 K.B. 108.
[32] 43 Ll.L. Rep. 1 (C.A.); [1933] A.C. 470 (H.L.).
[33] Sec. 30 (3) reads: "Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

tion" in s. 30 means goods other than those the seller "contracted to sell", *i.e.*, non-contract goods. The commercial mind does not claim that the buyer must accept non-contract goods: it wants the buyer to accept goods which are contract goods though they may not accord with the entire description in the contract.[34] The mistake of some judges is to treat s. 13 as if it made all description necessarily part of the definition of the contract goods.

The dictum of Bingham J. has been unfortunately treated as if it meant that non-contract goods must be accepted if "commercially near" the definition. The courts have definitely stated that such a proposition is erroneous. Thus, in *Ronaasen* v. *Arcos* Lord Buckmaster said: "If the article they have purchased is not in fact the article that has been delivered they are entitled to reject it, even though it is the commercial equivalent of that which they have bought." I think, moreover, such a proposition is meaningless, for business people do not consider whether non-contract goods are "commercially near" contract goods: they consider whether the goods delivered are so "commercially near" the description in the contract as to be contract goods.

Another meaning given to the dictum is that it deals only with "microscopic" deviations.[35] Rowlatt J. says, after referring to *Vigers Bros.* v. *Sanderson:* "I think that the decision shows that the phrase 'commercially within its meaning' is meant to cover cases in which the discrepancy is so small that you may say the law does not have regard to it — *de minimis non curat lex.*"[36] This interpretation of the dictum must be wrong: if the discrepancy is so small the goods would be *legally* within the specification.

In *Vigers* v. *Sanderson* [36A] the contract contained the word "about". In such a case, of course, if what is delivered is near enough to the rest of the description to be "about" it, the goods delivered are not merely the contract goods but there is also a compliance with the non-definition part of the description. It has been said that the dictum of Bigham J. deals merely with

[34] Lord Atkin also disagrees with Scrutton L.J. but not on these grounds. See *Ronaasen* v. *Arcos*, [1933] A.C. 470.

[35] Per Wright J. in *Ronaasen* v. *Arcos*, 42 Ll.L. Rep. 163. The same phrase is used in the Court of Appeal by Scratton and Slesser L.JJ., and in the House of Lords by Lord Atkin.

[36] *Green* v. *Arcos* (1932), 39 Ll.L. Rep. at p. 84. The same view was taken in the Court of Appeal. 39 Ll.L. Rep. 229. The judgment of Scrutton L.J. was expressly approved by the House of Lords in *Ronaasen* v. *Arcos*.

[36A] [1901] 1 K.B. 108.

the meaning of the term "about".[37] This, however, makes "commercially within its meaning" equivalent to "about the specification" and Bigham J. puts them in opposition.

The courts have had no difficulty in deciding that where goods delivered have not compiled with the specification the rejection clause does not apply.[38] In *Green* v. *Arcos* Romer L.J. is quite definite as to the position : "The clause only applies where the buyer is seeking to rely on grounds other than that the goods tendered are not the goods specified. If the goods are not the goods specified the clause never begins to operate." It is submitted this is too wide. It is possible, though it might be unusual, that something stated in the specification may not be part of the definition. It is unwise to adopt a formalistic approach to a business document and to consider everything within the specification as necessarily part of the definition and necessarily excluded from the operation of the rejection clause. Rowlatt J. was more cautious. He said : "It is clear that it (the rejection clause) does not mean that a man under cover of the contract can deliver anything in the wide world and say: 'You must take the stuff and we will arrange any difference of price by way of damages.' It cannot mean that. But it has never been precisely defined what it does mean."

The courts have had more difficulty in deciding that some matters not within the specification may escape the clutches of the rejection clause. In *Montagu Meyer* v. *Kivisto*[39] the decision that the rejection clause applied to a provision that the timber was to be properly seasoned was largely based on the fact that the provision was not contained in the specification. But in *Myer Ltd.* v. *Osakeyhtio Co. Ltd.*[40] the Court of Appeal held that the rejection clause did not apply where the time for shipment had not been complied with though it was not set out in the specification. Greer L.J. said: "This clause must refer to a breach of condition for it is not wanted for a breach of warranty at all, but only for the breach of some condition. But I am quite satisfied that it has now for a long time been held to be

[37] " Bigham J. was undoubtedly considering what degree of elasticity as a matter of commercial understanding should be attributed to the word ' about ' " per Wright J. in *Ronaasen* v. *Arcos, supra.* Lord Buckmaster in the House of Lords in the same case, after referring to *Vigers* v. *Sanderson* and the dictum of Bigham J., said: " That decision must be read in relation to the words of the contract then considered which provided that the goods were to be about the specification stated."

[38] See *Meyer* v. *Travani A/B.*, 37 Ll.L.L. Rep. 204: *Green* v. *Arcos, supra.*

[39] (1929), 35 Ll.L. Rep. 102, and 265.

[40] 37 Ll.L. Rep. 212.

the law of this country that a clause of this kind does not protect the seller and entitle him to deliver things which are not of the 'kind' sold. It must apply to some breach of condition and it is not necessary to define what breach of condition it does apply to for this case : but it does not apply to a breach of tendering goods which are not of the kind contracted for at all."

Beck v. *Symanowski*[41] was not a timber case : the rejection clause instead of referring to "the goods herein specified" said: "the goods delivered". Such a clause operates in the same way as the timber clause : it does not compel the buyer to accept non-contract goods, but here there is no room for argument that the buyer can reject goods which though they accord with the definition do not conform to some other description contained in a specification. There was a contract for the sale of "2,000 gross of 200 yards reels of six cord sewing thread". The rejection clause read: "The goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be bound to accept and pay for the same accordingly unless within 14 days of the arrival of the goods" they notify the sellers. The reels delivered contained only 188 yards and, though the sellers had not been notified within 14 days, the buyers sued for damages. They succeeded. The difficulty in the case was to determine whether 200 yards formed part of the definition. Lord Buckmaster who dissented thought that the contract was one for the sale of reels, and the difference in length on each reel did not make the goods delivered "outside the contract altogether". The other judges considered that the sale was of a defined quantity of thread and the "200 yards" formed part of the measure of quantity. All the judges regarded the rejection clause as inapplicable if the goods delivered were "as different from the material contracted to be sold as peas from beans". In other words, they considered that the rejection clause does not apply to the definition of the contract goods.

A Condition of the Seller's Promise to Deliver.—The seller may have in mind the performance of his promise out of a certain supply, and may desire to protect himself should the supply fail. Thus he may promise to deliver Manitoba wheat provided that the cargo ex S.S. Mary be Manitoba wheat. Should the cargo not be Manitoba wheat the seller is under no obligation to deliver anything : he does not have to procure Manitoba wheat in order to implement his promise. But if he so desires he can

[41] [1924] A.C. 43.

deliver Manitoba wheat from some source other than the S.S. Mary : and the buyer is bound to accept it.

The seller's promise may be to deliver the cargo ex S.S. Mary provided it be Manitoba wheat. In this case he cannot deliver Manitoba wheat from any other source: but he can deliver some other wheat provided it comes from the S.S. Mary. If the seller deliver other wheat he irrevocably waives the condition even though he was under the belief that the cargo was Manitoba wheat, unless that belief was induced by the buyer.

If the contract refer to Manitoba wheat the S.S. Mary it may be that each quality is part of the definition. I am merely pointing out here that it is possible for some quality to be not a part of the definition but a condition of the seller's promise.

A Condition of the Seller's Promise to Deliver AND of the Buyer's Promise to Accept.—In a contract for the sale of wheat ex S.S. Mary it may be a condition of the promises of both the seller and the buyer that the wheat be Manitoba wheat. If it be not Manitoba wheat the seller commits no breach by delivering it. He is not bound to deliver it in that event, but he may waive the condition and deliver other wheat. The seller, however, is not bound to accept other wheat : but he too may waive the condition annexed to his promise and accept other wheat. If he does so he is bound to pay the contract price : the delivery and acceptance were in accordance with the contract.

If Manitoba wheat be delivered and accepted with knowledge of the fact that it did not come from the S.S. Mary then there is no waiver of a condition for "ex S.S. Mary" was part of the definition, but a new contract comes into existence. The price will probably not be the contract price but a reasonable price, which will doubtless be the market price at the date of delivery and acceptance.

A sale by sample may furnish an example of a condition of the promises of buyer and seller. If a sample be produced in the course of negotiations it is not necessary that the contract goods be defined by reference to the sample : but it may be a condition of the contract that the goods shall conform to the sample. *Smith* v. *Hughes*[42] suggests a curious example of such a contract. It appears that the actual contract might have been for "old oats" but the sample produced was one of new oats. If the reference to the sample had been a term of the contract there would have been a contract for the sale of old oats provided that the goods delivered corresponded with the sample of new oats in quality.

[42] (1871), L.R. 6 Q.B. 597.

PART IV

The Operation of Description as a Warranty

Some description of the goods need not form part of the promise of the seller to deliver nor of the buyer to accept but may form part of a collateral promise. It is possible that the buyer may warrant that the goods are of a particular quality, but generally the warranty will be given by the seller. An example of the latter case is a contract where the seller promises to deliver wheat and warrants that the wheat delivered will be Manitoba wheat; and the buyer promises to accept wheat. The buyer must accept any kind of wheat but may claim compensation if it is not Manitoba.

The same description may operate both as a condition and as a warranty. The condition may be annexed to the seller's promise or to the buyer's promise or to both promises. In the following contract it is annexed to the buyer's promise. The seller promises to deliver wheat, and warrants that the wheat delivered will be Manitoba wheat : the buyer promises to accept wheat provided it be Manitoba wheat. If the seller delivers other wheat he performs his promise, but the buyer has a right of rejection. *In addition, i.e.,* whether or no he accepts the other wheat, the buyer can claim compensation. This contract must be distinguished from one where the definition of the goods is Manitoba wheat and there is no warranty or condition. In this latter case it is true that the buyer may accept or reject the other goods and in addition may obtain damages. But the delivery of other wheat in this latter case is not a performance of the seller's promise, and its acceptance is not a performance of the buyer's promise. Delivery and acceptance of other wheat give rise to a new contract. The right to sue the seller arises in consequence of a breach by him of his promise to deliver, not despite performance of that promise.

The warranty may be subject to a condition : and this condition may be that the buyer waive a condition annexed to his promise. Thus there may be the following contract:—the seller promises to deliver wheat, and warrants that the wheat delivered will be Manitoba wheat provided that the buyer accepts the wheat delivered; the buyer promises to accept wheat provided it be Manitoba wheat. In this case the buyer may either reject other wheat or accept and claim compensation. He cannot reject wheat and claim compensation. Of course if barley is sent he may reject and sue for damages.

It is possible that the Sale of Goods Act contemplates this class of contract as one which is prima facie deemed to exist when there are descriptive statements in a contract for the sale of goods. The question will be discussed in a later article.

In the following contract the same description operates both as a warranty and as a condition of the seller's promise. The seller promises to deliver wheat ex S.S. Mary provided that it is Manitoba wheat and warrants that it is Manitoba wheat; the buyer promises to accept wheat ex S.S. Mary. If the seller delivers other wheat the buyer must accept, but he will be entitled to compensation. He will also be entitled to compensation if the cargo, not being Manitoba wheat, the seller, as he is entitled by virtue of the condition, does not deliver any wheat at all. But the warranty might have been made conditional on the seller's waiving the condition annexed to his promise *i.e.*, it might have been a warranty that the wheat he delivers will be Manitoba. In such a case the seller would have the choice of compelling the buyer to accept other wheat but paying compensation, or of not delivering anything and not paying any compensation.

Finally, we may have the description operating as a condition of both promises and as a warranty. The seller promises to deliver wheat ex S.S. Mary, provided that it is Manitoba wheat, and warrants that the wheat the buyer accepts will be Manitoba wheat : the buyer promises to accept wheat ex S.S. Mary provided it be Manitoba wheat. If the cargo is not Manitoba wheat the seller is under no liability. If he waives the condition and delivers other wheat the buyer can reject it, in which case he will not be entitled to compensation; but if he accepts he will get compensation.

Conclusion

The precise operation of description, whether as definition or as a condition or as a warranty, depends on a consideration of the circumstances of each contract. It may be that in practice some references operate usually in a certain way. If this is so it is possible to lay down with justice prima facie rules which will shorten the task of construction. It is submitted that this is what s. 13 of the Sale of Goods Act does : and an attempt will be made in a later article to show that it introduces the prima facie rule that description not amounting to definition operates as a condition.

J. L. MONTROSE.

Faculty of Law, Queen's University,
Belfast, N. Ireland.