1894

Conditions and Warranties in Contracts of Sale

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THESIS

CONDITIONS AND WARRANTIES

in

CONTRACTS OF SALE

Presented for the Degree

of

Master of Laws

by

Frank Weldon Russell LL. B.

Cornell University

1894
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CONDITIONS AND WARRANTIES

in

CONTRACTS OF SALE

The question as to when a stipulation in a contract is a condition and when a warranty has given rise to considerable confusion and misapprehension. The authorities upon this point are numerous and not always harmonious. My purpose is to collate and discuss the principal English cases, to set out, if possible, what the law is and to point out some of its inconsistencies. Perhaps I can best point out the distinction in effect between a condition and a warranty, and also, incidentally how the question may arise, by quoting from the opinion of Lord Abinger in Bean v. Burness, 3 E. & S., 751. He says,—

"Properly speaking a representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of policies of insurance, at all events maritime
policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with knowledge of its untruth, or by reason of its being made if honestly, with a reckless ignorance of whether it was true or untrue. Representations are not usually contained in the written instrument of contract yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. The question however may arise, whether a descriptive statement in a written instrument is a mere representation or whether it is a substantive part of the contract. This is a question of construction which the court and not the jury must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of the contract and not a mere representation, the oft-discussed question may of course be raised whether this part of the contract is a condition precedent, or only an independent agreement a breach of which will not justify a repudiation of the contract but will only be a cause of action for a compensation in damages.
A distinction, in effect, between a condition precedent and an independent agreement or warranty is here pointed out, namely, the breach of a condition gives the promissory a right to repudiate the whole contract, while the breach of a warranty does not release him from his contract but is only ground for an action for damages. How are we to distinguish between those statements or representations which are conditions and those which are independent agreements or warranties.

Considerable uncertainty and obscurity is caused on this point by the unfortunate use of the word warranty. Anson gives five senses in which this word has been used. It is not necessary to enumerate them here but another quotation from the opinion of Lord Abinger in the above case will serve as an example of the many senses in which this word is used. At one place he says:—"If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the oft-discussed question may, of course be raised, whether this part of the contract is a condition precedent or only an independent agreement." And again—"If such de-
A statement was intended to be a substantive part of the contract it is to be regarded as a warranty that is to say, a condition on the failure or nonperformance of which the other party may, if he is so minded, repudiate the contract in toto. If, indeed, he has received the whole, or any substantial part of the consideration, or a promise on his part the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement for the breach of which the compensation may be sought in damages.

In the above quotations it will be observed that the word warranty is given at least three distinct meanings and condition and warranty are used as synonymous terms. I shall use the word warranty as meaning an independent subsidiary promise, collateral to the main object of the contract. This is the use of the word adopted by Sir William Anson. (See Anson on Contracts, Par. 295 N. 1).

In the earlier cases upon this subject the courts do not seem to have considered the intention of the parties as being of any importance whatever. Their decisions
are based upon a narrow and technical construction of the language of the instrument. Thus in 15 Henry VII. 10 pl. 17, it was ruled by Fineux C. J., that if one covenant with me to serve me for a year, and I covenant with him to give him twenty pounds if I do not say, for the cause aforesaid he shall have an action for the twenty pounds although he never serves me; otherwise it is if I say that he shall have twenty pounds for the cause aforesaid. So, if I covenant with a man that I will marry his daughter and he covenants with me that he will make an estate to me and his daughter, and the heirs of our two bodies begotten, if I afterwards marry another woman, or his daughter marries another man, yet I shall have an action of covenant against him to compel him to make the estate; but if the covenant were that he would make the estate to us two for the cause aforesaid, in that case he would not make the estate until we were married.

In later cases the rule has been established that the dependents or independents of covenants is to be collected from the evident sense and meaning of the parties. (See per Lord Mansfield, in Jones v. Barclay, 2 Doug., 684 - 691).

This is the rule by which the courts are now govern-
ed in deciding such questions. (Bettini v. Gye, 1 Q. B. D., 1883). In theory it is simple but, for some reason or other, it is very difficult of application.

Mr. Benjamin gives five rules for discovering this intention. (See Benjamin on Sales, Par. 562).

1st. Where a day is appointed for doing any act and the day is to happen or may happen before the promise by the other party is to be performed, the latter may bring action before performance, which is not a condition precedent; aliter, if the day fixed is to happen after the performance, for then the performance is deemed to be a condition precedent.

2nd. When a covenant or promise goes only to part of the consideration and a breach of it may be paid for in damages it is an independent covenant not a condition.

3rd. Where the mutual promises go to the whole consideration on both sides they are mutual conditions precedent formerly called dependent conditions.

4th. Where each party is to do an act at the same time as the other, as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer, these are concurrent conditions and neither party can maintain an action for breach of contract with-
out averring that he performed or offered to perform
what he himself was bound to do.

5th. Where from the consideration of the whole in-
strument it is clear that the one party relied upon his
remedy, and not upon the performance of his condition by
the other, such a condition is not a condition precedent.
But if the intention was to rely upon the performance of
the promise and not on the remedy, the performance is not
a condition precedent.

These are substantially the rules given in the notes
to Pordage v. Cole, 1 Wm. Saunders, S. 320, Note B.,
also Cutter v. Powell, 2 S. L. C. 1. They are not abso-
lute, however, and if the instrument, when construed ac-
cording to them, discloses an intention which is not the
apparent intention of the parties the court will disre-
gard them.

In Roberts v. Brett, 18 C. B., 561, there was an a-
greement dated the 15th of May, by which the plaintiff
covenanted forthwith to procure a vessel and stow on
board a certain telegraphic cable, then at Worden's
wharf, and to rig, provision and man her, and to have her
ready for sea at the Nora on or before the 15th of July.
The defendant covenanted to pay the plaintiff five hun-

£5000 by instalments,—£1000 seven days after the arrival of the vessel at Morden's wharves, £2000 on or before the expiration of twenty one days after the vessel should have arrived alongside Morden's wharf and the remaining £2000 as soon as she had put to sea from the Nora, and also to give the plaintiff 500 shares in a certain company. It was also mutually agreed that each party should, within ten days after the execution of the agreement, give and execute to the other a bond with two sureties in the sum of £5000 for the performance of the covenants on his part. In an action upon this agreement the breaches assigned being non-payment by the defendant of the five thousand pounds or any part thereof and non-delivery of the shares: held, that the execution of the bond by the plaintiff was a condition precedent to his right to sue for such breaches. For the plaintiff it was urged that the case came within the first rule in the notes to Portage v. Cole, (supra), as the liability to pay the £1000 might accrue before the time at which it was stipulated that the bond should be given; and also, that it came within the third rule (Mr. Benjamin's second rule) as it was a covenant going only to part of the consideration on both sides a breach of which might be paid for
in damages. Jervis, C. J.:—"I am of the opinion that
the giving of a bond by the plaintiff was a condition
precedent to the obligation on the defendant's part to pay
the £5,000 or any part of it. If we were to act
simply on the first rule in Portage v. Co that where a
day is appointed for doing an act, and the day is to happen or may happen before the thing which is the consider-
ation for it is to be performed, the condition is dis-
pensed with,—and were to assume here that the plain-
tiff was bound at once to begin to prepare the vessel,
so that it was certain that the seven days after her ar-
rival alongside Morden's wharf when the first payment of
£5,000 would be due must expire before the lapse of the
period for giving the bonds, we might feel some diffi-
culty in arriving at the conclusion we have come to. But
after all, that rule only professes to give the result of
the intention of the parties: and where on the whole, it
is apparent that the intention is that that which is to be
done first is not to depend upon the performance of the
thing that is to be done afterwards, the parties are re-
lying on their remedy, and not on the performance of the
condition; but where you plainly see that it is their in-
tention to rely on the condition, and not on the remedy,
the performance of the thing is a condition precedent".

However unsatisfactory, in some respects, the reasoning upon which this case is decided, the rule is there very clearly laid down that the intention of the parties when it can be discovered is to be the controlling consideration and that the rules to Portage & Co& will not be decisive where it clearly appears that the parties contemplated different results.

The 2nd and 3rd of these rules are the most important. In almost every case the question to be decided is, whether the promise goes only to part of the consideration or whether it goes to the root of the whole agreement. I propose now to examine and discuss the cases coming under these two rules.

In considering whether a promise or stipulation goes to the whole or only to a part of the consideration it is necessary to take into account the circumstances under which, and the purposes for which, the contract was made. A stipulation which might, under ordinary circumstances, be an immaterial one might under a different condition of affairs be one of the utmost importance. In Graves v. Legg, 9 Ex. 709, for instance, the plaintiff agreed to sell the defendant a cargo of wool and covenanted to declare
the name of the vessel as soon as the wool was shipped. At the trial it was proved that wool was an article of fluctuating value and not salable till the name of the ship had been declared. It was held that in order to get at the intention of the parties the court should take into consideration not only the language of the instrument but also the surrounding circumstances and, it having been shown that wool was an article of fluctuating value and not salable until the name of the vessel had been declared, they concluded that the stipulation after declaring the name of the vessel was intended by the parties to be of the essence of the contract.

In examining the cases under these rules we will probably gain nothing by going back of the case of Boone v. Eyre, 1 H. Bl., 273, Note. In this case the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies together with the stock of negroes thereon in consideration of £500 and an annuity of £160 pounds per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes and that the defendant should quietly enjoy it. The defendant covenanted, that the plaintiff well and truly performing all and ever
thing therein contained on his part to be performed, he
the defendant, would pay the annuity. Breach, the non-
payment of the annuity. Plea, that the plaintiff was
not at the time of making the deed, legally possessed of
the negroes on the plantation and so had not a good ti-
tle to convey. Held on demurrer that the plea was bad.

Lord Mansfield:— "The distinction is very clear, where
the mutual covenants go to the whole of the consideration
on both sides they are mutual conditions, the one prece-
dent to the other. But where they go only to a part,
where a breach may be paid for in damages, there the de-
fendant has a remedy on his covenant, and shall not plead
it as a condition precedent. If this plea were to be
allowed, any one negro not being the property of the
plaintiff would bar the action".

There are several cases which, though important,
cannot be classified under any general heading; these I
give here in the order in which they were decided except
in one or two instances where for purposes of comparison
I have found it convenient to depart from the general
scheme.

In Glazebrook v.Woodrow, 8 T. Rep., 356 the plain-
tiff covenanted to sell to the defendant a school house
and to convey the same to him on or before the first of August, 1797 and to deliver up the possession to him on the 24th of June, 1796, and in consideration thereof defendant covenanted to pay plaintiff £120 on or before the 1st of August, 1797. Defendant was put in possession on June 24th, but plaintiff did not execute any conveyance of property to the defendant. In an action by the plaintiff to recover the £120 it was held that the covenant to convey, and that for the payment of the money were dependent conditions and that the plaintiff could not maintain an action for the £120 without averring that he had conveyed or tendered a conveyance to the defendant.

It would seem as if this case would come under the first rule as a case where a day is appointed for the doing of an act and the day is to happen or may happen before the promise by the other party is to be performed, in which case, if that rule were followed, it would have to be considered an ill-decided case. The decision is put simply upon the ground that the agreement to convey was a substantive part of the contract. Lord Kenyon says:— "The very substance of the consideration to entitle the plaintiff to receive the money was the making of
the conveyance required; and it is admitted that he has not done it; that makes an end of the question.

Mattock v. Kinglake, 10 A. & E., 50, is a case somewhat similar to the one above. In this case, by article oles under seal, the plaintiff agreed to sell and the defendant to purchase certain premises. The plaintiff covenanted to pay, on or before the 5th day, as consideration for such sale or purchase, a certain sum and to pay for the conveyance and stamps. Held, that the conveyance was not a condition precedent to not concurrent with the payment. The case is so decided under the 1st rule to Portage v. Cole (supra) and, it seems to me, is directly in conflict with Glazebrook v. Woodrow which the court attempts to distinguish by saying that in that case both the acts were to be done at the same time or at the same day. Such, in fact, was not the case.

From the language used in that case it would appear that the parties clearly contemplated that the payment might be before the conveyance.

If we hold strictly to the rules of Portage v. Cole, the decision in Mattock v. Kinglake is right and that in Glazebrook v. Woodrow, wrong, but if, on the other hand
we are to be governed by the real intention of the parties, as nearly as it can be got at, then the position is just the reverse.

In Stavers v. Curling, 3 Bing. N. C., 355, the plaintiff as captain of a South Sea whaler, covenanted with the defendant that he would proceed to the fishery and procure a cargo of Sperm oil, or as great a proportion as might be under all circumstances, within his power to obtain; would return to London, and at his own cost deliver the cargo; would obey instruction; be frugal of provisions and not dispose of any of them without accounting for the same; and would not smuggle nor trade nor permit any on board to do so. Defendants covenanted "on the performance of the before mentioned terms and conditions on the part of the plaintiff" to pay him a certain proportion of the net proceeds of the cargo. Held, that the plaintiff's covenants were independent and that the performance of them was not a condition precedent to an action on the defendant's covenant, the court saying, that these covenants went only to a part of the consideration and that they were more anxious to discover and be governed by the intention of the parties than to follow the strict and technical form of words used in the agreement.
This would seem to be another departure from the 1st rule to Forderage v. Cole. Here a time was set for the doing of a certain act — the sharing of the profits — and it was to happen after performance by the other party. According to that rule a performance would be held a condition precedent.

The two following cases arising out of somewhat similar circumstances and both decided by the same court at nearly the same time will serve as good illustrations of the distinction between stipulations going only to a part of the consideration and those going to the root of the agreement.

The first is Deftini v. Gye, L. R. 1 Q. B. D., 186. Here the plaintiff agreed with the defendant, the director of an opera company, to take the part of 1st tenor in theatres, halls and drawing rooms in the United Kingdom during his engagement, to begin on the 30th of March, 1875 and terminate on the 30 of July, 1875, at a salary of £150 per month. The plaintiff agreed to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsal. Plaintiff was not in London six days before the commencement of his engagement and the defendant sought on this ground to re-
to repudiate the contract. Held, that the failure of the plaintiff to be present for rehearsals was not a breach of a condition precedent but merely a breach of an independent agreement for which the defendant could recover compensation in an action for damages. Blackburn, J:—

"The court must ascertain the intention of the parties, as is said by Park, B., in delivering the judgment of the court in Graves v. Legg, 'to be collected from the instrument and the circumstances legally admissible in evidence to which it is to be construed.' He adds:— 'one particular rule well acknowledged, is that where a covenant or agreement goes to a part of the consideration of both sides and may be compensated in damages it is an independent covenant or contract.' There was no averment of any special circumstances existing in that case with reference to which the agreement was made but the court must look at the general nature of such an employment. The court considering the facts, that this is a long engagement (fifteen weeks) to sing in drawing rooms and concerts as well as in the opera, and that the failure to attend rehearsals could affect only the theatrical performances for the first week or fortnight, were of opinion that this did not go to the root of the matter so as to require them to consider it a condition precedent."
In Poussard v. Spiers, L. R. L.Q. E. L., 410, the plaintiff agreed with the defendants to sing and play in the chief female part in a new opera, about to be brought out at defendant's theatre, for three months, provided the opera ran for that time, commencing on or about the 14th of November. The first performance was announced for the 28th of November, and no objection was raised by the plaintiff as to this delay. The attended several rehearsals, such attendance being an implied part of the contract, though not expressed. Owing to delays of the composer the latter part of the opera was not in the hands of the defendants until a few days before the 28th of November and the final rehearsal did not take place till the beginning of the last week. Plaintiff was taken ill and was unable to attend any of the rehearsals in that week; and it being uncertain how long her illness might continue, defendant's manager made a provisional engagement with another artist, Miss L—to study the part and take it if plaintiff was unable. If she was not wanted Miss was to receive a ducat. If she was called on to perform she was to receive £15 per week until the 25th of December, if the piece ran so long. The plaintiff continued too ill to attend the rehearsals or
the first performance on the 28th of November or the three following days. Miss I—accordingly performed on these days. On the 4th of December the plaintiff was well enough to perform and tendered her services which the defendant refused to accept, on which the plaintiff brought an action for wrongful dismissal. Held, that the plaintiff's inability to perform on the opening and early performances, went to the root of the matter and justified the defendant in rescinding the contract. Blackburn J.; "If no substitute capable of performing the adequately could be obtained except on the terms that she should be permanently engaged at a higher pay than the plaintiff, in our opinion it follows, as a matter of law that the failure on the plaintiff's part went to the root of the matter and dischmaged the defendant.

Sales by Description.

Where goods failed to answer the description under which they are sold such failure goes to the whole consideration and the vendee is not bound to accept the goods delivered. This rule is so well settled that no authorities need be cited but it is difficult in some
cases to say what will amount to a description.

In Shepherd v. Kain, 5 R. & Ald. 240, a vessel was sold as "a copper fastened vessel" but these terms were introduced into the agreement:—"The vessel to be taken was all faults without any allowance for any defects whatever". In an action by the vendee for breach of warranty, it appeared that the ship, when sold, was only partially copper fastened and that she was not what was known in the trade as a "copper fastened vessel". It also appeared that the plaintiff, before he bought her, had a full opportunity to examine her situation. Held, that the words "with all faults" must be taken to mean with all faults which a ship might have consistently with its being the thing described. That here the ship was not a copper fastened ship at all and therefore a verdict for the plaintiff was right.

Taylor v. Bullen, 5 Ex. 779, a vessel described as "teak built" was sold "with all faults and without any allowance for any defect or error whatever". The vessel was not teak built. It was held in this case that the insertion of the word error covered any unintentional misdescription so as to shield the vendor in the absence of fraud, from any responsibility for error in describing
the vessel as teak built.

In Allen v. Lake, 18 Q. B., 560, it was held that a sale of turnip seed as "skirvings Swedes" was not a sale with a warranty of quality, but with a description of the article; and that the contract was not satisfied by the tender of any other seed than "skirvings Swedes".

In Nicol v. Godts, 10 Exch., 191, there was a sale of "foreign refined rape oil warranted only equal to samples". The oil tendered corresponded with the samples but the jury found that it was not "foreign refined rape oil". Held, that the purchaser was not bound to receive it it not being the article described. The sale by sample had reference only to the quality.

Bannerman v. White, 10 C. B. N. S., 844. Upon a treaty for the sale of hops (by sample) the proposed buyer asked the seller if any sulphur had been used in the growth or treatment of them, adding, that he would not ask the price if sulphur had been used. The seller thereupon asserted that no sulphur had been used. After the hops had been inspected, weighed and delivered, the buyer discovered that sulphur had been used in the cultivation of a portion of the hops — five acres out of
300. The whole growth, however, was so mixed up together that it was impossible to separate the sulphured from the unsulphured hops. Held, that the representation that no sulphur had been used, was a substantive part of the contract and that the use of sulphur avoided the contract. Erle, C. J., "The question (for the jury) was, 'Was the affirmation that no sulphur had been used intended, between the parties, to be a part of the contract of sale and a warranty by the plaintiff?' and the jury answered this question in the affirmative. The effect of this finding of the jury, taken with the evidence is now to be considered. We avoid the term warranty because it is used in two senses, and the term condition because the question is whether that term is applicable. Then the effect is that the defendants required, and the plaintiff gave, his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation; and if it had not been given the defendant would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used. The intera
tion of the parties governs in the making and construction of all contracts. If the parties so intend, the sale may be absolute with a warranty superadded; or the sale may be conditional, to be null if the warranty be broken. And upon this statement of facts we think that the intention appears that the contract should be null if sulphur had been used."

In John v. Kingsford, 13 C. B. 3d S., 447, the sale was of oxalic acid which had been examined and approved and a great part of it used by the purchaser before he discovered the impurities. The vendor did not warrant the quality. On analysis, it was found to be chemically impure, from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by an experienced person. There were two counts in the declaration, one for breach of contract to deliver the "oxalic acid", the other for breach of warranty that the goods were oxalic acid.

Erle, C. J., told the jury that there was no evidence of a warranty, and that the question was, whether the article delivered came under the denomination of oxalic acid in commercial language. Held that the direction was right. of the s
In Aenmar v. Castella, L. R. 2 C. P., 431, the plaintiff sold cotton to the defendant through a broker under the following contract:— "Sold by order and for account of Messrs J. C. Aenmar, & Co., to Messrs A. Castella & Co., the following cotton, viz., 123 bales at 25 d. per pound expected to arrive in London per Cheviot from Madras. The cotton guaranteed equal to the sealed sample in our possession." The sealed sample was a sample of "Long staple Salem cotton". The cotton turned out when landed to be not in accordance with the sample, it being "Western Madras instead of "Long staple Salem". The contract contained a clause, "Should the quality prove inferior to the guarantee a fair allowance to be made." It was admitted that "Western Madras" cotton is inferior to Long staple Salem and requires machinery for its manufacture different for that used for the latter. Held, that this was not a case of inferiority in quality, but of difference of kind; that there was a condition precedent and not simply a warranty and that the defendant was not bound to accept the cotton tendered.

This case is apparently a doubtful one. In the opinion of the court it seems to be taken for granted that
that what the vendee bargained for was "Long staple Salem". Such, however, does not seem to have been the case, and what he got was cotton. No particular kind of cotton was mentioned, though there was a stipulation that it should be equal to a given sample. True, that sample was "Long staple Salem", but the cotton might have been equal to the sample though it did not happen to be that particular brand. The words "equal to" would seem to import quality rather than kind. An important element in this case and one on which it may be distinguished is the fact that the cotton tendered to the vendee required different machinery for its manufacture than cotton similar to the sample shown to him.

In Hopkins v. Hitchcock, 14 C. B. N.S., 65, we find an apparent limitation to the rule that a misdescription avoids the contract. It appears here, that the plaintiff, Hopkins & Co., had succeeded to the firm of Snowden and Hopkins, Iron Manufacturers, who were in the habit of sampling their iron "S. & H.", with a crown. The defendants applied to purchase "H. & S. " iron through a broker, and were informed that all iron made by the firm was now marked "H & Co." the defendants then ordered 67 tons of the iron, and the broker made the bought note
for "67 tons H. & S. crown company bars". The iron on delivery was marked "H. & Co. " and was rejected by the defendants. The jury found the variation in the brand to be of no consequence and gave a verdict for the plaintiffs. On motion for a new trial the court refused to set aside the verdict, holding, that under the special facts and circumstances of the case, and the jury having negatived that the mark was of any consequence, the plaintiffs had delivered the goods in conformity with the description in the contract.

This case contains, at least, a strong suggestion that where a misdescription is such as not to materially affect the agreement it will not avoid the contract. It must be remembered, however, that in this case there were peculiar circumstances, namely, the fact that the defendant was aware, before he purchased the iron, that the stamp had been changed. At the same time the court seemed to lay more stress upon the fact that the misdescription was immaterial, than upon the fact of the defendant's knowledge of the change.

Time a Part of the Description.

In some contracts of sale which contain a stipula-
Time a Part of the Description

In some contracts of sale which contain a stipulation that the goods are to be shipped within a certain time the stipulation as to the time of shipment is a part of the description of the goods. This is only so in cases where a variation in the time of shipment would alter the character of goods shipped under a certain name; for instance, a June shipment of apples would differ materially from an October shipment not only as to the time but as to the quality of the fruit furnished. The only difficulty that arises here is as to the interpretation of the expressions "to be shipped" or "shipment". Do they mean that the goods shall be placed on board ship during the time specified or that the shipment shall be completed before the time expires? The latter was the view adopted in Alexander v. VanDerzee, L. R. 7 C. P. 530, in which case the defendant had contracted for the purchase of 10,000 quarters of Danubian maize for shipment in June and (or) July. Two cargoes were tendered to defendant, the bills of lading being dated respectively the 4th and 6th of June. The loading of the cargoes
was commenced on the 12th and 16th of May and finished on the 4th and 6th of June, more than half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June, but it does not appear that any evidence of usage to affect the ordinary meaning of the words was tendered. At the trial it was left to the jury to say whether the cargoes in question were "June shipments" in the ordinary business sense of the term, and they found that they were. Held, That the question was rightly left to the jury. The words were ambiguous and might mean, either that the shipment was to be completed in one of those months, or that the whole quantity of grain was to be put on board during these months.

In Bowes v. Shand, L. R. 5, Pp. Sas., 455, the contract was for the sale of 600 tons Madras rice to be shipped during the months of March and (or) April. Bills of lading for various portions of the rice were given upon the 23rd, 24th and 28th of February. The last bill of lading was given upon the 4th of March but all except a small portion of the rice had been shipped in February. In an action for refusing to accept the rice the defence
was that it had not been shipped during the months of March and (or) April. There was no evidence to show that the words "to be shipped during the months of March and (or) April" had in trade any other than their natural and ordinary meaning; on the contrary, there was evidence that they were used in their ordinary and natural sense. Held, that the natural meaning of the stipulation as to the shipment was that the whole of the rice should be put on board during the months mentioned; and that, in the absence of any trade usage to affect the meaning of the words it was for the court to construe the contract. This decision of the House of Lords effectually disposes of the decisions in Alexander v. Vanderzee.

**Negotiable Paper**

**Comings**

Coming the head of "sale by description" is a class of cases in which it has been held that the vendor of bills of exchange, notes, shares, certificates, and other securities is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that
which is false, counterfeit, or not marketable by the
name or denomination used in describing it. (Benj. Par.
§607.)

In Gompertz v. Bartlett, 2 E. & B. 849, there was a
sale of a foreign bill of exchange. It turned out that
the bill was not a foreign bill and therefore worthless
because not stamped. Held that the purchaser was enti-
tled to recover back the price because the thing sold was
not of the kind described in the sale.

In Guernsey v. Wormsley, 4 F. & F., 133, a bill of
exchange was sold to the plaintiff on which all the sig-
natures were forged except that of the last endorser who
had forged all the preceding. Lord Campbell, C. J. said that
"After the repeated decisions the court thought it must
be settled law, that the plaintiffs were under such cir-
cumstances entitled to recover the money paid on a con-
sideration which had failed".

Bramwell, who acted for the defendant in this case,
made strenuous efforts to distinguish it from the preced-
ing cases on the ground that in those cases the thing
sold was entirely false and worthless; whereas, in this
case the signature of the last indorser was genuine and
the bill therefore of some value. The cases which he attempts to distinguish seem to bear him out in his distinction, see Jones v. Ryde, 5 Taunt., 486, and Young v. Cole, 3 Pink H. C., 274, in both of which cases the instrument sold were worth no more than the paper upon which they were written, and in both of which the court seems to have based its decision on the ground that there was a total failure of consideration. Besanquet, J., in Young v. Cole, says:—"I agree in the principle of the cases cited as to breach of warranty but this is not a case of that description. Here no consideration has been given for the money received by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds but, on the stock exchange worthless paper." The court in Guerney v. Wormsley did not however adopt Bramwell's view of these cases, nor would they have been right in so doing. There is no doubt that in the ordinary case of sale of goods or merchandise, as a cargo of grain or a specified quantity of hops, the goods must answer to the description under which they were sold or the buyer has a right to reject them and recover back the price, and this irrespective of the question as to whether the goods delivered were of any value or not, and
and there is no good reason why it should not apply to sales of commercial paper. It is now settled beyond doubt that it does.

**Merchandability Under Description**

Mellor, J., in Jones v. Just, L. R. 3 Q. B., 197, says:— "In every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specified description but must also be merchantable or saleable under that description." This, however, was an action for damages for breach of an implied warranty.

There is a warranty that goods shall be merchantable but it is not a condition precedent. There are cases, such as Young v. Cole, and Jones v. Ryde, supra, and Lattimore, 9 B. & C. 259, where the goods answered to the description but were absolutely valueless and in these cases it was held that the vendee was not bound to accept the goods. The decisions in these cases proceed upon the theory of a total failure of consideration.

It is for the court to say whether the language of the contract amounts to a description of the subject mat-
ter or not but the question as to whether or not the good delivered answered to the description is for the jury. See Mitchell Newhall, 15 M. & W. 308, per Rolf, E.B., p. 310.

Sale of Cargo

In the case of the sale of a cargo question has arisen whether the delivery of a complete cargo is a condition precedent. It would seem that this would depend largely upon the circumstances in each particular case. It does not seem as if, in the ordinary case, failure to deliver a complete cargo would go to the root of the whole agreement, but it is easy to conceive of a case where it would.

In Kregger v. Blanck, L. R. 3 Exch., 179, the defendant ordered of the plaintiff "A small cargo of lathwood of about the following lengths etc. in all about 86 cubic fathoms." and the plaintiff's accepted the order. The plaintiffs, not being able to procure a vessel of the exact size, chartered a vessel to the defendant's port loaded with 83 fathoms. On arrival of the vessel the plaintiff's agent unloaded, measured, and set apart timber to answer the defendant's order and tendered him a
bill of lading for that quantity, and a draft for acceptance. Defendant declined to accept on the ground that the cargo was in excess of the order. Held, that "cargo" meant the whole cargo and not a partial of a cargo and that plaintiffs had not complied with the order so as to entitle them to maintain the action. 

Kelly C. B., gives the following reasons why the stipulation for a "cargo" should be held to mean an entire cargo. He says,— "There might be a general lien for freight upon the whole cargo, which the defendant might be compelled to satisfy though interested in only a part of the cargo. There might be a dispute as to the quality arising out of the mixture of the defendants timber with other timber brought by the same vessel. Part of the timber shipped in one entire bulk might be lost in a storm, and the question would then arise as to whose was the timber that was lost and whose was saved; and, as between two different sets of underwriters which was liable to make good the loss."

In Borrowman v. Drayton, L. R. Exch. Div., 15, the plaintiffs sold to the defendant "a cargo of from 2500 to 3000 barrels of American petroleum to be shipped from
New-York, vessel to call for orders etc. The plaintiffs chartered a vessel, and put on board three thousand barrels of petroleum and a bill of lading was signed making them deliverable to the plaintiff. As this quantity did not constitute a full cargo, 300 additional barrels were placed on board which were marked with a different mark, and for which a separate bill of lading was signed. Plaintiffs gave notice to the defendant of the shipment of the 3000 barrels and were ready to order the vessel from its port of call to any port of delivery within the contract, and there to deliver to the defendant the 3000 barrels and to take the three hundred barrels themselves. Defendants refused to accept. Held, that the true construction of the word cargo meant the entire load of the vessel which carried it and that therefore, the defendant was not bound to accept the oil tendered.

It was said by Sir Barnes Peacock in delivering the judgment of the court in the Colonial Ins. Co. of New Zealand v. The Adelaide Marine Ins. Co., 12 App. Cas., 154, that the word "cargo" is a word susceptible of different meanings and must be interpreted with reference to the context.
Where the sale of the cargo is made by a bill of lading and in the bill of lading the cargo is described as consisting of a specified quantity of goods is a condition precedent to the sale that the cargo shall answer to that description.

In Tamvaco v. Lucas, 1 E. & E., 581 there was a sale of a cargo of wheat "of about 2 000 quarters, say from 1 800 to 2 200 quarters, seller to guarantee delivery of invoiced weight, except accidents excepted, buyers to pay for any excess of weight, unless it be the result of sea damage or heating. Payment cash in London in exchange for usual shipping documents." Plaintiffs offered defendants shipping documents for a cargo of wheat amounting to 2 215 quarters, which defendant refused to accept. When the bill of lading was tendered and the invoice made out the vessel was at sea and neither party knew what was on board except from the shipping documents. When the cargo was delivered from the ship it was found to consist of more than 18 000 and less than 2 200 quarters. Lord Campbell C. J. :— "The cargo, although of not an absolutely defined amount, was to be between 1 800 and 2 200 quarters. We think the agree-
ment was that it should not exceed that quantity. If the cargo offered exceeded that quantity so that, if accepted, the sellers would have a demand on the purchaser for payment of more than 2,200 quarters, we think that he was not bound to accept it. He did not want a larger quantity, and he could not be expected to be prepared to pay for a larger quantity. On the tender to him of the cargo by delivering 'the usual shipping documents' he could not have accepted the quantity he agreed to purchase and reject the excess. It seems to us quite clear that he would have been liable to pay for the excess, if there had been any; there being no ground here for saying that the cargo was to be taken at a fixed sum, for better or worse; and there being an express stipulation that, if the quantity delivered by measurement should exceed the estimated weight, unless from the result of sea damage or heating, the purchaser was to pay the excess."

In another case between the same parties {omi E. & E., 592}, it was held that the vendee was not bound to accept a cargo less than that described in the bill of lading.
Sale by Instalments

"In determining whether stipulations as to time of performing contract of sale are conditions precedent the courts seek simply to discover what the parties really intended, and if time appears, on a fair consideration of the language and the circumstances, to be of the essence of the contract stipulations in regard to it will be held to be conditions precedent." - Benjamin, Par. 593.

A question which has caused much trouble is whether in a contract to deliver goods or to pay for them in instalments, delivery of or payment for one instalment at the stipulated time is a condition precedent. The authorities upon this point are numerous and conflicting but it has at length been settled by a decision in the House of Lords.

In Hear v. Ronàie, 5 H. & N., 19, there was an agreement to buy 667 tons of iron to be shipped in about equal portions in the months of June, July, August and September. The plaintiff (the vendor) shipped only 21 tons in June which the defendant refused to accept. In an action for the price of the iron it was held that ma-
delivery at the time specified was a condition precedent and that the plaintiff could not on the facts, maintain an action against the defendant for not accepting.

In Jonasschwarz v. Young, 4 T. & B., 296, the declaration set forth in an agreement by the defendant to purchase as many of the plaintiff's N. Gas Coals as one steam vessel to be sent by the defendant could fetch in nine months. Breach: that the defendant refused to send a steam-vessel to fetch diverse cargoes of coal. To this the defendant pleaded that before any breach by the defendant the plaintiffs broke the contract by detaining an unreasonable time, and beyond the time permitted by the contract the vessel sent by the defendants to receive the coal. On demurrer, held, that the plea was bad.

Crompton, J., "The vice of the plea is that the breach goes to only a part of the consideration. The argument for the defendant must go to this length that the unnecessary detention of the defendant's vessel for the one hour would entitle him to put an end to the contract. In Maarev. Rennie, we must take it that time was of the essence of the contract'.

In Simpson v. Crippin, L. R. 8 Q. B., 14, the defendants agreed to supply the plaintiff with from six
thousand to eight thousand tons of coal to be delivered into the plaintiff's wagons at the defendant's colliery in equal monthly quantities during a period of twelve months at 5 s. 6 d. per ton. During the first month the plaintiff sent wagons to receive only 158 tons. Immediately after the first month had expired the defendants informed the plaintiffs that, as they had taken only 158 tons, the defendants would annul the contract. Plaintiff refused to allow the contract to be annulled, but defendants declined to deliver any more coal. Held that the breach by the plaintiff in taking less than the stipulated quantity during the first month did not entitle the defendants to rescind the contract. Blackburn J.: "No sufficient reason has been urged why damages would not be a compensation for a breach by the plaintiff, and why the defendant should be at liberty to annul the contract; but it is said that Hoare v. Rennie is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle Hoare v. Rennie was decided. No reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although
plaintiffs in that month failed to accept the number of tons contracted for. Hoar v. Rennie was questioned in Jonasson v. Young. Mellor, J., said he could not distinguish Hoar v. Rennie and tried hard to reconcile that case with some of the earlier cases. Lush, J., said he could not understand the judgements in Hoar v. Rennie and that the court must have interpreted the contract in that case as if time were of its essence.

In Front v. Burr, L. R. 9 C. P., 208, the defendant contracted to sell to the plaintiff 250 tons of pig iron at 50 s. per ton half to be delivered in two, remainder in four weeks; payment not cash 14 days after the delivery of each parcel. The market was rising, and notwithstanding urgent demands by the plaintiff the delivery of the first 125 tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming the right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and abandonment of the contract by the plaintiffs, refused to deliver any more. Held,
that the mere refusal to pay for the first parcel did not under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder. Lord Coleridge, C. J., :- "The true question is whether the acts and conduct of the party evinced an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. This is the true principle on which Hoare v. Bennie was decided, whether rightly or not upon the facts I will not presume to say. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract."

In Brandt v. Lawrence, L. R. 1 Q. B. D., 344, the defendant entered into two contracts, each of which was for the purchase from the plaintiff of 4500 quarters of Russian oaks, more or less, shipment by steamer or steamers during February. Plaintiff shipped in one steamer 4511 quarters to answer the first contract and 1139 quarters
ters to answer in part the second contract. He also shipped in another steamer a sufficient quantity of cases to complete the second contract. The shipment on the first steamer was made on time, that on the second steamer was made too late. The court held that the words "by steamer or steamers" showed an intention that the shipment should be made in different parcels and not in two specific lots, so that the case was brought within the principle of Simpson v. Crippen and the defendant was bound to accept the 1139 quarters in part fulfilment of the second contract.

In Reuger v. Sala, L. R. 4 C. P. D., 239, the contract was for the sale, by the plaintiff to the defendant of 25 tons Penang pepper, name of vessels to be declared. Plaintiffs declared 25 tons by a particular vessel, only 20 tons of which complied with the terms of the contract as to shipment. It was held by the majority of the court that the defendants were not bound to accept less than 25 tons. Brandt v. Lawrence was distinguished on the ground that in the case under consideration the plaintiffs had named only one ship and made one indivisible shipment. Brett, L. J., dissenting
says:— "The general principle could be deduced from these cases is that, where, in a mercantile contract of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of these deliveries does not absolve the other party from tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he could never fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are, that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity of annuling the whole contract that the whole construction of these contracts is that it is not contrary to the obligation to tender or accept a part; that the other party should have been or should be, always ready and willing and able to accept or tender the whole."

In Honak v. Muller, L. R. 7 Q. E. D., 92, the de-
defendant sold to the plaintiff 2,000 tons pig iron to be delivered to the plaintiff free on board at makers wharf in November or equally over November, December and January at 6 d. per ton extra. Plaintiff failed to deliver the delivery of the iron in November but claimed to have delivery of one third of the iron in December and one third in January. The defendant refused to deliver these two thirds and gave notice that he considered that the contract was cancelled by the plaintiff's breach to take any iron in November. Held, that the defendant was justified in refusing to deliver the two thirds. A majority of the court followed and observed Hoare v. Finnie (supra)

In the Mersey Steel and Iron Co. v. Naylor, L.R. 9 App. Cas., 434, the defendants had agreed to purchase from the plaintiff 5,000 tons steel blooms "delivery monthly commencing January next, payment net cash within three days after receipt of shipping documents." Plaintiffs delivered part of the first instalment but before payment became due a winding up petition was presented and defendants, acting upon a mistake of law refused, pending the bankruptcy petition, to pay for the steel already delivered. Plaintiffs treated the refusal to pay as a breach of the contract and refused to make fur-
their deliveries although the defendants were ready and willing to pay for them and offered to do so. It was held, without a dissenting opinion, that the failure to pay for the one instalment did not avoid the contract on the ground, that such a failure only went to a part of the consideration. Their Lordships intimate that in order to avoid the contract the conduct of the party must amount to an absolute refusal to perform.

The effect of this decision would seem to be that payment for one instalment can never be a condition precedent to the right to claim delivery of the remaining instalments; and it cannot be urged with any show of reason that the same rule does not apply to a delivery of an instalment of goods. The same principle is applicable to both cases. In both the failure goes only to a part of the consideration.

There are several cases coming under the 4th of Mr. Benjamin's rules which require some consideration. In Atkinson v. Smith, 14 M. & W., 695, there was an agreement in the following words, "Bought of Messrs Atkinson & Co. about thirty packs of Cheviot fleeces, and agreed to take the under mentioned noils; also agreed to draw for 250 on account at three months. The defendant re-
fused to deliver the noils. Held, that he could not re-
cover without avering and proving as a condition prece-
dent the delivery and tender of all the fleeces. In
Withers v. Reynolds, 2 B. & Ad., 262, the defendant a-
greed to furnish the plaintiff with straw at the rate of
three loads a fortnight at 33 s. per load for each load
of straw delivered on his premises during a certain pe-
riod. After the straw had been supplied for some time
the plaintiff refused to pay for the last load delivered
and assisted in always keeping one load in arrear. Held,
that the true intent of the agreement was that each load
was to be paid for on delivery, and that on the plain-
tiff's refusal to pay for them the defendant was not
bound to send any more. Pattison, J. :— "If the
plaintiff had merely failed to pay for any particular
load that of itself might not have been an excuse for
the defendant for delivering no more straw: but the
plaintiff here expressly refuses to pay for the loads de-
livered; and the defendant, therefore, is not liable for
ceasing to perform his part of the contract.

The above quotation indicates the distinction be-
tween this case and others such as the Mersey Steel and
Iron Co. v. Naylor (supra). Here the breach was not on-
ly as to one load but the plaintiff absolutely and positively refused to carry out the contract according to its terms and proposed to substitute another one in its place.

In Bankart v. Bowers, L. K. 1 C. P. 464, there was a written agreement by which the plaintiff agreed to purchase certain lands and all the mines, threads and veins of coal etc. under the same, at a certain price; and the defendant agreed to purchase from the plaintiff all the coal that he might from time to time require at a fair market price. Held, that these were concurrent acts and that the plaintiff could not maintain an action against the defendant for not taking the coal without averring performance or readiness to perform his part.

Mr. Benjamin says;—"But it must be borne in mind that to entitle the seller to rescind the contract, the acts or conduct of the buyer must either amount to an express refusal or manifest a complete inability to perform his part of the contract." He cites Corcoran v. Prosser, 21 Wk. Rep., 222, and Bloomer v. Bernstein, L. P. 3 C. P., 568, (Benjamin on Sales Par. 592, A.).

The 5th rule given by Benjamin will be found in substance in the opinion of Jervis, C. J., in Roberts v
Brett, 18 C. E. 561, S. C. 573. This rule is practically but a repetition of the supposed underlying principle governing this whole question, that the court will gather the intention of the parties from the whole instrument.

Effect of Part Performance

Where a condition precedent is broken the promissee can repudiate the contract provided it has not already been partially executed in his favor. But, if after breach the promissee continues to accept performance, the condition loses its effect as such and becomes a warranty in the sense that it can be used only in the sense of a means of recovering damages. Bean v. Burness 3 B. & S., 756. Park B. in Graves v. Legg, 9 Exch, 709, S. C. 716. says that the reason for this, "Seems to be, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust, that because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving
him to his remedy to recover any damage he may have sustained in not having received the whole consideration.

From Mr. Benjamin's statement of the rule (Benjamin 1ar. 564) and from the reasoning above quoted it might be inferred that it is immaterial whether the partial performance relied upon to change the nature of the stipulation of the relation from that of a condition precedent to that of a warranty or independent agreement is accepted before or after the breach of the stipulation. It seems more reasonable to say, and there is authority for saying, that it is only where a party accepts partial performance after a breach of the stipulation, that he loses his right to rely upon the stipulation as a condition precedent.

In Ellen v. Topp, 6 Exch., 424, by the terms of an indenture of apprenticeship an infant was placed by his father as apprentice to a master, described in the indenture as an "auctioneer, appraiser and corn factor, to learn his art and with him after the manner of an apprentice to serve". After the making of the indenture and the commencement of the apprenticeship the wholly relinquished the trade of corn factor; whereupon the apprentice absented himself from his master's service. Held,
in an action on the indenture by the master against the
father for the desertion of the apprentice, that the re-
linquishment by the master of his trade of corn factor
was a good answer to the action.

It was said in a later case that the grounds for the
decision in the above case was that, there the plaintiff
was to continue to do something which was to be the con-
sideration for the performance on his part and the case
was in this manner distinguished. (White v. Beeton, 7
H. & N., 42,). They say that the case would be differ-
ent where there was only a single act to be performed.
This may be so, for where there is but a single act to
be performed there would be a breach of condition when
one party tendered part performance of that act and if
the other party accepted that part performance he would
accept part performance after breach of the condition and
consequently would be no longer able to rely on the con-
dition as a condition but only as a warranty. In Carter
v. Scargill, L. R. 10 Q. B., 564, by an agreement be-
tween the plaintiff and defendant, after a statement of
the weekly expenditure and profit of the plaintiff's busi-
ness as a printer and publisher of a newspaper, it was a
agreed, that, in the event of the business being proved
by the books kept by the plaintiff to realize a clear profit of £7 per week as shown by the above statement, defendant should pay plaintiff £50 on the 24th of December, 1867, £50 on the 24th of June, £100 at Christmas, 1868, and £200 within four years from the 25th of December, 1867. In consideration of the premises the plaintiff agreed to sell to the defendant all the plant and furniture on the premises, and the good will of the business, with all the earnings subsequent to the 30th of December, 1867, and the house and premises then occupied by the plaintiff. The defendant on the 30th of December, entered into possession of the house with the plant and furniture and of the business, which he thenceforth carried on until he sold it. After the lapse of four years the plaintiff brought an action for the instalment and the defendant sought to set up as a defence that the business was not proved to be worth £7 clear profit per week. Held, that, assuming that this, if the contract had been made executory, would have been a condition precedent, yet the defendant having had a substantial part of the consideration could not now set up the non-performance as a defence. Field, J.,—"If it be urged on the part of the defendant that if the business
only realized 1/2 a per week it would be unjust that he should pay the price which was estimated upon realization of 47 per week. The answer is obvious that in the interval between the date of the agreement and the 30th of September, and before taking possession or within a reasonable time he might have ascertained whether the condition which he now alleges to be precedent was capable of being performed or not and might as soon as this was ascertained, have repudiated the agreement, and returned any portion of the consideration which he might have received in the meantime. Instead of doing so he entered into possession of, and carried on, and sold the business, and the fair inference is, either that he satisfied himself at the time that in substance the condition was capable of being performed, or that he was indifferent whether it was or was not, and that the agreement was of sufficient value to him for other reasons as to make it worth his while that it should be performed and acted upon.

"We come, therefore, to the conclusion that that which might have been a condition precedent has ceased to be so by the defendant's subsequent conduct in accepting less than his bargain, if, in fact, there was any substantial
deficiency". This is

This language would seem to sustain the position that it is only where part performance is accepted after breach that the condition loses its effect as such and becomes a mere warranty.

It will be observed that, in the case of Glazebrook v. Woodrow, it was held that a stipulation in the contract was a condition though part performance was accepted before breach, but the question as to the effect of part performance does not seem to have been raised in that case. In Withers v. Reynolds, (Supra) there was an acceptance of part performance before breach for it appears that some of the straw had been delivered and paid for before any dispute arose.

Where the Property Passes

Where, in a contract of sale the goods are specific and the property passes a stipulation with respect to the quality or description of the goods will be held to be a warranty. Where, on the other hand, the sale is of goods in general and the property does not pass such a stipulation may be held as a condition.
In Street v. Elay, 2 E. & A., 456, it was held that where a person bought a horse warranted sound, sold it again and then repurchased it, he could not by reason of unsoundness resist an action by the original vendor for the price. Lord Tenterden C. J., in delivering the judgment of the court, said:— "It is not necessary to decide whether in any case the purchaser of a specific chattel, who, having had an opportunity of exercising his judgment upon it, has bought it, with the warranty that it is of any particular quality or description, and actually accepted and received it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is indeed authority for that position. Lord Eldon in the case of Curtis v. Hannay, 3 Esp. S. P. C., 29, is reported to have said, that 'he took it to be clear law, that if a person purchases a horse that is warranted sound, and it afterward turns out that the horse was unsound at the time of the warranty, the buyer might, if he
pleased, keep the horse and bring an action on the warranty in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value; and he proceeds to say that if it were in a worse shape than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery.

"It is extremely difficult, indeed impossible to reconcile this doctrine with those cases in which it has been held, that where the property in a specific chattel has passed to the vendee, and the price has been paid, he has no right upon the breach of the warranty, to return the article and revert the property in the vendor, and recover the price as money paid on a consideration
which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the title, and has thereby consented to rescind the contract, or has been guilty of fraud which destroys the contract altogether. Weston v. Downs, 1 Doug., 23, Towers v. Barrett 1 T. R., 155; Payne v. Whale, 7 T. R., 274; Power v. Wells, Doug., 24 n. and Emanuel v. Dane, 3 Campb., 299, where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser can not by his own acts alone unless in the excepted cases above mentioned, reseize the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot by the same means, protect himself from the payment on the same ground.

It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have
a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts it shall be of a certain quality, or fit for a certain purpose and the article sent as such is never completely accepted as such by the party ordering it. In this and similar cases the latter may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial, Okell v. Smith, 1 Stark., N. P. C., 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain specific chattel, accepted and received by the vendee and the property in which is completely and entirely vested in him."

The decision in Heyworth v. Hutchinson, L. R. 2 Q.
E. o seems to leave it open to doubt whether a stipulation is not necessarily a warranty in all cases where the goods are specific, and not only in cases where the goods are specific and the property passes. In this case the defendants bought of the plaintiff at a price named, "410 bales of wool to arrive ex Stige, or any vessel they may be trans-shipped in. The wool to be guaranteed to be about equal to samples in the selling broker's possession and if any dispute arises it shall be decided by the selling brokers whose decision shall be final". On arrival of the wool it turned out not about equal to sample and the brokers after protest from the defendant, awarded that the defendant should take it at a certain abatement of the price of different bales. It was held that the defendant could not reject the wool on account of its inferiority but was bound to take it according to the conditions of the broker's award. Cockburn, C. J., —

"The terms of the contract seem to me free from any reasonable doubt. This contract is for the sale of specific wool to arrive by a particular ship; they are earmarked, so as to prevent the contract applying to any other wool; and they are guaranteed about similar to sam-
ples. If the matter stood there, this being the sale of specific goods, though with a warranty, there would not be any right or power on the part of the buyer to reject the goods on the ground of their not being conformable to samples, but the buyer's remedy would be either by cross-action on the warranty or by giving the inferiority in evidence in reduction of damages. There is nothing in the contract to import a condition that the buyer shall be at liberty to reject the wools if not about similar to sample”.

Blackburn, J.:— "The contract relates to the particular bales of wool specified and to those only and the additional clause, that the contract is to be off if the bales are previously sold in New York, shows that the contract is confined to this particular cargo. Then the wools are, 'guaranteed about similar to samples'. Now such a clause may be a simple guarantee or warranty, or it may be a condition. Generally speaking, when the contract is as to any goods such is a condition going to the essence of the contract. But when the contract is as to specific goods, the clause is only collateral to the contract and is the subject of a cross action, or matter in reduction of damages."
The observations above quoted are merely dicta, the case having been decided upon another point entirely, but, even as such, if they embody a correct exposition of the law as it should be, they are entitled to weight in spite of the fact that they are directly opposed to the principles laid down in a prior case.

The question then is whether or not the view adopted by the learned judges who decided Hayworth v. Hutchinson is correct, or whether the true rule is that announced in Street v. Elay.

It is hard to understand why there should be any distinction upon this point between the cases where specific goods are sold and those where goods are sold in general, especially in cases where, although the goods were specific, the vendee has had no opportunity of inspecting them and some act remains to be done before the property passes.

The rule that a stipulation as to specific goods the property in which has passed cannot be a condition would seem to be but a logical consequence of the doctrine that where a party has accepted a part performance of a contract after a breach of a condition the condition ceases to be available as such and becomes a mere warranty.
The vendee, once the property has passed, cannot reject the goods. The passing of the property implies acceptance on his part. If the goods when he accepted them, did not correspond to sample or description, he has accepted them after a breach of the stipulation and therefore the stipulation is no longer available as a condition but merely as a warranty.

It would follow naturally from this that in all cases where the property has passed the stipulations must be regarded simply as warranties, for instance, where the property passes by selection and appropriation by the vendee.

It is impossible to find a single case where any reason is given why, merely because the goods are specific, stipulations in respect to them must be considered as warranties and it seems equally impossible to conceive of any good reason why this should be so. It is also difficult to conceive of any good reason why there should be any distinction between the case where the goods are specific and the property passes and that where the goods are sold in genero and the property passes. In the one case the vendee has had an opportunity to inspect the goods himself; in the other, if he has not delegated the
that right to the vendor, he has a right to inspect the goods and the property in them will not pass until he has had an opportunity to exercise that right.

With respect, now, to these two rules—that where part performance is accepted after breach of the condition, the condition loses its effect as such and becomes a mere warranty, and, what has been pointed out as being a more consequence of the above rule, that where the goods are ascertained and the property passes there is only a warranty—there are several cases which require explanation. One of these is Josling v. Kingsford (Supra), in which case, though the property in the goods had passed, the vendor recovered, not for a breach of warrant but for a breach of the contract. The only reasonable explanation of this case is that as the vendor had never delivered explicit acid there had never been any performance or part performance of the contract although some goods had been delivered. This is the only ground upon which Hannerman v. White, (supra), can be upheld, for though the goods were specific and the property had passed and still the vendor successfully defended an action for the price. This could only be on the ground that, as the
vendee had contracted for unsulphured hops and had got sulphured hops, a very different article as the evidence showed, the contract never had been fulfilled by the vendor.