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CONDITIONS, WARRANTIES, AND OTHER CONTRACTUAL TERMS

The necessity for an accurate terminology in law has often been stressed. Dean Roscoe Pound, however, has warned us against attaching too much importance to this matter: "the utility of precise terminology and exact meanings is more in connection with differentiating problems from pseudo-problems and with formulation of results than in providing solutions."[1] But very often it is only the lack of a clear definition of what the problem really is that has prevented the emergence of the solution: the difficulty sometimes consists not in getting a right answer but in getting the right question. Moreover, solutions which are stated in equivocal language serve only as starting points for further problems. "Terminology," it is true, "matters little . . . . . if the variance of usage is not the cause or effect of error,"[2] but it often is. A precise terminology, though not a terminus *ad quem* nor even a terminus *a quo*, does furnish the rails on which the vehicle of fruitful discussion can most safely be carried.

Some of the confusion into which we are led by the defects of language may be traced to two sources: firstly, the same concept is sometimes denoted by more than one word, and secondly, the same word sometimes applies to more than one concept.[3] Synonyms are essential for aesthetic reasons: but it is not always easy to know whether different words have really identical meanings. The reader may give different meanings to different words intended by the writer to have the same meaning. *Sane commodius erat singulas causas singulis appelationibus distingui.*[4] A more subtle error arises when the same concept is given a

[1] Pound, *The Call for a Realist Jurisprudence* (1931), 44 Harv. L. Rev. 697 at p. 702.
[2] DEL VECCHIO, FORMAL BASES OF LAW, p. 130.
[3] See Pound, *op. cit.*
[4] Gaius, 2. 146.

different name in different subject matters. The development of general principles may be obstructed by the failure to realise that though there is a difference in terminology there is identity in substance. There are several evils flowing from the multivalence of words in legal currency. There is what Hohfeld terms "the principle of linguistic contamination" : the use of a "blanket" term to cover more than one concept conceals the distinction between those concepts, more attention being given to the identity of terms than to the difference of context.[5] Linked with this is the error of treating as correct a proposition involving a word used in one meaning when the proposition has only been established for some other meaning of that word. Least of all such evils is the ambiguity which results where more than one meaning of a word are relevant to the universe of discourse.

In sciences other than law use has been made of the classical languages for the manufacture of new words having the required precision. The remedy, in the opinion of some, has been as bad as the ailment, for it has resulted in the creation of a jargon not understandable of the people. The introduction of exactness by way of Liddell and Scott is more subject to adverse criticism in the case of law. Natural scientists may carry on their discussions behind closed doors, but the practice of the law must take place 'publicly and in open view'. It is desirable that the science of law should use the same language as the practice of the law. Even with the use of ordinary language it is possible to introduce greater precision into juristic writings.

In this article I propose to consider the nature and operation of the different terms of a contract. The distinctions between many terms have been quite lost as the result of applying to all of them the one word condition. The most difficulty is caused by applying condition to promises. It is sometimes assumed that the terms of a contract must be either conditions or warranties. Others recognize promises as a distinct term of a contract but include some promises in the category of conditions. Thus Benjamin says : "Conditions may in law be either statements or promises to be made good or performed by the party by whom they are made, or collateral acts or contingencies, there being no promise that the act or contingency shall happen."[6] The distinction between condition and promise

[5] "The identity of terms seems irresistibly to suggest an identity between the ideas which are expressed by them." HOLLAND, JURISPRUDENCE, 10th ed., p. 81, quoted by HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS, p. 70.

[6] BENJAMIN, SALE, 6th ed., p. 635.

is important but there are also other distinctions which though more subtle are not more refined than some drawn in other branches of law.

The Nature of Promises.—"A contract," says Blackstone, "is an agreement upon sufficient consideration to do or not to do a particular thing." This definition, interpreting the singular as including the plural, is unassailable. The essence of a contract, all are agreed, is the creation of rights between the parties: and a right is a claim to some act or forbearance. The constituent elements of a contract are thus promises, a promise being an undertaking by the promisor to act or forbear in some specified way in the future. In contracts for executed consideration there are promises by one party only, but generally there are promises by both parties to the contract.

Performance of a promise consists in acting or forbearing in the specified manner: performance of a contract consists in performance of all the constituent promises. The breach of a contract involves the non-performance of a promise. This is actionable at law even though no damage is sustained by the promisee. In equity the promisee may sometimes enforce his claim to the specified act or forbearance by specific performance or injunction.

Holmes does not limit promises to undertakings to act or forbear. "A man may bind himself at law that any future event shall happen," and moreover, "when a man covenants that it shall rain to-morrow," he is not saying "in a short form I will pay if it does not rain."[7] There is, he contends, a promise in such a case but no undertaking to act or forbear. The essential error, it is submitted, is Holmes' unwillingness to recognize the distinction between right and right of action, between the claim of subject against subject, and the claim of subject against State to enforce the prior claim. Holmes' well-known statement is that "a right is the hypostasis of a prophecy — the imagination of a substance supporting the fact that the public force will be brought to bear upon those who are said to contravene it."[8] It is well not to underestimate the importance of a sanction, but even in early national law the maxim was not *remedium est jus* but *ubi remedium ibi jus*. The distinction between primary right and sanctioning right is sound. The former is a claim to an act of forbearance; and so the elements of a promise must be undertakings to act or forbear. A promise that it will rain

[7] HOLMES, THE COMMON LAW, pp. 289-290.
[8] COLLECTED LEGAL PAPERS, p. 313.

to-morrow is only an elliptical way of stating a promise to compensate if it does not rain.

The actual way in which Holmes arrived at his proposition as to the nature of a promise is as follows. It is clear that a man may contract to do that which he has no power to do. The analysis of a promise offers no solution to the problem whether the law will enforce a particular promise : that is a question of policy. In fact in English law, as in all legal systems, a man is bound by some promises which he cannot perform. In *Canham* v. *Barry* [9] the defendant was held liable in respect of a promise to assign a lease though he was unable to do so since his landlord refused consent and there was a covenant against assigning without consent. Maule J. said : "A man may no doubt for good consideration contract to do that which he cannot be sure that he will be able to do : a man may if he chooses covenant that it shall rain to-morrow."[10] This is Holmes' text. But it only states that a promise, an undertaking to act or forbear, may relate to something the promisor cannot do. His denial "that when a man covenants that it shall rain to-morrow . . . he only says in a short form I will pay if it does not rain" is supported by the following statement. "This is not necessarily so. A promise could easily be framed which would be broken by the happening of fair weather." He does not give an example, and it is submitted that his statement is incorrect. There is involved, however, the consideration of the nature of a warranty, and the question is discussed further in that connection.

Limitations and Conditions.—The promise must state the nature of the acts undertaken to be done or forborne. This necessitates a statement of the circumstances in which the acts are to be done,[11] for a particular act in one set of circumstances is of a different nature from a similar act done in different circumstances. All the terms of a promise define the nature of the act to be done, but some operate by way of limitation and others by way of condition. A limitation merely defines the nature of the undertaking : the act must be performed in the manner limited. If the limitation is not observed the promise is not performed. A condition assumes that the undertaking has been limited and sets out further circumstances in which the promisor has the choice of either carrying out the undertaking as limited or of not doing anything. A condition is

[9] (1855), 15 C.B. 597.
[10] At p. 619.
[11] For convenience I shall not refer to forbearances: or they may be considered as negative acts.

inserted for the benefit of the promisor. The undertaking is made conditional on an event happening; if it does not happen the promisor need do nothing. But he may waive the condition, and his carrying out the undertaking though the event happens is a performance of the promise. A simple illustration of the difference between limitation and condition is this. In a promise to accept a sound horse the quality of soundness operates by way of limitation and the acceptance of an unsound horse is not a performance of the promise. In a promise to accept a horse provided it is sound the quality of soundness operates by way of condition. The promisor is not bound to accept an unsound horse, but if he does so he performs his promise.

The traditional distinction between limitation and condition is that in the former there is a reference to an event which is bound to happen, e.g., some future day, in the latter, the event is one which may never happen. It is true that a reference to an event which is bound to happen cannot give the promisor an alternative and so cannot operate by way of condition, but the reference to an event which may never happen can, we shall see, operate by way of limitation.

Terms Going to Performance and Terms Going to Obligation.— The traditional treatment of limitation and condition stated also that whereas a limitation went only to performance a condition was necessarily suspensive of obligation. Pothier says: "The effect of a condition is to suspend the obligation until the condition is accomplished or considered as accomplished: till then nothing is due: there is only in expectation that what is undertaken will be done: *pendente conditione nondum debetur, sed spes est debitum iri.*[12] On the other hand, "The condition of a thing which certainly will happen is not properly a condition, and does not suspend the obligation, but only defers the right of demanding payment of it and is merely equivalent to a term of payment."[13]

This treatment attributes to the accidental distinction of whether an event is or is not bound to happen, the essential distinction whether it is or is not suspensive of the obligation. A term may be inserted in a contract for the purpose of fixing the inception of a promise: but such a term may refer to an event which is bound to happen or to one which is not bound

[12] POTHIER, OBLIGATIONS (tr. EVANS, 1806) Part II, par. 218. The general opinion at one time was that in Roman law *condicio* was necessarily suspensive of the obligation, but later commentators do not take that view. See GIRARD, MANUEL ELÉMENTAIRE DU DROIT ROMAIN, 8th ed., pp. 502 *ff.*

[13] POTHIER, *op. cit.*, Part II, par. 203.

to happen. Moreover if the reference be to an event which is not bound to happen it does not follow that the term may be waived. It may be the intention of the parties that if the event does not happen the promisor should not be authorized to act. He may not be interdicted from acting but if he does act it will not be in performance of the promise. The questions (a) whether an event is or is not bound to happen; (b) whether a term of a contract may or may not be waived; (c) whether the term goes to obligation or to performance, are independent of each other.

Where a term goes to obligation it may be considered as not being part of the promise. In *Pym* v. *Campbell* [14] the court took the view that a term fixing the inception of a contract was outside the contract altogether and so not caught by the parol evidence rule. It is, however, important to consider each term in connection with the promise it affects; a particular term going to obligation may affect only one promise.

There is no specific name for terms going to obligation. If they refer to an event which is not bound to happen then they are included in the name condition. It becomes, therefore, important to distinguish between conditions going to performance and conditions going to obligations. Where the condition goes only to performance it can always be waived. There seems to be no valid reason why there may not be some conditions precedent to obligation capable of waiver. Parties may provide that an obligation shall arise either when a specified event happens or, if it does not happen, when the promisor waives the condition.[15]

The exact intention of the parties must be ascertained. They may intend there to be a power of revoking the promise before the specified time arrives. On the other hand they may not have such an intention. In that case the effect of the term will be that no action for breach of contract can be brought until after the specified time. If one party repudiates before the specified time he cannot then commit a breach of contract for no obligation exists. But, if he does not withdraw, his continuing repudiation will amount to a breach when the specified time arrives.

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[14] (1856), 6 E. & B. 370.

[15] If the event does not happen the mere choice of the promisor subjects him to an obligation: nevertheless this is not an exception to the doctrine of consideration; for the consideration is supplied by the original agreement. If the waiver consist in the promisor's acting as promised, such action, it must be noted, is in discharge of an obligation and not the mere exercise of a privilege.

The Operation of Limitations.—A limitation is of course an integral part of a promise. A promise to pay £100 on Jan. 1st is but one element of a contract though it may appear in two separate clauses: (a) an undertaking to pay £100, (b) time for performance Jan. 1st. For some purposes the separation may be convenient, but it must not be forgotten that there is only one promise. The time of performance does not affect the inception of the promise: an obligation comes into existence as soon as the contract is concluded. This is shown in English law by the action for an anticipatory breach of contract.

A limitation can refer to an event which may never happen. There may be a promise to act until A returns from Rome.[16] When A returns from Rome further action will not be a performance of the promise: the promisor cannot waive the term. Again there may be a promise to act if A returns from Rome. Though performance cannot be required before A returns, an obligation to act arises at once. Nor is the term a condition if the parties have not inserted the term for the benefit of the promisor so that he is able to waive the term. The fact that a long period may elapse before it can be determined whether the promisor has to act does introduce an element of uncertainty into the contract, but it has never been suggested in the case of a condition, which in this respect is governed by the same considerations, that the contract would be void for uncertainty. Should it become clear that A will never return then the promisor is not required to act. Such inaction is, however, a performance of the contract. Further matters relevant to such terms are discussed in the next section, for the more usual operation of a term relating to an event which may never happen is probably by way of condition. In fact the courts would probably take the view that prima facie such a term is a condition.[17]

A promise to act *only* if A returns from Rome must operate by way of limitation. It cannot be said that there is a promise

[16] This is sometimes wrongly considered to be a resolutive condition. See POTHIER, *op. cit.*, par. 224, and post p. 319.

[17] Except where the term is part of a warranty. A warranty contains a limitation of this nature. See post pp. 327 *ff.* So too does the recent case of *Re A Debtor*, [1937] 1 All E.R. 1. In that case A had guaranteed in 1933 a debt due from B, a married woman, to C. A paid C in 1936. A obtained judgment from B on an indemnity; and petitioned for her bankruptcy. The Law Reform Act 1935 only allowed petitions in bankruptcy against a married woman in respect of contracts, debts or obligations incurred after the passing of the Act. B contended that it was no term of A's guarantee that she should indemnify A; but that this indemnity was imposed by law when the guarantor was called on to pay. In argument it was admitted that a promise to pay a sum of money on the return of A from Rome gave rise to an immediate obligation. B's indemnity was a promise to pay A if A was called on to pay C.

to act subject to a condition that A returns from Rome. If that were the case the condition could be waived and the promisor act though A had not returned, whereas he has promised not to act unless A returns. Nor can it be said that the promise is merely to forbear subject to a condition that A does not return. If that were the case the promisor could waive the condition and forbear even though A returned, whereas he has promised to act if A returns. The true position is that there are two promises; (1) to forbear so long as A does not return; (2) to act if A does return. In the first there is clearly a limitation. The second also contains only a limitation, for waiver there would be a breach of the first promise : it is clear, therefore, that the parties cannot intend there to be waiver.

The Operation of Conditions.—Where the condition goes merely to performance it is clear that it is an integral part of a promise. A promise to pay £100 if a horse win the Derby is one entity though it may be convenient to treat it in two parts, and in an actual contract the promise may appear as two clauses : (a) an undertaking to pay £100, (b) a condition, if the horse win the Derby. It has been suggested that the name promise should be confined to the aggregate and that the name 'prestation' should be given to the undertaking and its limitations. This might result in an unequivocal terminology, though prestation is capable of meaning performance. The main objection to the new name is that there is current a terminology whereby the undertaking apart from the condition is itself called the promise : and this terminology does not cause error provided it is realized that such a promise has inseparably annexed to it the condition.

A condition defines the nature of the acts to be carried out, but its mode of limitation is to give the promisor alternative modes of performance. It is usual to say that the failure of the event upon which a promise is conditional releases the promisor from liability to perform the promise. This is only true if promise is used as meaning the undertaking apart from the condition. The true position is that by doing nothing the promisor does perform his promise for he did not undertake to do anything in the event of a failure of the condition.[18]

Identical conditions can be annexed to every promise of one party or they may be annexed to every promise of both

[18] "A promise is as truly kept and performed by doing nothing where the condition of the stipulated act has been broken, as it would have been by doing the act if the condition had been fulfilled." (HOLMES, THE COMMON LAW, p. 318.)

parties. In the latter case the event specified in the conditions can be said to be a condition of the contract. This phrase "condition of the contract" should be confined to that case. It is, however, sometimes used where there is meant condition in a contract, where only one promise is subject to the condition. It is, of course, obvious that different conditions may be annexed to various promises; and that more than one condition may be annexed to one or more promises or to the contract as a whole.

A condition may be framed positively or negatively. A promise to act if x happens is exactly the same as a promise to act if *not-x* does not happen. It is thus always possible to say that the performance of the promise is conditional on the happening of an event.

In order to distinguish clearly between a condition and a promise it would be convenient to call the happening of the event which is the subject of the condition, the "fulfilment" of the condition, and to confine "performance" to the carrying out of the promise. The non-happening of the event would be called the "failure" of the condition and the "breach" used for the non-performance of a contract. This terminology would avoid the error of considering as a promise what is really a protestative condition making a true promise conditional on the doing of some act by either of the parties.

Conditions Precedent to Performance and Precedent to Obligation.—Pothier had considerable influence on the development of English Law, and his view that a condition is necessarily suspensive of the obligation is found as a proposition of English law in a modern text book.[19] It is, however, submitted that not only does English law recognize that a condition may be precedent to performance only, but that a condition should be regarded as going to performance unless the parties have made it clear that they intend it to go to the existence of the obligation. The question is one of construction and therefore dependent on the circumstances of each case; but ordinarily parties contemplate that a binding obligation will arise from the time of the conclusion of the agreement.[20] A repudiation by the promisor

[19] SALMOND AND WINFIELD, CONTRACT, p. 138.

[20] *Cf.* WILLISTON, CONTRACTS, 1st ed., sec. 666. "Generally in contracts where reference is made to conditions what is meant is conditions qualifying liability under a contract or promise, not conditions qualifying the existence of a contract or promise. . . . . The fact that no liability on either side can arise until the happening of a condition does not however make the validity of the contract depend on its happening. Whether there is a contract depends on the right of the parties to revoke their promises. A contract to sell goods to arrive will impose no liability on either party unless the goods arrive, but each is irrevocably bound by a contract from

before the event fails would be regarded as wrongful. It is clear law that where a promise by one party is conditional on the performance by the other of his promise a repudiation by the former enables the latter to sue him at once without even having to perform his promise.[21]

The law recognizes of course that a condition may go to obligation. Thus in *Payne* v. *Baird*,[22] Bankes L.J. said : "The sending of the sample is a condition precedent . . . . . which has got to be performed before either party is bound to the other." If there is failure of a condition the promisor is not bound to carry out his undertaking. This is true whether the condition goes to obligation or performance. But the different operation of such conditions is seen where the promisor repudiates before failure of the condition.

Where the condition goes merely to performance there is at once an anticipatory breach of the contract. Subsequent failure of the condition does not affect this fact. It may, of course, affect the question of damages, and justify the grant of merely nominal damages. But circumstances may be envisaged in which damages may be substantial. A promises to charter a ship from B provided a certain cargo arrives from Rome. Before the cargo is shipped and B has a chance of insuring it A repudiates. B will be entitled to substantial damages even though the cargo is subsequently lost at sea on its way to Rome.

Where the condition is precedent to the existence of an obligation then repudiation before failure cannot amount at the time it is made to an anticipatory breach of the contract. Should the condition fail no breach of the contract is ever committed. But if the condition is fulfilled and the repudiation has not been retracted there will be a breach of contract. If the time for performance has not arrived when the condition is fulfilled the breach will of course be anticipatory.

Resolutive Conditions.—A resolutive condition, or condition subsequent, is a term of a contract which provides that on the happening of an event the obligation under the promise shall cease.[23] Williston defines it as "a condition which divests a liability once it has accrued". It must be distinguished from (1) a limitation providing for action *until* the happening of a

the outset." It is, however, submitted that a condition may go to obligation yet the parties may not have power to revoke. The true distinction is suggested in the text.

[21] *Braithwaite* v. *Foreign Hardwood Company*, [1905] 2 K.B. 543.

[22] (1921), 9 Ll.L.Rep. 167.

[23] *Cf.* POTHIER, *op. cit.*, par. 224.

given event, and (2) a condition precedent to further performance on the happening of the event, which assumes a limitation until the event. The distinction must be that in the case of a condition subsequent the happening of the event avoids the liability ab initio : there is deemed never to have been any promise. Accrued "rights" are annulled, having been subject to the condition. The term implied by the courts under the doctrine of frustration is thus not a resolutive condition.

Where an act has been done under the contract the happening of the event does not however give rise to a right to restitutio in integrum. I promise to give you £5 but not if A returns from Rome. A promise to pay arises at once. But if I do not pay and A returns from Rome payment cannot be demanded nor can it be alleged that there had been a breach by non-payment before his return. On the other hand if I have paid and A returns I am not entitled to the return of the £5. The condition cannot nullify an act. Of course the payment may be made subject to a proviso for repayment if A returns.

The event in the case of a resolutive condition must be one which may never happen. For if it is bound to happen it is certain that the contract will become void ab initio, and no court would consider that parties intended such an absurd result. As it is, Roman law considered all resolutive conditions to be invalid. Williston sees no reason why they should not be legally recognized.[24] The event must however be limited in some way. If the event which destroys the promise is always likely to happen absolute rights could never be acquired and the promise could never be enforced. There would be no certainty and it is submitted that the entire promise would be void. Where the limitation depends on the doing of an act by some person there is of course a limitation on the period of uncertainty, namely the death of the person. If A dies before having returned from Rome it becomes impossible for him to return and the promise becomes absolute. A promise to pay £5 but not if St. Paul's should be demolished is however void. No action can ever be brought on the promise for the promisee has no absolute right. There must be some limitation such as "but not if St. Paul's should be demolished within 2 years".

[24] *Head* v. *Tattersall* (1871), L.R. 7 Ex. 7, is perhaps an example of one in English Law. The purchaser agreed to buy a horse provided he could return it by the veening of a certain day. The court regarded the proviso as a condition subsequent to the vesting of the property in the buyer. They might also have regarded the promise to pay as subject to a similar condition subsequent.

It may not be clear from the wording of a condition whether it is precedent or subsequent to obligation. A term that A shall not return from Rome may be a condition precedent — I promise to give you £5 if A shall not return from Rome: or it may be a resolutive condition — I promise to give you £5 but not if A returns from Rome. In either case of course if A does return from Rome there is no obligation to pay the £5 but there are important differences, as already seen, between the two promises. It is submitted that only the clearest language would justify a court in treating a condition as resolutive. "Such conditions are rare," says Williston. Prima facie the condition should not be regarded as resolutive.

Further differences between a condition precedent to obligation and a resolutive condition exist where there is repudiation. (a) I will give you £5 on January 1st 1938 if A does not return from Rome before September 1st 1937. If the condition is precedent to obligation and I repudiate on June 1st 1937 there is no anticipatory breach on that date. If A returns from Rome by September 1st then no obligation ever arises and there is never any breach. If A does not return there is an anticipatory breach on September 1st provided the repudiation has not been withdrawn. (b) I will give you £5 on January 1st 1938 but not if A returns from Rome before September 1st 1937. If the condition be resolutive and I repudiate on June 1st 1937 there is an anticipatory breach. But your right is conditional, and you cannot bring any action, you must wait to see whether the obligation is not destroyed ab initio by the return of A. If A returns from Rome by September 1st then your right of action ceases to exist. If A does not return there is an anticipatory breach committed on June 1st.

Conditions de Praesenti.—The event which is the subject of the condition need not be future. It may be uncertain as far as the parties are concerned though past or present and they may provide for the contingencies of which they are not certain. A charter of a ship may be conditional on its having arrived at a port on some past date, or on its being at the port at the time of the contract. Such a condition is termed *de praesenti*. In Roman law such a term was not considered an obligation. Buckland says: "A gift to X if St. Paul's is 400 feet high was not conditional; it was valid or not according to the facts."[25] Pothier accepted the Roman law doctrine. "An obligation contracted under the condition of anything that is past or present

[25] TEXT BOOK OF ROMAN LAW, 2nd ed., p. 297.

is not properly a conditional obligation."[26] The common law attitude, however, it is submitted, is as stated by Williston.[27] A condition *de praesenti* operates in the same way as one *de futuro* : it is fulfilled or fails when the true state of facts is discovered or ought to have been discovered by the party to whose promise the condition is annexed.

A condition *de praesenti* may go either to performance or to obligation, and in the latter case it may be precedent or subsequent. It is more likely that parties will consider a condition *de praesenti* as going to obligation than one *de futuro*. They may intend an obligation to arise only in certain circumstances. On the other hand they may not intend that the promisor should consider himself free before the actual facts are ascertained : which is the position if the condition goes to obligation. On the whole, however, it is likely that the proposition that a condition is prima facie to be considered as precedent only to performance does not apply to the case of a condition *de praesenti*.

If failure of a condition *de praesenti* always made the promise entirely void there could never be waiver of such a term. Waiver however is regarded as possible in some cases. There may however be other cases where the parties do not intend there to be waiver. In such cases failure of the event would of course make the contract void ab initio.[28]

The differences between a condition *de praesenti* being (1) precedent to performance; (2) precedent to obligation; (3) resolutive, can be illustrated by considering the effect of repudiation before discovery of the true facts. (1) There is a breach at once for which nominal damages at least may be recovered even if the condition fail. (2) If the condition fail there is no breach. If the condition is fulfilled the breach arises at the time of the discovery of the facts. This latter proposition appears unjust, and is an objection to the view put forward above of the materiality of the time of discovery by the parties. (3) There is a breach at the time of the repudiation according as the condition is fulfilled or no. This appears to accord with the ordinary intention of the parties: and so the courts may find no difficulty in regarding a condition *de praesenti* as being resolutive.

[26] POTHIER, *op. cit.*, par. 198.
[27] *Op. cit.*, sec. 663.
[28] One case in which there is no waiver arises when the reference to the past or present event is a limitation. The legal position in such a case, apart from the question of waiver, is the same as that in the case of a condition precedent to performance.

A common example of a condition *de praesenti* is one relating to the existence of some quality in the subject matter of the transaction. The existence of an implied condition *de praesenti* appears to me to be the best explanation of the effect of mutual mistake on a contract. Where parties are under a mutual mistake as to the subject matter of a contract, erroneously supposing that it possesses some particular quality, then if the non-existence of that quality makes the subject matter different in identity from that which the parties believe it to be, a condition is implied.[29] Section 6 of the Sale of Goods Act 1893 deals with the special case of an assumption that there is in existence the subject matter of a contract for the sale of specific goods. The section enacts that "if the goods are not in existence the contract is void".[30] The section thus prevents repudiation before the discovery of the facts from amounting to a breach. The effect of the section is the same as if a resolutive condition were deemed to exist. There is of course no possibility of waiver of the promises to deliver and accept the goods.

Potestative Conditions.—These involve the doing of an act by some person. There are three classes to be considered.

A. *Where the act is to be done by somebody other than the promisor or promisee.*

I promise to give you £5 if A goes to Rome before January 1st next. This does not differ from a condition independent of the doing of an act by some person: and is indeed a common example of a condition.

B. *Where the act is to be done by the promisee.*

The act may or may not also be the subject of a promise by the promisee. The two cases must be distinguished. (i) I

[29] In *Bell* v. *Lever*, [1932] A.C. at p. 218, Lord Atkin rejects the theory of implied condition as explaining the effect of mutual mistake. He agrees, however, that it supplies the same practical test as his theory. His theory is that mutual mistake is not concerned with "the investigation of the terms of a contract when made" but with the "formation of a contract". It "operates so as to negative or in some cases nullify consent." The distinction between "negativing" and "nullifying" consent in this particular context is not seen by me. My objection to his theory is that it is not based on any principle. Why should mutual mistake nullify consent, and if so why only where the mistake affects the identity of the subject matter? Historically the doctrine of mutual mistake is an illogical deduction from the erroneous theory of consensus ad idem in the sense of subjective agreement. If the effect of mistake is that one party assumes one thing and the other party another then according to the subjective agreement doctrine there can be no contract. But if both parties make the same assumption, as in the cases of mutual mistake, there is no reason according to the subjective agreement doctrine why there should not be a contract. The fallacy consists in assuming that a proposition true for some kinds of mistake is true for all kinds of mistake.

[30] Lord Atkin considers this a case where consent is nullified.

promise you £5 if you go to Rome before January 1st, but you do not promise to go to Rome. If you do not go to Rome I am released from my promise to pay you £5, but you are under no liability to me for not going. (ii) I promise you £5 if you go to Rome: you promise to go to Rome. There are two terms of the contract the subject matter of which is going to Rome: there is a condition annexed by my promise and there is your promise. Each has a distinct function and so your going to Rome has a dual operation. It is a fulfilment of the condition annexed to my promise and also it is performance of your promise. I must pay you the £5 not because you have performed your promise as such, but because such performance operates as a fulfilment of the condition annexed to my promise. Likewise, of course, your not going to Rome has a dual operation. There is a failure of the condition annexed to my promise and you have committed a breach of your promise. Because of the failure of the condition I do not have to pay you £5: because of the non-performance of your promise you are liable to me in damages. The event which brings about failure of the condition operates also as a breach of your promise. Failure of the condition is followed by your liability to pay damages but is not the cause of it. The breach of your promise is followed by release from my promise but is not the cause of it. This does not appear to be always clearly recognized in the treatment of dependent covenants of which the instant case is an example. When it is said that my promise to give you £5 is dependent on your promise to go to Rome there is meant that annexed to my promise is also a condition that you go to Rome. The exact position is obscured by a terminology which calls your promise a condition and says that breach of the condition releases me from liability. It is difficult to say whether the terminology or the analysis is at fault, and if both which ismore to blame.

C. *Where the act is to be done by the promisor.*

Again the case where the act is also the subject of a promise must be distinguished from the case where it is not. (i) I promise to give you £5 if I go to Rome by January 1st but I do not promise to go to Rome. Performance appears to be dependent on my caprice as to whether I go to Rome or not. The case, however, is not the same as the stipulation *spondesne si volueris* which in Roman law was a nullity.[31] I remain free to go to

[31] Dig. 54.1.46.3. *Cf. Re Brand Estates Ltd.*, [1936] 3 All E.R. 374. A clause in a contract provided that "publishers shall be freed from the obligation of publishing the guide, should, in their opinion insufficient advertisements be obtained to justify publication". It was argued that no real obligation rested on the publishers, but the court held that the opinion had to be a reasonable and honest one.

Rome or not, but if I do go I must give you the £5. There is a binding promise in that event and not a mere option. (ii) I promise to give you £5 if I go to Rome and I also promise to go to Rome. If I do not go to Rome I break my promise to do so, but I am released from my promise to give you £5. In assessing damages for breach of the promise to go to Rome the fact that I promised to give you £5 if I went must not be taken into account or proper effect will not be given to the condition.

Dependent Covenants.—Covenants are said to be dependent when, if one party commits a breach of his covenant, the other is entitled to repudiate his covenant and ceases to be bound thereby. The leading case in English law used to be *Boone* v. *Eyre*,[32] in which Lord Mansfield stated that the test of dependency is whether a covenant goes to the whole of the consideration or only to part. The older learning on the subject is to be found in the notes of Serjeant Williams to *Pordage* v. *Cole*.[33] His comment on *Boone* v. *Eyre* is that "where a person has received a part of the consideration for which he entered into the agreement it would be unjust because he has not had the whole he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to his remedy to recover any damage he may have sustained in not having received the whole consideration." This is a construction of the term *ex post facto* and is unsound.[34] Perhaps appreciation of this resulted in the test of dependency adopted later being whether the covenant goes to the root of the consideration. This test appears to be arbitrary and unsupported by principle. Moreover it has proved unsatisfactory as a practical guide. As Lord Sumner said: "the phrase 'goes to the root of the consideration' like most metaphors is not nearly so clear as it seems."[35] The courts have eventually, after much labour, arrived at this test as to whether covenant A is dependent on covenant B. Would performance of covenant A, though there was no performance of covenant B, be different in identity from that for which the parties clearly intended to stipulate?[36]

Much of the difficulty with which the courts have had to contend is the terminology found as early as *Boone* v. *Eyre* whereby if one covenant is dependent on another the latter is

[32] (1777), 1 H.Bl. 273 n.

[33] 1 Wm. Saunders 320.

[34] See the adverse comments in *Ellen* v. *Topp* (1851), 6 Ex. 424. And see *Wallis* v. *Pratt*, [1911] A.C. 394 at p. 400.

[35] *Bank Line* v. *Capel*, [1919] A.C. 459.

[36] *Guy-Pell* v. *Foster*, [1930] 2 Ch. 169, per Lawrence L.J. at p. 187: *Huntoon* v. *Kolynos*, [1930] 1 Ch. 528.

called a condition.[37] The problem is really a simple one. When is the performance of one promise a condition of another promise? For a promise is dependent on another promise if there is annexed to the former promise a condition that the latter promise be performed. The terminology which calls the latter promise a condition prevents the problem being stated thus, for it would appear nonsensical to say a promise is a condition if its performance is a condition.

The solution of the problem is also simple. The contract may expressly provide that performance of one promise is to be a condition of the other. You promise to go to Rome. I promise to give you £5 if you go to Rome. We have already considered such a case. If there is no express condition the problem depends on whether a condition can be implied. The rules as to the implication of terms in a contract are now quite clear. A term is implied in a contract if it is necessary in a business sense to give efficacy to the contract, if failure to add such a term would make the contract different in identity from that contemplated by the parties.[38] Thus a promise will be subject to an implied condition that a promise of the other party be performed if without such a condition the promise would be different in identity from that for which the parties clearly intended to stipulate. This is the test at which the courts have finally arrived by another route. A similar test will decide whether a reference to any matter is a condition of a promise or whether it operates by way of warranty.

Mutually Dependent Covenants.—Two promises cannot be mutually dependent in the sense that performance of one is a condition of performance of the other and vice versa: that would result in a stalemate. Promises are said to be mutually dependent when the promise of each party is subject to the condition that the other is ready and willing to perform his promise. Holmes distinguishes clearly between the promise and the condition,[39] but unfortunately sec. 28 of the Sale of Goods Act calls the promises concurrent conditions.

[37] Williston strongly criticizes this terminology. He does not state, however, its early sanction by judicial use and its present statutory authority in the Sale of Goods Act. His criticism is found in sec. 665 of his great work. "The difference between conditions and promises is so radical in its consequences that there is no excuse for a nomenclature which fails to recognize the distinction. In the English books there has sprung up an astonishing usage of the word 'condition' in the law of sales as meaning a certain kind of promise, and their usage has to some extent been followed in the United States. It cannot be too strongly deprecated."

[38] See *The Moorcock* (1889), 14 P.D. 64; *Reigate* v. *Union Manufacturing Co.*, [1918] 1 K.B. 592; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A.C. 119; *Bank Line* v. *Capel*, [1919] 435; *Bell* v. *Lever*, [1932] A.C. 161.

[39] HOLMES, *op. cit.*, p. 321.

Waiver of Conditions.—Waiver is a unilateral act of the promisor whereby he manifests an unequivocal intention of performing the promise even though the condition fails. Conduct is sufficient, and actual performance of the promise despite failure of the condition is of course an obvious case of waiver. Where A's promise is conditional on B doing some act then if A prevents B from doing that act he is deemed to have waived the condition: he shows he does not require the act to be done.

Is waiver revocable? It appears not unreasonable to hold that it is revocable except where the other party has altered his position in reliance on a declaration of waiver. If the parties agree for valuable consideration that one party shall waive a condition the agreement would itself constitute an irrevocable act of waiver. If both parties agree to waive conditions annexed to their respective promises they would thus irrevocably waive the conditions. Consideration is not necessary for waiver, but even if waiver is otherwise revocable it is submitted that it becomes irrevocable if there is consideration. It is not a case of there being merely a collateral contract not to revoke, under which, though revocation is possible, it amounts to a breach of such contract.

The courts might hold that waiver is always irrevocable. The promisor has the alternative under the contract, if the condition fail, of not acting or electing to act. It is from the nature of the case impossible for him to elect without full knowledge of the alternatives. He is given the alternative for his own benefit. Should he not be bound by his election? Where he has actually performed despite failure of the condition he is of course on any theory unable to recall his waiver.

It will be remembered that waiver is not possible with regard to all conditions going to obligation. The name condition has been given to terms going to obligation referring to an event which may never happen even though the parties do not intend there to be waiver.

The condition which is waived may be the performance by the other party of his promise. Waiver of the condition does not release the other party from his promise: he will be liable in damages if he does not perform his promise.[40] There would have to be consideration for the release of the promise, but it is not necessary for waiver of a condition. Consideration might be supplied for waiver of the condition, and yet the agreement

[40] It is just possible that sec. 11 (1) (a) of the Sale of Goods Act is merely a statutory declaration of this proposition.

might not extend to release of the promise, though in most cases it would. Of course there might be a release of the promise without waiver of the condition.

An agreement by parties to a contract to waive the conditions annexed to their promises is different from an agreement which rescinds a contract and substitutes therefor a new contract. In the case of waiver the old contract continues. The distinction is important in the case of a contract requiring written evidence e.g., a contract for the sale of goods of more than £10. Where there is rescission there must be a memorandum of the substituted contract in order that it may be enforced, though effect can be given to the rescission alone without any memorandum. On the other hand the agreement to waive is not a contract for the sale of goods, and the contract can be enforced in its absolute form though there is no memorandum of the waiver.

In the light of this difference the distinction between the doctrine that a promise subject to a non-fulfilled condition *de praesenti* is void ab initio and the doctrine that the failure of the condition operates in the same way as the failure of a condition *de futuro* is seen to have practical consequence. Let us consider a contract for the sale of goods of more than £10 in value subject to the condition that St. Paul's is more that 400 feet high. (a) If a condition *de praesenti* operates in the same way as one *de futuro* this condition can be waived. A binding contract will then exist without a new contract being entered into and without any new memorandum being required. If therefore there were an agreement to waive and the seller did not deliver he could be sued for breach of the contract: he could not be sued for breach of an agreement to waive for waiver has in fact taken place. (b) If the contract is to be deemed void there could be no waiver. The parties could however agree to perform despite the failure of the condition. But this would be a new contract for the sale of goods and would require a new memorandum. It would not be waiver.[41]

Warranties.—A warranty is a promise to compensate the promisee in money for the harm he suffers by the happening of a specified event. Its essence is insurance against the risk of the event happening. But for the warranty the promisee may have had himself to bear the risk: the warranty makes it clear that the risk is borne by the promisor.[42] In contracts of guarantee

[41] In *Bell* v. *Lever*, [1932] A.C. at p. 225, Lord Atkin refers to the possibility of a contract subject to a non-fulfilled condition *de praesenti* being waived. Yet he also says the contract is void *ab initio*.

[42] *Cf.* SALMONS & WINFIELD, CONTRACT, p. 32.

and assurance such a promise is the principal term: and the promise is not called a warranty. A warranty is generally a collateral term of a contract. By this it is not meant that the warranty is in any way a subsidiary or less important term of the contract but merely this: the risk assumed is one connected with the subject matter of another promise made by the warrantor, as where A sells a horse and warrants that it is sound.

According to this definition performance of the warranty is payment of the compensation, which is nil if the risk does not materialize: breach of the warranty is failure to compensate. It would be reasonable to hold that there was no breach until the warrantor had knowledge, or means of knowledge of the risk, and had failed thereafter to pay compensation. It would also follow that in some cases the promisee would have to give notice to the warrantor of the materialization of the risk, e.g., where this could only be known by the promisee.[43]

The ordinary meaning, however, of the phrase "breach of warranty" is not failure to make compensation, but materialization of the risk—the happening of the event insured against. If I warrant that a horse is sound the mere fact that it is unsound is said to be a breach of warranty, and any question of my knowledge of its unsoundness or of my unwillingness to compensate may be deemed irrelevant. It is submitted that this is due to the tortious character of an action for "breach of warranty". If I warranted that a horse was sound when it was not then the law certainly was at one time that I had committed a breach of a duty imposed by law.[44] The mere fact that the horse was unsound was thus a "breach of warranty". If the warranty related to a future event independent of an act of the warrantor no cause of action lay in tort if the risk materialized. If I sold you a horse and warranted that it would live for one year and it died within the year your cause of action lay in contract only. In such a case it is submitted that no action lies unless I am unwilling to compensate, which may involve my knowledge of the death of the horse. It cannot be said that the death of the horse gives rise per se to an action for breach of warranty. It is possible that the courts might now hold that all actions for breach of warranty are contractual. If the warranty relates to a present state of facts then insofar as an action lies without

[43] "There are certain cases where from the very nature of the transaction the law requires notice to be given though not expressly stipulated for."—*Vyse* v. *Wakefield*, 6 M. & W. 442, per Parke B.

[44] *Williamson* v. *Allison*, 2 East 446.

proof of unwillingness of the warrantor to compensate the cause of action is still in tort.

Holmes apparently would draw no distinction between the nature of a warranty and the nature of other promises. All promises involve the "assumption of the risk of a future event" and "there is no second subsidiary promise to assume that risk", "the assumption follows as a consequence directly enforced by the law without the promisor's co-operation".[45] This is certainly true of promises other than warranties: but Holmes would apply it also to warranties. As we have seen, in his view a promise that it will rain to-morrow is not a promise to compensate if it does not rain. Nevertheless it is submitted that in the case of a warranty, while there is only one promise, that promise is the specific assumption of the risk. The payment of compensation is not a "consequence enforced by the law" but the essence of the promise. It is true that according to this analysis the obligation imposed by law appears to be the same as that imposed by the parties. This is not however due to an error in the analysis whereby what is only a legal consequence of a breach of warranty is made part of the definition of a warranty. The legal remedy for every promise to pay money appears to be the same as the contractual obligation: the common law action for damages appears to operate as a decree for specific performance.[46]

Holmes supports his argument by saying that "a promise could easily be framed which would be broken by the happening of fair weather". He does not frame one, and I find it difficult to envisage a promise that it will rain to-morrow which is broken by the happening of fair weather. If I promise to pay you a sum of money at the very moment when fair weather occurs to-morrow this may be broken by the happening of fair weather,[47] but this is not a promise that it will rain. This is a promise essentially for payment of money, the reference to fair weather (the non-existence of rain) being merely a limitation. The essence of a promise that it will rain is a promise to compensate

[45] HOLMES, THE COMMON LAW, p. 302.

[46] *Cf.* FRY, SPECIFIC PERFORMANCE, sec. 16, (iii): "Lord Mansfield C.J. has remarked that 'pecuniary damages upon a contract for payment of money are from the nature of the thing a specific performance' (*Johnson* v. *Bland* 2 Burr, at 1086). But the remark seems hardly strictly accurate. No doubt the sum agreed to be paid will be the same whether the contract be performed or broken. But in the former case the money is paid in performance of the contract: in the latter it is paid as a satisfaction for its non-performance."

[47] A promise to pay you a sum of money one hour before fair weather occurs must be broken by the happening of fair weather. This, however, is certainly not a promise that it will rain.

if it does not. In such a case a contractual breach is constituted not by fair weather but by unwillingness to compensate.

The reference to the happening of the event in a warranty operates by way of limitation. An obligation arises at once, not merely when the event happens. The damage sustained by the promisee is determined when the event happens, and the amount of compensation is then fixed. If the event happens but no damage results then it is submitted there is no payment to be made at all. No action lies for nominal damages: a warranty is insurance against risk of damage. If the event does not happen no payment can be made under the warranty: any payment would be outside the scope of the warranty. The reference to the event being a limitation is not a condition which can be waived. Moreover unless the event happens the amount of compensation cannot be ascertained.

The materialization of the risk does not release the warrantee from his obligation under the contract. I warrant that a horse I sell you is sound. You must pay the price even should it be unsound, though you may set off damages for breach of warranty. A promise may, however, be subject to a condition the subject matter of which is the risk contemplated by a warranty: e.g., I warrant that a horse I sell is sound: you promise to take delivery and pay the price provided the horse is sound. Each contract must be examined to see whether an event referred to is the subject matter of a condition as well as a warranty: there may be a warranty without there being a condition.

A warranty, like any promise, may itself be subject to a condition, e.g., I warrant that a horse I sell you will live for a year provided it is not used for hunting. The condition may be that you shall waive a condition annexed to your promise. Thus, I warrant the horse I sell you is sound provided you take delivery and pay the price; you promise to take delivery and pay the price provided the horse is sound. If the horse is unsound you may avail yourself of the condition annexed to your promise: but in that case you cannot sue me on my warranty—I can avail myself of the condition annexed to it. You can waive the condition and take delivery, and in that case my warranty becomes absolute and I must compensate you.[48]

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[48] This, it is submitted, is the real effect of sec. 11 (1) (a) of the Sale of Coods Act.