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THE HISTORY OF CONDITIONS IN THE  
ENGLISH LAW OF CONTRACT

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## PREFACE

The reason of the law is the life of the law; for though a man can tell the law; yet if he know not the reasons thereof, he shall soone forget his superficial knowledge.

Lord Coke.

The purpose of this thesis is to facilitate investigation and discussion of an area of contract law which is of great importance and in equally great confusion. The area concerns the concept of a condition and certain related problems in the performance of a contract.

This field is vast and is discussed at length by all the modern contract writers. It is unnecessary to cite instances of modern problems or to refer to the many eloquent observations as to the intractability and plain awkwardness of the area, because my purpose is not to investigate the many difficult modern problems of performance but rather to facilitate their investigation and analysis. The treatment is purely historical, covering only the period up to the end of the eighteenth century. I am concerned not to tackle the ideas of "breach going to the root of the contract", "failure of consideration", "fundamental breach" and so on, but rather to examine and to clarify the older and more basic concepts upon which these relatively modern ideas depend.

The province of this work, then, is to examine the early concept of the condition and to trace its development from an early stage to that time, about the end of the eighteenth century, when the modern dichotomy between condition and warranty, and its countless attendant problems, started to evolve. The basic idea of condition, and the

dichotomy between condition and covenant, will be traced from their origins in real property law through an evolutionary process in contract law up to the date mentioned. The changes in the nature of the condition precedent thus brought about, the story of dependency and independency of covenants and the evolution of concurrent performance (concurrent conditions) are intertwined and will all be examined.

No treatment of the development of many problems of performance through the nineteenth and twentieth centuries has yet been produced. The field is so wide, the interconnected factors and trains of development interlinked in such complexity, that perhaps it never will be. And yet the attraction of this area of the law is that while so much remains far from settled at the present day, the materials on which a settlement may be based are right at hand, for the principles of discharge and performance of contract have been discussed in the courts for hundreds of years.

It is my belief that one of the major causes of the confusion which exists today is a failure correctly to analyze certain ancient and basic concepts of the law and to perceive the changes, sometimes subtle, sometimes marked, that these concepts have undergone over the years. Therefore, this thesis will attempt to make some analysis of the origins and evolution of certain basic concepts, an understanding of which is vital to an understanding of the modern law.

## INTRODUCTION

The utility of precise terminology and exact meaning is more in connection with differentiating problems from pseudo problems and with formulation of results than in providing solutions.

Dean Roscoe Pound.

There may be much truth in the observation that too much attention is devoted to the erection of elegant and symmetrical systems within our law, awkward decisions being rationalized and cases or doctrines hopelessly out of line being proclaimed exceptions.

Yet while much of this theorizing may be condemned, it is important to delineate our basic doctrines in contract law so that we can analyze their development and interaction for it may well be that much of the confusion present in the modern law is attributable to insufficient attention to important conceptual distinctions between conditions, promises and consideration. These concepts will be dealt with more fully later, but a brief outline is appropriate here.

The promise is the basis of a contractor's legal liability. It may not be the ultimate basis, because enforceability is attributed to the fact that the promise is under seal, in the case of a deed, or is supported by consideration in the case of a simple contract. But it is the causa causans of liability, a positive act by the contractor essential to contractual liability.

Consideration is a concept quite distinct from that of promise. For the purpose of this work it has two important facets.

First of all, it may form the ultimate basis of enforceability of a contract, for though consideration is not generally needed in contracts under seal, it is vital in the case of a simple contract. This aspect of consideration will become important when we trace the development of the enforceability of simple executory contracts, the consideration for one party's promise being the promise of the other party.

Secondly, the factor of consideration may furnish an important aid to the construction of contracts. Thus if performance A is promised in return, or in consideration, for performance B, then it may well be inferred that one performance is intended to be a condition precedent to the liability to perform the other. Thus the three concepts, promise, consideration and condition, may coincide in a case and, indeed, it may not be important to differentiate between them in a particular case. But it is important to keep the concepts clearly separate so that when a more complicated and difficult fact situation arises the method of procedure is clear.

Let us take what would appear to be a simple fact situation: A promises B to perform X; B promises A to perform Y. Although simple in the extreme, this example raises one of the most basic and important issues in the history and development of contract law, namely, when can one party enforce performance by the other party? Is his own performance a condition precedent to the liability of the other party? There seem to be both consideration and a promise, and therefore enforceability; on the other hand, these very elements also suggest a condition to that enforceability.

The Condition. It is almost trite to say that the word 'condition' may be used in several senses, for it has been pointed out more than once



that the word has many different connotations in everyday or lay usage and probably even more in legal language.

It is perhaps sufficient to cite the Shorter Oxford English Dictionary to gain a preliminary view of the difficulties of definition of this noun.

Condition ...

- I. (1) Something demanded or required as a prerequisite to the granting or performance of something else; a provision, a stipulation.
- (2) Law. In a legal instrument, a provision on which its legal force or effect is made to depend 1588
- (3) Covenant, contract, treaty 1718
- (4) Something that must exist or be present if something else is to be or take place; a prerequisite ME.
- (5) A restriction or qualification 1841
- (6) A clause expressing a condition in sense 4; called in Logic the antecedent, in Grammar the protasis, of a conditional proposition 1869.
- II. (1) Mode or state of being ME.
- (2) State in regard to wealth; circumstances; hence, social position, estate, rank ME.
- (3) Mental disposition; character; temper 1611; personal qualities 1830
- (4) Nature, character 1586
- (5) A characteristic, attribute (of men or things) 1712.

From a glance at the above one may deduce that this word is likely to be used in different ways by different Courts and by different commentators. Indeed Dr. Stoljar<sup>1</sup> has provided an interesting list of twelve quite different ways in which the word may be used by lawyers and there may well be more. It is, of course, possible to set some of these meanings on one side since their use, when it occurs, is readily recognizable

and should not confuse us. Thus condition in the sense of state or quality of goods is one of these meanings.

But this still leaves a number of meanings, all valid because of repeated usage by the Courts and all liable to intermingle and confuse unless attention is paid to their context, the background of the area of the law in question and the whole history of the confusion surrounding this word condition.

Of course, some confusion is almost inevitable in the case of any word, for the reason that words do not have an absolute meaning within themselves but are only useful when considered in conjunction with other known objects and concepts. Words can describe, modify and distinguish objects and concepts, but their meaning is subject to the circumstances in which they are used.

Clearly, discussion of the concept of a condition can only logically proceed in relation and contradistinction to other concepts, for 'condition' is a word of many meanings, its usage only being rendered intelligible by examination of its background and its relation to other concepts.

Furthermore, when one says 'condition', one should then immediately ask, 'condition of what?', for condition is a word that, in itself, refers to a larger entity or concept. It is not logical to examine 'condition' in vacuo, but only in conjunction with that larger entity of which it is a part.

In the light of all the above, it is natural that commentators have contrasted condition with a number of other concepts. Thus, a condition

rather than a covenant; a condition inside the contract rather than an external condition; a condition precedent rather than a condition subsequent; a condition rather than a mere warranty and so on.

Unfortunately, the properties and meanings of condition change just as the comparisons. If we were to start afresh, this might be avoidable, but it is a feature of our case law that distinct points in particular contexts are resolved and settled rather than symmetrical concepts formulated. As the body of cases that are decided over hundreds of years is amassed, one clear and precise concept of condition is going to break down in favour of a number of concepts of condition, each applicable to a different type of problem.

The point is that the usual treatment of noting the properties of, and requirements for, a condition is misleading, because built into this approach is a comparison with other concepts such as those listed above. And as we try to enumerate comprehensively the properties of a condition, we unconsciously slide from one comparison to another in our effort to provide a treatment that is complete.

The result is that treatments become inconsistent within themselves and, of course, the treatments of different writers tend to be very different. Comparisons may therefore bring forth great confusion and loud lamentations.

This is not to say that anyone is wrong. If it were possible to gather all commentators around a table and point out that their treatments differ on various points, they would probably say, 'Well I really meant this when I said that', and 'I make the same point, but under a different heading' and 'I agree with that concept, but I've described it in different

terms', and so on.

Our basic problem, then, is that different people use different words to mean the same things and it is impossible to change this. Further, it is useless to formulate yet another definition and say 'This is it. If all other definitions are scrapped and this alone is adopted there will be no more confusion'. Such a process is useless for several reasons.

First of all, it is completely impracticable. As Professor Corbin observed:

(H)owever beautiful and exact may be the usage and terminology of this book, comparatively few people will read it; and it is impossible to compel millions of contractors to conform to it. It will not even be possible to induce lawyers, and other supposedly skilled draftsmen of contracts and statutes and constitutions, to conform to it. The Courts, and the lawyers and law writers, must take the raw material that is prepared for them by contractors and draftsmen and determine its meaning and operation.<sup>2</sup>

Secondly, even if we all did adopt some abstract definition, we would be little better off, because condition does not have meaning in the abstract. We need the background of decided cases and related concepts to give it body and substance.

Now it is submitted that, while we cannot banish all the different approaches and treatments to a state of limbo, it is possible to formulate a treatment that is consistent within itself. If we can keep the original concepts, and the way in which those concepts developed, clear and distinct, we may be able to light the way for an examination, which is beyond the scope of this thesis, of the way in which confusion has arisen in the more modern law.

Turning then to the history of the concept of condition, it might be suggested that the various types of conditions should first be investigated. For example, the condition precedent could be contrasted with something called a condition subsequent and with yet another relation, the concurrent condition. But such analysis usually bogs down in confusion and ambiguity due to the failure to consider the logically prior question, 'condition to or of what?', condition is a word that naturally involves a larger entity, and discussion of the word by itself is logically unsound.

Therefore, before we concern ourselves in dividing up the concept into various types of condition, let us first consider what the original concept and role of the condition was at law. What did it originally qualify?

P A R T I

THE ORIGINAL CONCEPT OF CONDITION

## CHAPTER I

### THE CONDITION IN LORD COKE'S TIME

If we consult the heading 'condition' in the digests, we find that its primary meaning, and the great bulk of learning on the topic, was concerned with conditions of real property estates.<sup>3</sup> There were several reasons for this emphasis. First of all, land was of the utmost contemporary importance, not only because we speak of a time before the industrial revolution, but also because the pattern of life could then still be said to be regulated more according to status than individual freedom of contract, and this concept of status was intimately connected with land.

A second reason, more vitally connected with the matter at hand, was that there was as yet no general theory of contract, for we speak now of the period before the evolution of the enforceable simple bilateral contract.<sup>4</sup> Further, the action of Debt, while truly a forerunner of contract law, was based rather on concepts of property and, more importantly, ex hypothesi dealt with executed consideration, thus avoiding the problems of conditions and performance that we wish to discuss.

The personal actions of Debt and more especially Covenant are naturally of great importance and will be discussed in due course. However, because real property law was of such great importance, it is natural that much of the early development of the law should have centred on it and this development was, quite predictably, to have a great effect on the development of a general theory of contract law.

Today there are major differences between real property law and contract law; but most so-called contractual principles have their origins in the antiquities of property law. If we wish to resolve modern problems, it is to these origins that we should first turn.

(A) THE NATURE OF CONDITIONS OF ESTATES

Originally, the doctrine of conditions derived from the feudal system of land tenure, the performance of feudal services being a condition annexed to the landholder's title by law and custom; if he neglected to perform them, his feudal superior might re-enter. This in turn applied to each relation in the feudal hierarchy, the conditions being well accepted and understood.

For various reasons,<sup>5</sup> however, parties began to introduce other conditions and it was early recognised that this was possible. Lord Coke observed:

A condition annexed to the realtie, whereof Littleton here speaketh in the legal understanding, est modus, a qualitie annexed by him that hath estate, interest, or right, to the same, or whereby an estate, etc. may either be defeated, or enlarged, or created upon an incertain event.<sup>6</sup>

Lord Coke's formulation suggests a division between conditions precedent and subsequent, a distinction which was part of the law from the earliest times. But in the particular area we wish now to discuss, the nature of the actual estate held, this distinction was not of great significance. We are not talking of a contract to convey land, but of something separate and independent, a continuing estate.



The question that should always be borne in mind when puzzling over the distinction between conditions precedent and subsequent is, precedent or subsequent to what? If we ask this question we realize that a condition of a continuing estate is really neither precedent nor subsequent because it is actually part of the estate itself. However, if it is insisted that the conditions we are about to discuss be classified, they are clearly subsequent, in the sense that they come after the grant and may defeat an estate already vested.<sup>7</sup>

The essential point to be remembered is that while this condition was not part of the limitation,<sup>8</sup> and therefore an actual re-entry was originally needed to terminate the estate, it was thought of as something very intimate to the estate itself, something beyond the province of mere personal contracts. Perhaps the following passage will illustrate the position. Challis described the nature of the real property condition in this succinct fashion:

At the common law, a condition may be annexed to an estate of fee simple, by a breach of which, if it is a negative condition, or by the performance of which if it is a positive condition, a right of entry accrues to the grantor or his heirs; and if an entry be made, the estate to which the condition is annexed is destroyed; whereby the fee reverts to the grantor or his heirs, in the same manner in all respects as before the grant of the estate subject to the condition. But the benefit of a common law condition cannot be reserved to a stranger; nor is the estate subject to the condition destroyed, until an entry has been made in pursuance of the right of entry.<sup>9</sup>

Thus the condition ran with the land and the right to exercise it was not extinguished by the death of the original grantor but passed to his heirs. Yet it was not some sort of contractual right, for it could clearly not be assigned; rather it was a type of estate in the land in the grantor<sup>10</sup> and hence his heirs, but an estate the law would not allow to be transferred. Indeed, the concept of estate was considered socially prior to contract, dating from an age when men lived according to their rank and status, with which went fixed and certain incidents of land tenure, rather than according to private contractual arrangements.

Perhaps this distinction between estates and contract will be rendered somewhat clearer through the exposition of some examples, or consequences, of the concept. A good example<sup>11</sup> is afforded by the doctrine of repugnant conditions, which meant that while some conditions could be attached to an estate, certain others could not, for they were repugnant to the estate itself.

The modern reader may well ask, first of all, why should a man be prevented from affixing certain conditions to his contract of conveyance and secondly, if he is prevented, where does one draw the line? The rationale and answer to these questions is to be found in the nature of estates in land.

If one refers to any text on the law of real property, one will see that originally the intricacies of estates in land, though perhaps not simple to modern minds, were well recognised and known to contemporary lawyers. Possession and finality were crucial, the freedom to create complex contractual conditions much less so. As stated previously, it

came to be recognised that new conditions, apart from feudal rents and services, could be annexed to grants, and yet these annexations were viewed with suspicion. It was still thought that the incidents of landholding were well known and right and should not be interfered with.

These two concepts, the freedom to annex conditions on the one hand and the independent entity of land tenure on the other, naturally conflicted, and produced problems. One result was the doctrine of repugnant conditions, which meant that certain incidents of an estate could not be interfered with, for to do so would be to attack the very nature of the estate granted. In effect, therefore, a new type of estate would be granted, and, as the law recognised only fixed and standard types of estate, such crucial modifications could not be allowed.

Though elaborate statements are to be found in the contemporary digests,<sup>12</sup> for our purposes the following examples from Megarry and Wade will suffice:

Conditions subsequent are ... jealously regarded by the law and such a condition is void (so making the fee simple absolute) if it infringes any of the following rules:

(i) It must not take away the power of alienation. One of the incidents of ownership is the right to sell or otherwise dispose of the property. A condition against alienation is said to be repugnant to this right, and contrary to public policy, if it substantially takes away the tenant's power of alienation; and such conditions are void. ...

(ii) It must not be directed against a course of devolution prescribed by law ...<sup>13</sup>

But the position of real estates was to be contrasted with contracts. A condition that was considered to be of a collateral nature could be imposed:

If A be seised of Black Acre in fee, and B enfeoffeth him of White Acre upon condition that A shall not alien Black Acre, the condition is good; for the condition is annexed to other lands, and ousteth not the feoffee of his power to alien the land where the feoffment is made, and so no repugnancy to the state passed by the feoffment; and so it is of gifts, or sale of chattels real or personal.<sup>14</sup>

A second illustration of the intimate nature of the link between condition and grant is afforded by the doctrine that none but the grantor of the land could impose a condition on the estate, for the condition, to forfeit an estate, must be part of that estate and not a collateral contractual matter. Thus in the case of Tresham v. Robin (1574) Tresham brought an action of Debt on a recognizance against Robin, the condition of which was to stand to an arbitration award. The award was that Robin should have the land 'yielding and paying £10 per annum' and the question was, did the words 'yielding and paying' make a condition of the estate? In other words, did non-payment mean a forfeiture of the estate? It was decided that the payment was not a condition of the continuance of the estate, for it was never part of the grant made by the original grantor and hence was not a part of the land, but was merely a separate matter of contract. The Court held:

(I)f a man makes a feoffment in fee, reddendo salvendo £10 for years, the same is a condition. But in the principal case, it is not a condition; for it is not knit to the land by the owner itself, but by a stranger; i.e. arbitrator ...<sup>15</sup>

A further example is afforded by the old doctrine of impossibility of performance of condition, which again illustrates the distinction between something contractual and an executed estate.

Thus if A granted an estate to B, upon condition that if A performed a certain act the estate would revert to A, or unless B did a certain act the estate would revert, and the act concerned became impossible by act of God, the estate became absolute. However, if the condition of a bond became impossible, the whole bond became void; that is, it did not become absolute as in the case of real estate.

(A)nd the reason of the diversitie is, because the state of the land is executed and settled in the feoffee, and cannot be redeemed back again but by matter subsequent, viz. the performance of the condition. But the bond or recognizance is a thing in action, and executory, whereof no advantage can be taken until there be a default in the obligor.<sup>16</sup>

A further illustration of the nature of real property estates and conditions is afforded by the fact that a right of re-entry for breach of condition could not be granted to another person by the original grantor or his heirs:

(A)nd the reason hereof is, for avoyding of maintenance suppression of right, and stirring up of suits; and therefore nothing in action, entrie, or re-entrie, can be granted over; for so under colour thereof pretended titles might be granted to great men whereby right might be trodden down, and the weak oppressed, which the Common Law forbiddeth, as men to grant before they be in possession.<sup>17</sup>

Thus we again find, in these last two examples, the concept that the estate was something independent from, and quite different from, an executory contract. The last illustration also displays the intimate concern the Common Law had for a man's estate, and for the preservation of peace and the status quo; if a man was in possession of this thing called an estate he should not have to resist claims from third parties who purported to have an independent right granted by the original grantor of the estate. Therefore, once again, the concept of estate was shown to be different from that of contract, for the Common Law did not permit a person to make a grant of land to one person with a grant of re-entry to another.

We shall now proceed to examine more fully the nature of the real property condition.

#### (B) CONSTRUCTION OF CONDITIONS OF ESTATES

We have seen that the concept of estate was separate and distinct from contract and that the law favoured finality with respect to estates. It is not surprising, then, that conditions to defeat vested estates were construed contra proferentem. As was stated in Carpenter v. Smith (1670):

Provisoes and conditions, which go in defeasance and destruction of estates, are odious in law, and shall be taken strictly, and shall not be construed beyond the words of the condition or provisoe ...<sup>18</sup>

Something has already been said about the reasons for this attitude, but perhaps they may be summed up thus. First of all, there was the

ancient principle that a deed is to be taken most strongly against its maker, 'but by the obscure wording of his own contract, he should find means to evade and elude it.'<sup>19</sup> Secondly, and more specifically related to our case, the early law placed great stress on the importance and significance of the actual ceremony of grant and entry into possession. Although these new conditions could be introduced, they were frowned upon as causing uncertainty and discord within the hitherto settled pattern of land law.

Thus the Lord Chief Baron observed, in the case of Egerton v. Brownlow, that the reason for the odious nature of a condition was

obvious, because a condition interferes with the absolute vesting of the estates, which the law always favours, and it controls the ownership; it seeks to exercise a dominion over the property after the death of the donor; it opposes the will (possibly the caprices) of the dead to the jus disponendi of the living. The law, therefore, while it encourages commerce and favours contracts deems a condition odious, and looks at it with jealousy.<sup>20</sup>

The consequence of all this was that in order to establish a condition it was not sufficient to show the intention to impose it, but precise words of condition must have been used, just as precise words were originally necessary to convey a fee simple. As was stated in Carpenter v. Smith (1670), 'be the intention what it will, yet in a conveyance other words are requisite to make a condition. Ea

intentione, or ad faciendum, or ad effectum, will not make a condition in feoffments or grants.'<sup>21</sup> Thus the relevant test was not, as it is so often said today, the true intention of the parties as ascertained from all the circumstances etc., but rather depended much more upon the actual words used.

Furthermore, it was not only required that words expressly stipulated a condition but that a certain form of words was used. The position may be summarised as follows. Just as questions concerning limitations of estates were decided on the technical and accepted verbal formulae, so it was thought that some words were, and others were not, proper words of condition, and that all phrases relevant to the question of conditions could be divided into several categories, as follows:

First of all, some words were thought legally suitable for the creation of conditions and it was sometimes said that these words always made a condition whenever they appeared. Thus Littleton stated:

Also, divers words there be, which by virtue of themselves make estates upon condition; one is the word sub conditione: as if A enfeoffe B of certain land, to have and to hold to the said B and his heres, upon condition (sub conditione), that the said B and his heires do pay or cause to be paid to the aforesaid A and his heires yearly such a rent, etc. In this case without any more saying the feoffee hath an estate upon condition.<sup>22</sup> (my underlining).



Secondly, and a logical corollary of the first proposition, some words were not fit to make a condition, even though they might show that that was really the parties' intention, for they were not included in the legally recognised words of condition.

Thirdly, a condition could be created by the stipulation of a forfeiting event coupled with an express right of re-entry. Thus Littleton wrote:

Also, there be other words in a deede which cause the tenements to be conditionall. As if upon such feoffment a rent be reserved to the feoffor etc. and afterward this word is put into the deed, that if it happen (quod si contingat) the aforesaid rent to be behind in part or in all, that then it shall be lawful for the feoffor and his heires to enter, etc. this is a deed upon condition.<sup>23</sup>

It is, of course, difficult to say just how the status of phrases was originally determined, but by the time of Lord Coke judgment had been passed on a large number of phrases which were held not to be words of condition. Thus Viner tells us that ad effectum, ea intentione, ad solvendum, ut adveniat, ad inveniendum, or perimplendum were all denied conditional status in various decisions.<sup>24</sup>

The position as to what words would make a condition per se was rather less clear. While Littleton's statement that divers words had this status is adopted both in Viner's and Comyn's Abridgements, the only example given is that canonised by Lord Coke as the most proper phrase to make a legal condition, sub conditione itself.

Indeed, although one can often discern in the books a longing for certainty, for a conclusive categorisation of words applicable in all cases, it is evident that from very early times a great number of the words which were sometimes listed as conditional in fact belonged to yet a fourth class, words which might or might not be conditional per se, according to the context. It may well be that, in still earlier times, the categories were more final and that there were divers words which were always conditional. If so, this is particularly interesting for it shows, at a very early stage in history, a movement from a strict 'words' approach to a more flexible approach.

Coke's treatment of the earlier writings of Littleton perhaps illustrates this point. Littleton, of course, had asserted that there were divers conditional words and after giving sub conditione as an example, did give further examples:

Also, if the words were such, Provided always (proviso semper), that the aforesaid B do pay or cause to be paid to the aforesaid A such a rent, etc. or these, So that (ita quod) the said B do pay or cause to be paid to the said A such a rent, etc. in these cases without more saying, the feoffee hath but an estate upon condition ...<sup>25</sup> (my underlining).

We can only guess as to the extent of the rigidity of interpretation in very early times but it is clear that by the time of Lord Coke there was a definite trend towards this fourth category of words, i.e. of equivocal meaning. Words such as proviso, while regarded as proper words of condition, received varied meanings according to their context. This does not mean, however, that there was overwhelming concern to discover the parties' true intention; rather, the Courts were still concerned with the

actual words, only conceding that their prima facie conditional effect might be modified through considerations of grammar, position, by whom the word was used, etc.

To illustrate this stage of development let us examine the interpretation of the word proviso.

Littleton attributed to this word a conditional meaning but Lord Coke in his Commentaries wished to give Littleton's statements a restricted meaning:

Our author putteth his case where a proviso cometh alone. And so it is if a man by indenture letteth lands for yeares, provided always, and it is covenanted and agreed between the said parties, that the lessee should not alien, and it was adjudged that this was a condition by force of the proviso, and a covenant by force of the other words.

This word proviso shall be also taken as a limitation or qualification, as hereafter in his proper place shall be said. And sometimes it shall amount to a covenant. All which do appear by the authorities in the margent.<sup>26</sup>

It is evident from this contemporary statement that other vital concepts are present besides that of the ancient idea of condition, and it is to these concepts that we must now turn.

## CHAPTER II

### FROM PROPERTY TO CONTRACT

#### (A) COVENANTS AND CONDITIONS

Although we have thus far been concerned with the nature and interpretation of conditions of estates, when those conditions occur in deeds it is clear that there may be another type of stipulation also present in the deed. I refer to covenants, promises not part of the actual estate but nevertheless contained in the same deed, such as a covenant by the donee to pay certain sums or promises collateral to the actual estate by the donor, such as a warranty of title.

It was recognised from the earliest times that there is a clear, fundamental difference between a condition and a covenant, and were it not for some confusion in modern cases it would seem otiose to state it. The distinction is that the covenant, like the grant of an estate, is the actual foundation of enforceability; once established there is prima facie legal enforceability. A condition, on the other hand may rebut this prima facie enforceability. In the case of a grant, it restricted the estate by stipulating an event by which it commenced or ended. In the case of a covenant, a condition could again restrict enforceability because the condition was part of the covenant; if the condition was not satisfied, the covenant did not come into being, for its legal viability depended on the fulfilment of the condition.

But although the concepts are distinct, it seems almost inevitable that problems must arise, and of course this matter of condition or promise (or warranty) provides the backdrop for the discussion, (and confusion) in the modern law.

In the case of the old law the problem was not so much one of blurring of concepts, but of practical classification. This was largely due to the fact that the law attempted to resolve the cases by examination of the words and their status per se, but at the same time it was becoming apparent that people could, and did, use words such as proviso with reference to concepts other than conditions. To illustrate this point we shall now outline some of these difficulties, using proviso as an illustration of the way in which the problems arose.

(i) LIMITATION OR CONDITION? : THE EXTENT OF THE PROMISE

In the case of estates it is well established that there is a distinction, though perhaps a rather fine one, between estates on condition and estates determinable on the occurrence of a certain event. In the first case the condition is annexed to the estate, and hence re-entry is needed, while in the second the prescribed event is part of the estate, i.e. of the limitation of the estate, and the estate therefore determines automatically.<sup>27</sup>

Discussion of this rather technical doctrine is outside the scope of this work, but it is interesting for it furnishes a helpful parallel to contract law. In the case of contractual promises, the extent of the promise (the limitation) should be contrasted with a condition superimposed on that promise. Before asking any question about conditions, we should first ask, does the promise even prima facie cover the matter at hand? Only if the answer to this is affirmative should we then consider the problem of conditions to that promise.

We have seen that words such as proviso could qualify an estate, but we have also seen that there could be promises collateral to the estate in the same deed. The question therefore arose, did the word proviso in any given case qualify (i.e. limit or delineate) one of these collateral promises?

Now this appears simple enough, but we must remember that it appears simple because we are prepared to glance at the words, ascertain what we think is the meaning of the parties, and then attribute that meaning to the words. But to a lawyer accustomed to affixing a certain meaning to words, at least words of condition, the fact that such words could have such radically different meanings was, though comprehensible, at least worthy of comment and notice. And, of course, the distinction was not usually so obvious as the situation I have put. Witness the case of Dive v. Maningham in 1550. The facts of the case do not concern us but, in the course of his judgement, Montague C.J. made this observation:

(I)f one makes a lease for years of a manor except a close, etc. rendering annually a rent, etc. and the lessee is bound to perform all grants, covenants, and agreements contenta expressa, or recitata in the indenture, if he disturbs the lessor in the occupation of the close excepted, he has forfeited the obligation, for when he excepts the close, the other is content with it, and that the lessor shall occupy it, and then this is an agreement, and the said words viz. contenta expressa, et recitata do each of them go as well to the exception as to the rest.<sup>28</sup>

The point here is that the condition of a bond refers to covenants and agreements etc., and the question is, what is an agreement. With respect to the contrary opinion of Montague C.J., it would seem that there is not any agreement in the indenture as to the close excepted, for the subject

matter of the indenture encompasses only the rest of the land; the close is mentioned only to define the subject matter of the agreement.

The same point arose again in 1598 in the case of Dame Russel v. Gulwell, which again involved a bond conditioned on performance of all covenants and agreements in a grant of land, except a certain close. The plaintiff alleged that the defendant had entered the close excepted and so broken an agreement. Counsel put the matter thus:

(I)t was a breach; for the exception is an agreement that the lessor shall retain it: for an indenture is the deed of every the parties; and therefore the disturbance of the plaintiff from the occupying thereof is a breach of the agreement.<sup>29</sup>

This was enough to persuade Gawdy J., who reasoned:

(F)or the words in an indenture put in the generality shall bind both parties, and shall be taken to be the agreement of each party; and to that purpose cited 35 Hen. 8; Dyer 37; 21 Hen. 7 p.137 that a reservation of rent is as a covenant on the lessee's part.<sup>30</sup>

Again with respect, this was not correct. It is true that the words bound both parties, but the point is that before one asks if an agreement has been breached, one must first decide the subject matter of the contract and agreement. The exception goes to define the subject matter, and is completely outside the purview of the relevant agreements. The defendant was no more in breach of his agreement by trespassing on a neighbouring close specifically excepted from the contract than he would have been by trespassing on another close of the plaintiff twenty miles away ( and hence impliedly excepted).

And the majority of the court perceived and accepted this analysis, differing from Gawdy J. Thus Popham and Fenner JJ., observed:

They agreed, that an exception is an agreement that shall charge the lessee; but that is, where he agrees on his part that the lessor shall have a thing dehors which he had not before: as if he lets lands, excepting a way, or common, or any other profit a prender, that is an agreement of the lessee's that he shall have the profit: and that if he be obliged to perform all the covenants and agreements, if he disturb in this, he shall forfeit his obligation; for there the lessor hath an interest in the thing excepted (31).

This is plainly correct, and the bulk of authority adopts this approach (32).

The matter was settled in Bush v. Coles (1692), where the plaintiff had let to the defendant a house, except two rooms and free passage leading to them. The defendant blocked up the passage, and the question was whether an action of covenant would lie. It was decided the covenant did lie but the correct approach was clearly adopted:

(T)he diversity is this, if the disturbance had been in the chamber, it is plain then no action of covenant would have lain; because it was excepted, and so not demised: aliter, where the lessee agrees to let the lessor have a thing out of the demised premises, as a way, common, or other profit apprendre; in such case covenant lies for the disturbance (33).

So the position became settled that words such as 'proviso', 'except', 'but not' etc. might well be used to define the promise. And, of course, when used in this fashion the word proviso cannot be said to be conditional in the sense that the whole contract may be avoided.



The case of Ayer v. Orme (1559) (34) again illustrates this point. The Archbishop of York leased lands in Battersey rendering rent there, proviso that during any vacancy of the see the rent should be paid to the chapter ut in jure suo. The rent was in arrear and the lessor's bailiff re-entered. The question was whether this re-entry was lawful. The question as to the conditional status of proviso is thus neatly raised. If it is like sub conditione, it would appear that the re-entry is lawful. If, however, the context can be examined, it is seen that the word is used to modify or describe a covenant only. The Court accepted this second view and stated the result thus:

(T)he proviso placed as above is not a condition, but an exception or saving in the sentence of the reservation of the rent, and as an agreement or covenant: for it is not annexed to the estate, nor to the thing granted etc. But it is like the case of a warranty, proviso that he will not vouch, 7H. 6 (43 b pl 21) and 9H. 6 (35 A. pl. 6) without impeachment of waste, proviso that he shall not commit waste wilfully in the houses etc. (35) And Littleton (sect. 220) in grant of a rent-charge, proviso that it shall not extend to charge the person (36).

Although this seems simple enough when analyzed, if one is used to placing great emphasis on fixed meanings of words, such radically different interpretations are remarkable.

We now move on to a second contemporary issue, which once again constitutes an important and substantive background to modern law, although it might at first appear to be dry and, for today, irrelevant learning.

(ii) CONDITION OR COVENANT?

As has been stated above, the early courts always recognised a clear, fundamental difference between a condition and a covenant (or promise). The distinction was that a condition, in effect, is always an integral part of the grantor's liability; if the condition does not occur then he is not liable, for it is an integral part of his grant. A covenant, or grant, on the other hand is the actual foundation of liability; it is the thing which prima facie establishes legal enforceability (to which, of course, there may be a condition).

This distinction was clearly perceived in the early law and, as we have seen, the first criterion for ascertaining the presence of a condition was the actual wording used.

Now although it was clear that some words, such as sub conditione, always kept their conditional meaning, we have seen that other words, such as proviso, came to receive a more flexible interpretation, their meaning changing with their context.

But the important point was that the two concepts, condition and covenant, were still very distinct and so, while proviso could mean one or the other, it could not mean both at the same time, for the two concepts were mutually exclusive (37).

The question, then, was to decide whether, in a given situation, an equivocal word such as proviso made a condition or a covenant. This problem again raised a number of difficult considerations, some of which were rather technical.

Let us take a convenient illustrative case, Henry Earl of Pembroke v. Sir Henry Barkley, decided in 1596 (38).

The Earl granted by deed certain rights of custody of a forest to Sir Maurice Barkley with a clause in the deed as follows:

Provided also, and the said Sir Maurice covenanted, granted and promised for him and the heirs male of his body, to, and with the said Earl, his heirs and assigns that neither the said Sir Maurice nor any of the heirs male of his body, nor any of their assignees, will cut any manner of wood growing upon any part of the premises...

The son of Sir Maurice, Sir Henry Barkley, did cut some of the trees and converted them to his own use and the question was:

(W)hether by this act done by the said Sir Henry, the now Earl of Pembroke may re-enter into the things granted by him.

This matter stood upon two points and the issue that concerns us was "whether the last proviso makes a condition, or be but a mere covenant."

The case was argued several times and there was a difference of opinion amongst the judges. The minority, Gawdy and Clench JJ., with whom Walmsley and Beaumont JJ. were to concur in a later argument of the case, advanced three main points.

First of all, it was said that the word proviso by itself is nonsensical; there must be some sentence attached to it, and here the relevant sentence was a covenant. Therefore, proviso here makes a covenant (39).

Thus the word proviso, traditionally a word of condition, was disposed of in a rather cavalier fashion. One reason for this was an apparent disenchantment with the proliferation of the word:

And further, it is common for scriveners and ignorant persons to make in effect every covenant to begin with a proviso in this manner, and therefore to expound such a manner of proviso as a condition, it shall be too perilous to the estates of men (40).

But, as the reader will appreciate, such arguments, at this time in history, bordered on the heretical. The actual words used were still of immense importance and the traditional conditional connotation of words only slightly less so.

Thus the "Chief Justices, Chief Baron and all the other justices and Barons", the majority, quickly dismissed this argument:

(W)e are not to alter the law for the ignorance of scriveners, who do they know not what by their ignorance, shall be corrected by the law (41).

The word proviso did make a condition "for the proviso here hath a perfect conclusion. For the words that the lessee shall not fell trees, refer to the proviso and to the covenant; so it rounds as well to the condition as to the covenant; and it shall be as if there had been several sentences..."(42).

The point here was that the minority had argued that because there was a covenant, established by express words of agreement and because the proviso referred to that covenant the proviso could only be a covenant.

The majority, however, decided that the clause was both a condition and a covenant; a condition because of the conditional word proviso and a covenant because of the later express words of agreement:

(I)t was a condition and also a covenant, and it was for good purpose to have to be so: for suppose that the game had been destroyed by the said Sir Henry, shall this be a sufficient recompence or satisfaction to enter for the condition broken? no, and therefore the covenant was made to recompence him for damages (43).

So we see in this first diversity between the judges the clear importance placed on the distinction between condition and covenant.

The minority led by Gawdy J., thought that the consequence of the distinction was that the fact that the subject matter of the proviso was also the subject matter of a clear covenant concluded the matter against the proviso being a condition.

The majority decided that it was a covenant, but the conditional word proviso meant that it was also a condition.

The temptation is to say that the majority were correct; that their reasoning was not at all inconsistent with the distinction between condition and covenant and, further, that their decision was a logical application of it.

This is a valid viewpoint, but to understand what was behind the minority's reasoning we must look to their second argument, for although apparently distinct, it is closely related. It is as follows:

And they (the minority) said further, that this last proviso shall be said entirely the words of the grantee himself, as the covenant is, and without words of the grantor a condition cannot be, for it is for him to condition with the estate given, and not for him to whom the grant is made; and therefore suppose that it had been on the other part, to wit, provided always, and the grantor covenant that the grantee shall have the refuse of the brouse, and the like; this shall not be said to be any condition, but a mere covenant: in like manner shall it be on the other part (44).

The origin of this argument was the fact that when a man granted an estate it was up to him, the grantor, to delineate the type and extent of that estate; only he could determine the conditions applicable, because the estate moved solely from him. Hence, any things to be performed by the grantee could only be matter of covenant.

Now while this was a valid argument in relation to unilateral grants of land, could it be applied to bilateral contracts under seal? Could a purely technical and grammatical approach be taken to determine who "spoke" what, who "granted" what in a bilateral contract?

There was some early authority which suggested an affirmative answer. For example, in an anonymous case in 1536 a lease was made by deed in which the lessee "covenants and grants to the lessor, that if he, or his executors or assigns, aliene the term, that then it should be lawful for the lessor and his heirs to enter, and oust the termor."

The term was assigned and one question was whether the above clause was a "condition that gives advantage to enter or not".

The majority decided that it was not a condition:

And it seemed to Marvynne and Shelley JJ., that it did not: but it is a constant principle, that a condition may not be reserved nor made by any one, unless on the part of the lessor, feoffor, or donor, for the condition is annexed to the thing given or leased and it is not like a rent or a common, the which the lessee may well grant to the lessor, for it is not a condition that can defeat his estate, etc. (45).

Fitzherbert J., in the minority, argued that a deed is the agreement of both parties and therefore a stipulation made to forfeit the estate is referable to either.

But the majority was adamant that:

(T)he covenants and grants which arise from one party are not the covenants and grants of the other party... And it in no wise resembles the case which Fitzherbert hath put, That if an indenture run thus, viz. 'It is witnessed, that it is covenanted, granted, and agreed between the aforesaid parties, that one shall have certain land for years or otherwise, and that he shall not aliene', that is a good condition, for those words are spoken in the third person, and suit equally well to the lessor and lessee, so no resemblance (46).

This view, which is to be found expounded in several of the early cases (47), once again illustrates the blinding effect produced by the use of certain words in the old law. It was probably based on a deduction from a quite separate rule that the word proviso used by a lessor with regard to his own obligations obviously did not go to voidability of the lease but only to delineation of the lessor's obligations; in this context, words were obviously needed that related to obligations of the lessee (48). From this true

principle, some judges may have deduced that a wider rule was true: that, for a condition of a lease, the words must always be attributable, through considerations of grammar, to a particular party (the lessor) and refer to the obligations of the other party (the lessee).

In any case, as late as the year 1616 in the case of Whitchcocke v. Fox (49) this argument against a condition was still being seriously advanced. But in Whitchcocke v. Fox it was conclusively resolved that a deed is the agreement of both parties and that the mere fact that the grantee appears to "speak" the words under consideration is not sufficient per se to defeat a conditional construction.

However, although Fitzherbert J.'s opinion was destined to be accepted, at the time of Pembroke v. Barkley the more technical argument advanced by the majority in the anonymous case still had considerable force.

Thus the majority largely avoided the problem, deciding that it was a condition on the basis that the words were referable to the grantor:

And when upon the habendum a proviso is added for a thing to be done by him to whom the deed is made or to restrain him to do any thing, this is a condition, as well as if it had been a condition which shall make or shall restrain to do such a thing, for they are in this case the words of the grantor, to restrain the grant in some manner, and to show in what manner he shall have it, and it is always to him who passeth the estate, and to no other (50).

But, of course, this is only lip service to the old doctrine, for it is merely saying that if the situation is equivalent to the grantor actually stipulating, then it will still be a condition, whereas the argument of the



minority was that if by the grammatical examination of the deed it is found that the clause in question is "the words of the grantee" it must for that very reason be construed as a covenant.

Pembrook v. Barkley may therefore be viewed as an important stage in the transition from the technical and grammatical method of approach towards the position adopted in Whitchcocke v. Fox, and accepted thereafter, that the question of who said the words is not conclusive, because the deed is the agreement of both parties.

Let us now examine another important case which was decided four years after Pembrook v. Barkley. Lord Cromwell v. Andrews (1600), argued before all the judges of England, provides a further example of the problems discussed and an authoritative statement of contemporary principles.

A bargained and sold a manor to B, but with various advowsons and uses etc. which were expressed in the deed but need not be explored here. Then came the phrase:

'proviso that B should grant by deed the advowson to A for life;  
with further covenant...'

Thus the proviso was jumbled up amongst recitals and covenants and the question was whether A could re-enter after B's death, B not having granted the advowson. Was it a condition?

The judges resolved thus:

First, that the said proviso makes a condition; for the law hath not appointed any place in a deed proper or peculiar to a condition, but its place is where the parties please. And it appears by Littleton, that proviso is as apt a word to make an estate conditional, as sub conditione, or any other word of condition.

However, important qualifications are then made to this statement:

(B)ut notwithstanding that, when this word proviso shall make an estate or interest conditional, three things are to be observed:

- (1) That the proviso do not depend upon another sentence, nor participate thereof, but stand originally of itself.
- (2) That the proviso be the words of the bargainor, feoffor, donor etc.
- (3) That it be compulsory to enforce the bargainee, feoffee, donee to do an act;

and because they all concur in this case, it was resolved that it was a condition in what place soever it be placed... (51).

The point of delving into these expositions of ancient technicalities is this. The early courts originally adopted as their guidelines for ascertaining intention and justice the actual words used and every effort was made to give words fixed and clear meanings, but it came to be seen that the same words were often used in the contexts of completely different concepts.

Rather than say, "Well, it is all a question of intention", the courts began to lay down rules to help them decide cases; but these rules were not founded on any general theory but rather on a number of diverse cases which established or demonstrated points which were considered analogous to, or exceptional to, the general doctrine of conditions.

The process was almost entirely empirical. As I have attempted to demonstrate through the illustration of the "condition or limitation?" problem, at first the decisions were hazy and inconsistent just because there were few well developed theories and concepts beyond that of following the technical meaning of the actual words used. As distinctions became apparent, so there arose a variety of decisions, and to attempt to classify, and clarify, these decisions certain rules were laid down (52).

Thus in Lord Cromwell's Case, supra, it was decided that the proviso should not depend on another sentence, that it should be the words of the feoffor etc; that it should be compulsory to enforce the feoffee etc. to do an act.

By themselves such rules may seem arbitrary and puzzling, but when we put them into context we see that their adoption was an attempt to distinguish those cases where it was held that the proviso was a limitation or a covenant from those where it was a condition. The facts of these latter cases were examined and, by a technical process of deduction and corollary, it was thought possible to state positive propositions about conditions.

(B) THE CHANGING NATURE OF THE DISTINCTION BETWEEN CONDITION AND COVENANT

We have been examining a system which, though perhaps technical, was quite consistent and logical within itself. And the consistency, internal logic, and, of course, the technicalities, were attributable to the fact that the system relied on the pure interpretation of the actual words used by the parties.

However, when we depart from absolute reliance upon the actual words used, we depart from the foundation of these qualities. And depart we must, for it has been long recognised that, although the actual words used are of vital importance, some degree of implication, some use of common sense, is often necessary to explain equivocal statements in the light of their context.

It is beyond the scope of this work to launch into an examination of the topic of implication of terms, but we must briefly outline its history and development in two important areas: covenants and conditions.

(i) What Constitutes a Covenant?

Perhaps the most basic, or limited, deviation from adhesion to the actual words used by the parties is to hold that the formal word 'covenant' is unnecessary and that less formal words may constitute a covenant. And it was early decided by the Courts that if it is plain that the scheme of the deed is that each of the parties promises to do certain things, but the word 'covenant' has not been used, a 'lesser' word will suffice. Thus, in Stanton's Case in 1582, a master brought Covenant on an indenture of apprenticeship, but counsel for the defendant apprentice raised several objections on demurrer:

Le primer fuit quia in le Indenture les pols sont q Apptice sra loyal and secreta sua relaret and similia, sans auters pols de covenant expsses:

le Court tunt ceo nul exceptcon, car les pols imply covenant; si come lease est fait pur ans and les pols sont tiels, and le lessee faira tiel chose; ceux pols imply covenant sans plus a dire (53).

A slight extension of this principle occurs when a covenant is implied because it is obvious from the whole context of the deed that the parties intended it, though a covenant is not actually stipulated for either in formal terms or in the less formal terms found adequate in Stanton's Case. An early example of this category is conveniently furnished by the facts of Bush v. Coles (1692) discussed supra in a different context (54). In that case the plaintiff demised to the defendant a house, excepting two rooms, and 'free passage' leading thereto. Although there were no express words by the lessee, it was held that the lessor could maintain covenant for blocking free passage, because it was seen that a new thing was created, distinct from the estate and yet dependent for its existence on the lessee's actions; it was therefore decided that the parties intended a covenant concerning the passage.

Or, to take another situation, the question may be whether words are intended merely as introductory window dressing, 'mere representations', or as covenants. If later positive covenants seem to assume that the introductory portions are covenanted, the courts will strive to interpret them as contractually binding.

Thus in Sampson v. Easterby (1829) a lease contained a recital of an agreement for pulling down an old smelting mill and building another larger

one, and the defendant then covenanted to keep the new one in repair, but there was no actual covenant to erect it. The Court had little trouble deciding that there was an implied covenant to erect it upon which the plaintiff might sue (55).

These, then, are some situations in which Courts have been prepared to hold that the strict letter of express covenant need not be adhered to, because it was clear that the parties intended to contract, to covenant, and it was thought ludicrous to insist on an absolutely formal manifestation of that intention.

Express covenants and implied covenants in the above sense, have very few differences for our purposes. Naturally, as the law developed, the use and role of implication became more and more important, but for now we can see that implied covenants were at first but a narrow extension of the strict 'words' approach, the fundamental rationales of the law not changing at all.

However, besides express and implied covenants, there is to be found a third category: covenants imputed by law. This concept is perhaps most easily delineated by referring to something familiar to modern lawyers, for example, implied warranties of fitness in the sale of goods. The distinction between these terms and the implied terms referred to above is that the latter terms were implied from the facts and language in the particular case; terms imputed by law rest on doctrines of law, no doubt originally founded on particular facts that certain terms should be applied in certain factual situations unless the parties expressly exclude them.

This much more free approach is, of course, to be attributed to a period much later than that under discussion, but we can, once again, trace back the origins of this concept of imputation of terms to real property law.

It was very early held that words of grant e.g. 'demise', 'grant' or 'dedi', 'demisi', 'concessi' etc. by themselves implied certain undertakings by the grantor, such as a covenant for title, quiet enjoyment etc. (56). To take one example, in Style v. Hearing (1602) the defendant demised and granted land to the plaintiff for twenty years, but a third party evicted the plaintiff and established rightful title. Could the plaintiff sue the defendant in the absence of an express covenant? It was decided that he could:

And resolved by all the justices, that upon the words demise and grant, without other words which comprehend any warrant in them, this action well lies (57).

The important point to be stressed is that the principle of 'covenants at law' was a limited one. The covenants were intimately connected with the words of grant; they were actually part and parcel of the grant (58).

Tindal C.J. in a later case delineated the boundaries of these concepts:

The distinction between covenants, and the only distinction (so far as relates to the present inquiry), we take to be this: they are either covenants by express words or covenants in law. 'There are two kinds of covenants', says Lord Coke (Co. Litt.139 b) 'viz. a covenant in deed and a covenant in law'; or, as it is put in Vaughan's Reports, p.118 - 'All covenants between a lessor and his lessee are either covenants in law, or express covenants'...

A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created: as, if a man by deed demise land for years, covenant lies upon the word 'demise', which supports, or makes, a covenant in law for quiet enjoyment; or if he grant land by feoffment, covenant will lie upon the word 'dedi' ...

In every case, it is always a matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases, that meaning is more clearly expressed, and therefore more easily observed; in others, it is expressed with more obscurity, and discovered with greater difficulty ... But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning, is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant ... it is only those covenants which the law itself implies, that can be properly considered as covenants in law - a character and description which, as we have already seen, does not belong to the covenant now under discussion (59).

As such, the position seems clear enough but, of course, there would be little point in discussing the matter if it remained so. It did not.

Since covenants could in some cases be implied without express words of covenant, litigants began to assert that words which might appear to be conditions were really covenants, and so the question became once again, condition or covenant?



Before proceeding, however, we must examine our logically second question.

(ii) What Constitutes A Condition?

We have already attempted to answer this question in the context of estates, but we are now concerned to trace the development of the condition from estates to contract.

One might perhaps say that it is not a question of development but rather of two concepts, the real property condition and contractual condition. This would be quite incorrect however for, as has been already observed and will be further demonstrated, the very roots of our law of contract are to be found in property law.

There is, moreover, a much more subtle error: to say that there are only two things to be considered, the law of real estates and the law of contract. This is nearly correct, but it leaves out an area which constituted an intermediate stage of development, or perhaps more correctly the very means of development, from the one to the other. I refer to the lease for years.

The Nature Of The Lease For A Term Of Years

A detailed examination of this topic is beyond the scope of this work. The treatises on real property, and in particular Pollock and Maitland History of English Law contain detailed and accurate accounts. However, because this topic furnishes an important background to subsequent development, a short outline will not be out of place.

As long ago as the end of the twelfth century, the tenant for a term of years was not considered to have an estate in the land, but was regarded purely as a contractor with his lessor.

He did not have an estate because he was not seised of the land, and he was not seised of the land because he was not entitled to invoke those remedies, the free Assizes, which protected seisin.

If the reader finds this rather circuitous, perhaps it is, but then so are vast areas of our early real property law. Perhaps Pollock and Maitland put the matter most aptly when they state that the reasoning is not circular, but spiral:

Its course is not circular but spiral, it never comes back to quite the same point as that from which it started. This play of reasoning between right and remedy fixes the use of words. A remedy, called an assize, is given to any one who is disseised of his free tenement:- in a few years lawyers will be agreeing that X has been 'disseised of his free tenement,' because it is an established point that a person in his position can bring an assize. The word seisin becomes specified by its relation to certain particular remedies (60).

However, beginning with the invention by Raleigh J. circa 1235 of the form of action quare ejecit infra terminum and concluding with the development and extension of trespass de ejectione firmæ, it became apparent that the tenant for years now did have real remedies and consequently did have an estate of some type. As Plucknett concisely observes:

(A)s a result of the real remedies devised by Raleigh and extended by the Statute of Gloucester, it was clear that the lessee had a tenement, and in Raleigh's own day it was said that he was seised (61).

Thus, by the time of Lord Coke a term for years was an estate, and yet some aspects of its contractual origins remained. For our purposes the important point was that the interpretation of leases was much less rigid than that of estates; as in personal contracts, the courts at least purported to try to ascertain the true intention of the parties.

Thus Bayley J. was to observe in Doe v. Watt:

The words 'provided always, sub conditione, ita quod,' used in a conveyance of real estate, by themselves, made the estate conditional. But in a lease for years no precise form of words is necessary to make a condition. It is sufficient if it appears that the words used were intended to have the effect of creating a condition (62).

And Lord Coke had also contrasted the position of a term of years with that of freehold estates:

But for the avoyding of a lease for yeares, such precise words of condition are not so strictly required as in case of freehold and inheritance. For if a man by deed make a lease of a manor for yeares, in which there is a clause (and the said lessee shall continually dwell upon the capitall messuage of the said manor, upon paine of forfeiture of the said terme) these words amount to a condition.

And so it is if such a clause be in such a lease. Quod non licebit, to the lessee, dare, vendere, vel concedere statum, et sub poena forisfacturae, this amounts to make the lease for yeares defeasible, and so it was adjudged in the court of common pleas in queen Elizabeth's time; and the reason of the court was, that a lease for yeares was but a contract, which may begin by word, and by word be dissolved (63).

The ascertainment of intention is always a matter of degree. And though it was said that it is sufficient if it appears etc., the ways in which that intention could be investigated were still narrow; the words used were still of immense importance though other factors could now be considered.

Lord Coke perhaps correctly expressed the matter when he said (supra) 'precise words of condition are not so strictly required...' Thus, traditional words of condition could, and should, be used but these would not be strictly insisted upon if the intention was made manifest through other suitable words.

We shall now see that the interpretation of leases was to play a major part in the development of contract law.

(iii) The Change in the Distinction between Condition and Covenant

To return to our question of 'condition or covenant?', let us examine some sets of facts that occur with respect to leases.

If there is a clause providing for rent or repairs etc. in a lease, can the lessor re-enter (i.e. determine the lease) if the rent is not paid or the repairs not carried out? Alternatively, the lessor may not wish to re-enter, but to sue for the rent. Is he restricted to re-entry? We have seen that a given word or set of words was regarded as having a conditional or a non-conditional meaning, but not both at the same time, and therefore the question was, 'condition or covenant?'

To give an example, in Simpson v. Titterell (1589) a lessor brought ejectment against his lessee, claiming a breach of a clause which was to that effect the proviso semper the lessee would not aliene except in a particular way. The lessee did otherwise aliene, claiming that the clause was a covenant and not a condition, but,

all the justices held it was a good condition to defeat the estates. For Periam J. said, proviso always implieth a condition, if there be not words subsequent, which may peradventure change it into a covenant; as where there is another penalty affixed to it for non-performance, as Dockwray's Case, 27 Hen. 8 pl. 14. But it is a rule in provisos, where the proviso is, that the lessee shall perform or not perform a thing, and no penalty to it this is a condition, otherwise it is void; but if a penalty is annexed, aliter est: to which the rest of the justices agreed (64).

It is interesting to note that the court was willing to advert to considerations somewhat beyond a mere examination of the actual word proviso involved. Thus, they observed that if there were a penalty annexed to the proviso that would show that a covenant and not a condition was intended.

Similarly, in Geery v. Reason (1629) the plaintiff demised to the defendant certain rooms in Bear-Alley 'provided, and upon condition, that the said Reason (defendant) shall gather the rents of other the (plaintiff's) tenements in Bear-Alley.'

The defendant did not gather and pay these rents to the plaintiff, who therefore attempted to sue in Covenant.

It was decided, however, that there was not a covenant to oblige him to collect the rents, but only a condition, for:

(I)t is not to be intended that it should be a covenant to enforce him to gather and pay them where peradventure he cannot collect them (65).

Thus, once again, an extrinsic consideration, (the fact that he would not covenant to do what was very difficult but only accept the task as a condition) was important to the court's decision.

But let us assume there are no such aids to a decision; the decision is to be based purely on the words e.g. 'the lessee yielding and paying rent.' Is that a condition of the lease or a positive covenant by the lessee?

Because of the difference between the concepts of condition and covenant and the technical rules considered above, we would expect such words to be considered as part of the grant - a condition rather than a covenant. And this seems to have been the original view of the law. Thus we have seen that in Simpson v. Titterell, supra, it was thought that the words would be void if they did not have a conditional character, for they could only be viewed as a covenant if a penalty were annexed, thus positively demonstrating the parties' intention to covenant. In an Anonymous case in 1589 a lease was made by deed and the lessor covenanted that the lessee, 'paying his rent', should have quiet enjoyment. The lessee did not pay his rent and afterwards was ejected by title paramount. He thereupon sued the lessor on the covenant for quiet enjoyment, but was met with the objection that payment of rent was a condition to that

covenant. It was decided by Walmesly and Wendham JJ., against Periam J., that

(T)he covenant is conditional, and that the lessee should not have advantage of it, if he did not perform the condition, which is created by this word (paying) (66).

So we see that if words were referable to the grant itself they were likely to be construed as a condition rather than a covenant, for they were thought to be part of the thing granted and hence inseparable. This was plain enough when it was sought by the grantor (or grantee) to attribute to them a conditional nature, but what if the grantor wished to use the words as a covenant on which to sue? Remembering the difference between the concepts of condition and covenant, one would tend to say that he could not do so, in the absence of an express agreement (as, say, was the case in Pembroke v. Barkley *supra*). However, although this reasoning was originally correct, a number of factors combined to blur and complicate the traditional distinction and it is to this evolutionary process that we now turn.

We have seen that it was possible to imply covenants in some circumstances where the words used were not of a formal nature. We have also seen that there were certain covenants at law in some cases, invoked by words of demise.

However, cases soon arose which went quite beyond these situations, the typical example being a lessor attempting to establish a covenant from words such as 'yielding and paying'.

Now, we have seen that these words originally went to estate; i.e. they were words of condition and therefore not of covenant. However, from about the mid-seventeenth century it came to be held that these words did connote a covenant. To summarise

- (a) In the beginning, the law was largely concerned with the extent of the estate, and this was always to be gauged by the words used.

The precise words used kept their importance, but there was a swing to flexibility in that it was recognised that very few words, contrary to more ancient learning, had at all times a conditional impact. This flexibility was even more evident in the case of leases for years.

- (b) Because the extent of the estate was to be determined by the grantor, technical rules of interpretation abounded, not the least of which was that only the grantor could make a condition. However, as the trend to a broader view of contract law established itself, this view was discarded and the rationale that the deed was the agreement of both parties became dominant. Therefore, such precise technical rules became increasingly irrelevant.
- (c) In the sphere of covenants, a trend to flexibility was also apparent. Words that hitherto had connoted a condition could now, in appropriate circumstances, constitute a covenant. Covenants could also be implied and imputed in certain limited circumstances.

It is naturally very difficult to explain precisely what occurred but it is submitted that all these factors combined to produce changes that were at first perhaps subtle but were to have great repercussions.

Let us return to the problem exemplified by the phrase 'yielding and paying'. The original position was that words which were intimately



connected with the estate, such as 'rendering rent' would make a 'covenant in law' (67). Now, as explained by Tindal C.J. in Williams v. Burrell (supra), the effect of a covenant in law in no way derogates from our condition/covenant dichotomy; the words have a secondary force after they have delineated the estate so that the issue of conditions and covenants being mutually exclusive is not raised.

However, due to quite different problems such as assignment, covenants running with the land etc., the distinction between express covenants and covenants at law was of great significance, and, by the mid-seventeenth century, it had become established that words such as 'yielding and paying' would create an express covenant.

Thus in Newton v. Osborn (1653) (68) and Porter v. Swetnam (1654) (69) it was held that such a clause was an express covenant, 'for the words are the agreement of both parties' (70). So the factors (a), (b) and (c) listed above had combined to produce a definite change in emphasis in the law: a swing from concentration on the precise creation of an estate by one party towards agreement of two contractors.

Now, of itself, this process may not seem terribly significant, but let us change the facts slightly; or rather, revert to our original situation. Suppose the grantor wishes to take advantage of a non-observance of a stipulation so as to re-enter. The question then is, did such a stipulation as 'yielding and paying' retain its conditional aspect in favour of the grantor after various cases had decided that, on different facts, it could be taken advantage of as a covenant?

This problem crystallised in 1675 in the important decision of Hayes v. Bickerstaffe. The lessee brought an action for breach of an express covenant for quiet enjoyment, but the lessor pleaded that he had re-entered by virtue of a breach of condition of the lease. The stipulation relied on as a condition stated that the lessee 'paying the rent and performing the covenants on his part to be performed, shall quietly enjoy', and it was alleged that he had not performed those covenants.

Now, because this stipulation actually referred to other covenants already in creation (the lessor had already covenanted pay the rent etc.) one would naturally expect it to be held to be a condition for, as Burrell for the lessor said, 'If it be not a qualification, the words are totally void' (71).

However, counsel for the plaintiff lessee took a totally different approach, and it is well worthwhile citing his argument:

It is not conditional, but they are mutual covenants, and the parties have mutual remedies: he admitted, that where a liberty was granted to take such a thing, paying so many hens, there if the party did not pay the hens the grant was void, because the other had no remedy for the hens: and he cited the case of Ambrose Bennet, adjudged in the King's Bench, which was the very same with this case and there ruled by all the Judges; and he cited Owen 54 (the case of Michell v. Dunton), which he said was a stronger case, being in a will (72).

Thus the argument was now not based on the intrinsic nature of the clauses in the document but the much wider consideration of whether or not the parties had sufficient remedy for a breach. If a party had no remedy then obviously the clause was a condition of the grant but if, so the

argument now went, each party had a remedy for breach then the clause should be construed as a covenant rather than a condition.

These concepts of availability of remedies and inequality of damage will be examined in the next part of this work, but for the moment we should again note the drastic change in the interpretation of documents with regard to the condition/covenant dichotomy that had taken place.

This change is well pointed up by Serjeant Pemberton's citation of the case of Michell v. Dunton (1587) in purported support of his argument. In this case, the lessor executed a lease under which the lessor covenanted inter alia to repair. The lessor in his will devised the same land to the lessee for a further term, under such covenants as were in the first lease. The lessor continued in possession under this second lease but did not do the repairs that were stipulated. The remainderman now argued that this repairing was a condition of the lease and that, it not having been performed, he was now entitled to possession.

The argument by counsel for the remainderman was that the repairing must be a condition, because the remainderman had no covenant he could enforce, Shuttleworth contending that '(I)t is a condition, for he cannot have a covenant, and then it shall be intended that it is conditional'.

However the Court rejected such arguments, the classic distinction between a condition and a covenant being still strictly observed. A clause was either a covenant or a condition, and if it was clearly intended to be a covenant by the parties, and it was so termed in the lease and in the will, then it could not have a conditional effect.

Thus Anderson J. observed that the 'nature of a covenant is to have an action, but not an entry, and therefore there shall be no entry'.

And at length the whole Court resolved as follows:

(T)he will expressing that the first lessee should have the land observing the first covenant shall not be now taken to be a condition by any intent that may be collected out of the will: for a covenant and condition are of several natures, the one giving action, the other entry, and here the intent of the will was, that although the covenants were not performed, yet the lessee should not forfeit his terme, but is only bound to such paines as he was at the beginning, and that was to render damages in an action of covenant (73).

This seems a clear decision and one which was quite in line with the contemporary authority that we have already examined. The interesting thing is, of course, that the condition should be cited by counsel 100 years later in support of an argument which depended for success on a completely different approach to the analysis of conditions and covenants.

The point is that in Michell v. Dunton it was decided that a covenant rather than a condition was involved and, in Hayes v. Bickerstaffe, Serjeant Pemberton was also concerned to argue that a clause was a covenant. He therefore cited Michell v. Dunton. The similarity between the cases is superficial in the extreme. In Michell v. Dunton, the decision turned on the rigid distinction between condition and covenant, and an argument based on the non-availability of a remedy was explicitly rejected. In Hayes v. Bickerstaffe, on the other hand, Serjeant Pemberton was concerned to erode this old distinction and to base himself on the question of remedies. Therefore, if anything, Michell v. Dunton was an authority against him.

But the time, it seems, was past for such nice analysis and, although Atkins J. doubted, the majority of the Court accepted these arguments. Thus:

North C.J., remembered the case of A'Bennet, cited by Pemberton, and said it would be very mischievous if it should be otherwise; for this clause is now so usual, that it is but clausula clericorum and he said, if it should be construed conditionally, then if the lessee broke a covenant of the value of a penny, it would excuse the lessor of the breach of a covenant of £1000 value (74).

Hayes v. Bickerstaffe was to be immediately consolidated by a number of cases applying it (75), yet it has always been the subject of some puzzlement (76). Just how did it happen that words which, looking back only a few years before the decision, would have been accepted as conditional had now suddenly lost that character?

I hope I have shown some of the factors that contributed to this evolution but it is obvious that there are two important factors, which are intimately related, that have not yet been examined.

In Hayes v. Bickerstaffe both plaintiff's counsel and the court stressed the importance of availability of remedies and the factor of the consideration for a covenant. Once again we find that a number of topics are intertwined, a number of factors are contributing to the evolution of the law. Thus, in this instance, these topics developed parallel for the most part to the development we have been discussing, overlapping now and again perhaps, then coming together in a case such as Hayes v. Bickerstaffe.

It is to these factors of remedies and consideration, then, that we must now turn.

P A R T   I I

THE CONTRACTUAL CONDITION PRECEDENT

## CHAPTER 1

### THE CONCEPT OF A CONDITION PRECEDENT

#### (A) THE NATURE OF A CONDITION PRECEDENT

It has already been observed that in Lord Coke's day the field of learning called to mind by the word 'condition' concerned conditions of estates, and this topic, together with some of its influence on subsequent development, has already been examined.

But while this was the usual and proper import of the word, it was recognised that the term was sometimes also used with reference to contracts. Thus Bacon observed:

By the word 'condition' is usually understood some quality annexed to a real estate, by virtue of which it may be defeated, enlarged, or created upon an uncertain event.

Also, qualities annexed to personal contracts and agreements are frequently called 'conditions', and these must be interpreted according to the real intention of the parties and are usually taken most strongly against the party to whom they are meant to extend, lest by the obscure wording of his own contract, he should find means to evade and avoid it (77).

But the correct way to approach the topic of contract was to talk in terms of conditions precedent.

A condition precedent was something that was intended by the covenantor to be performed before his liability on his covenant could be perfected. A

condition precedent could, of course, be stipulated for in the case of the vesting of real estates, and the early definitions covered both these cases of real estates and personal contracts.

Thus Comyns states:

A condition precedent is such as ought to be performed before the estate vests, or the grant or gift takes effect (78).

And Bacon:

Conditions precedent are such as must be punctually performed before the estate can vest...(79).

And both commentators then give examples drawn from both real property estates and personal contracts. But perhaps the most important point to be made is that stress very definitely was laid on the word 'precedent', for it meant exactly what it said. The event, or condition, had to occur before a good cause of action accrued.

This was particularly obvious in the case of the action of Debt, which depended on an executed quid pro quo, and it is to this situation that the original doctrine of conditions precedent was primarily addressed. For example, besides the case of wills and vesting of real estates, Bacon gave the following examples of personal contracts after his definition cited above:

As, if I grant, that if A will go to such a place about my business, that he shall have such an estate, or that he shall have £10 etc; this



is a condition precedent (3 H.6 7h. Roll. Abr. 414).

So, if I retain a man for 40s. to go with me to Rome, this is a condition precedent, for the duty commenceth by going to Rome (3 H. 6. 33b Roll. Abr. 414).

It is perhaps now possible to attempt some definition, or perhaps more realistically some description, of the terms 'condition' and 'condition precedent' in the sphere of the law of contract. It was stated earlier that when we are faced with the term 'condition', we should ask, 'condition of what?' and if 'precedent' is added, we should ask 'precedent to what?' While some English writers have perhaps not attacked the problem in as clear a manner as they might have, learned American writers have formulated the problem in these terms and have thus provided valuable guidance to its solution.

Thus Professor Williston wrote:

It is a source of confusion of thought that the word 'condition' is frequently used without exact recognition of what the supposed condition qualifies.

Generally in contracts, when reference is made to conditions, what is meant are conditions which become operative after the formation of the contract and qualify the duty of immediate performance of a promise or promises thereunder - not conditions which qualify the existence of a contract or promise (80).

Let us analyse this passage. Professor Williston is stating the following things:

- (1) People frequently use the word condition in a way which is misleading, because although it is realised that it qualifies something, it is not made clear exactly what the user intends that something to be.
- (2) Although the usage of the word can vary, both in lay and legal spheres, the usual or general meaning is that it is something which qualifies a duty of immediate performance, operating after formation of the contract.
- (3) There are other meanings of the word condition, of which two are first, the qualification of the existence of any contract, and secondly the definition or limitation of a promise in a contract - but these usages are not what is generally intended.

Now the reader may think this analysis superfluous, or ex abundanti cautela, but I wish precisely to state this approach, which is typical of both Professors Williston and Corbin, so that I may make some comments about them which might otherwise be difficult to follow.

The above approach may be said to be this. There are a number of usages of the word condition, and it is impossible to ignore them. But, for the sake of clarity, we choose to adopt one clear and well established meaning of the word, and clearly to define our term condition in that way so that there can be as little misunderstanding as possible when we use the word condition.

Professor Corbin clearly states this approach:

Like all other words, the term 'condition' is used in a variety of senses. There is no law against this; and there is no single 'correct' definition. People cannot be compelled to use a legal

term in the sense preferred by the present writer or by the makers of a dictionary. A good dictionary attempts to report all usages that are common and respectable. The only basis for choice among definitions is the extent and the convenience of the usage. Without doubt this results in ease and variety of expression; but in many instances, in which exactitude and clarity are especially needed, it results also in inexact thinking and in misunderstanding by others. It is to avoid such inexactness and misunderstanding that the term 'condition', for use in the present work, is defined as an operative fact, one on which the existence of some particular legal relation depends (81).

Now of course I do not criticize this approach which, with respect, is eminently practical in that it recognizes the problem created by the multiple meanings of the word condition and takes the giant step towards clarity by adopting a treatment of the topic which is consistent within itself, because the terms used are clearly defined.

However, it has been my submission that, in order to choose a worthwhile definition of 'condition' it is best to go back into the history of the term to see if the word did originally have a clear, well recognised meaning. If so, then it is perhaps that meaning which we should now prima facie give to the word condition, all the time recognising that more recent decisions may be using the word in different senses due to subtle shifts in context and emphasis over the years.

Now it is submitted that the word condition did originally have a clear, well recognised meaning. In the sphere of real property, we have seen that it meant a condition of an existing estate, on breach of which the estate was (or could be) divested. In the sphere of contracts we have seen that it meant a condition of a party's cause of action, something that had to be fulfilled before the party could enforce his contract.

The crucial point to note is that this concept was derived from property law, where the word used was 'condition' simpliciter.

'Condition', as Bacon stated (82), was sometimes also used in relation to contracts but the more usual usage was 'condition precedent'. But, in relation to contracts, 'condition' and 'condition precedent' meant exactly the same thing, viz. a condition of, and precedent to, the fulfilment of a party's complete cause of action.

This, therefore, is the foundation meaning of the word condition, the meaning on which we may build and with which later developments could be compared.

And of course it is the meaning Professors Williston and Corbin adopt for their respective analyses of the modern law. And so the minor point I am seeking to make is this: granted that there are numerous meanings of the word condition and granted that we need to make a choice between the concepts for the sake of internal consistency of analysis, the way in which we make that choice is to discover what the original meaning was and then use that as our reference point, or our point of comparison, when examining the more recent developments in the law and the changing concepts and meanings of the word condition. It is submitted that this analysis is preferable to that of adopting the most popular and general modern meaning, or even a meaning that seems correct in an abstract, logical sense for, although many modern decisions do proceed on a basis of application and adoption of the modern meanings and concepts of condition, thus suiting the last two methods of analysis noted, nevertheless the older cases and learning are of crucial importance. Not only do surprisingly ancient cases sometimes rise up that cover a modern set of facts and resolve a modern legal problem, they provide the very bedrock and foundation of our common law.

True it is that the law changes, and it must change to meet changing social needs and mores. But if we merely reason in the abstract, if we merely play with abstract concepts, inverting, subtracting components, rearranging them like mathematical formulae, we will soon find ourselves quite adrift from any guiding principle, quite devoid of certainty and direction.

We should therefore use our historical bedrock as at least a starting point upon which we can engraft changes and modifications, always clearly recognizing what we are doing and why. In this way we will be able to retain clear principles rather than be faced with the veritable maze of these grafts and alterations that, without the background and context of the original principles, mean very little.

Having said all this, somewhat in anticipation of developments we have not yet fully covered, let us return to our historical treatment of the condition precedent.

We turn now to the reasons and rationales of the insistence upon performance of a condition precedent before a promise could be enforced.

#### (B) PERFORMANCE OF CONDITIONS PRECEDENT

We should always remember that, before the advent of the enforceable simple executory contract, the actions of Covenant and Debt governed many fact situations that we would now subsume under a general law of contract.

Of course, the intricacies of the evolution of the action of Assumpsit and a general theory of contract as distinct from Trespass and Debt are

largely outside the scope of this work. However, for our purposes, it is important to remember that the basis of many remedies that we would now regard as contractual was originally thought of in terms of grants of property; the foundation of liability was based on the concept of property rather than promise. Thus in one case it was said:

(C)ontracts of debt are reciprocal grants. A man may sell his black horse for present money, at a day to come, and the buyer may, the day being come, seize the horse, for he hath property then in him, which is the reason in the Register, that actions in the Debet and also in the Detinet, are actions of property, but no man hath property by a breach of promise but must be repair'd in damages (83).

We have seen that a grant had a force in itself; if it was executed then, unless there were appropriate legal words of condition in the grant, the actual estate granted could not be defeated (84). However, if the covenant, or grant as it was thought of, was of an executory nature (i.e. it had not been performed or was of a continuing nature) the expression of the consideration for the grant could be vital in the following situation. If A bound himself to perform X for B, in consideration for performance of Y but B did not bind himself to perform Y, it was thought from the earliest times that the performance of Y was a condition precedent to A's liability. This was explained in various ways. Thus, it was said on the one hand that if the consideration were expressed, then it became part of the grant itself; the performance of the consideration formed the very foundation and commencement of the grant. On the other hand, it could be put in terms of intention; because the promisor had no remedy to compel performance by the promisee, it was his intention that the performance of the consideration was to be a condition precedent to his liability, and the courts were willing to take cognizance of this intention.

These two rationales are, of course, linked and it could easily be said that the second is but an example of practical interpretation by the courts; A expressed the consideration, but he knows he has no remedy for it and therefore he must have intended the performance of it to be a condition precedent to his liability. Nevertheless, we do find that the cases tended to be resolved with reference to one rationale or the other, rather than a combination of both. In the first class of cases, performance was viewed as part of the very grant itself, the paradigm case of a condition precedent to the vesting of the grant. Thus Lord Coke, in his report of Ughtred's Case, observed:

Suppose I retain a man to go with me to Rome for 40s. here by the going the cause of the duty first arises, in which case, if he brings an action of Debt for it, in his declaration he ought to declare, that he was there; otherwise the declaration shall abate. So it is if I retain one to serve me for 40s., by the years; for here by the consideration performed the duty arises, so that it is in the nature of an act precedent... (85).

The point is, that in these cases the reason for decision was not so much the lack of a remedy by the promisor, but the concept of grant; the performance was part of the grant and so the grant did not vest until the performance - the condition precedent - was performed.

However, it is also quite clear from other cases that the lack of mutual remedies was regarded as of crucial importance from the earliest times, and came to be stressed more and more as the true reason for construing performance as a condition precedent in these cases.

This rationale was put succinctly and clearly in the following cases.

In Cowper v. Andrews (1612) the position with regard to an executed grant was again distinguished from an executory grant, and this case is especially interesting because it demonstrates again that this concept of grants and the distinction between executed and executory was not narrowly limited to real estates but was of general application. Therefore, before referring to the crucial passage, let us briefly state the facts.

Tithes were usually payable to a vicar in kind, i.e. part of what the land produced, and originally this had been the case with the land in question. However, from time out of mind the land had been a park, and the farmers had paid two shillings a year and one shoulder of every third deer killed. However, the land was converted to arable land and no deer were left. The farmers therefore tendered two shillings only, but the vicar refused this, asserting a claim of tithes in kind. The argument against the vicar's claim was that a composition or grant of tithes (i.e. deer and two shillings) had been executed in return for tithes in kind, and the latter could not now revive. The vicar argued that his consideration had failed and therefore the original tithes revived. The Court found against the vicar, because the grants were executed, and there were no legal words of condition. Thus Hobart J. held:

Wherein first to remove that, that bleareth the eyes, which is, that because the tithe is supposed to be given originally for this recompence of money and venison, and therefore if the recompence be detained, the tithe must revive. ... I must begin with the consideration of the nature and operation of a grant of one thing for another.



Whereupon I lay this ground, that regularly this word (PRO) or in consideration doth not import a condition, or make the grant defeasible, though the thing taken in lieu be either taken away by the giver wrongfully, or by any other person upon a just tithe, so as the thing given be wholly lost. And therefore if I.S. give W acre to I.N. for B. Acre, and so E converso, without the word of exchange, it will be not defeasible; nay more, if they use the proper word of exchange, and that be executed a wrongful entry of either party will do no hurt, but a rightful eviction will. But without the proper word of exchange, though perhaps it were meant in the nature of an exchange, it will not defeat.

His Lordship then referred to the different position of executory grants which we are now considering:

But it is true that the word (PRO) in some cases hath the force of a condition, when the thing granted is executory, and the consideration of a grant is a service or some other like thing, for which there is no remedy but the stopping of the thing granted, as in the case of annuity granted for counsel, or for doing the office of a steward of a Court; or the service of a captain or keeper of a fort, Ughtred's Case, Co. 7 Lib (86).

Thus the availability of a remedy was regarded as crucial to construction of executory grants. Gray's Case decided in 1594 affords another example. Without examining the form of action involved, it is sufficient to state that it was necessary for the plaintiff to establish a custom to have common of pasture. The jury found for him on this point, but also found that every commoner used to pay for the same one hen and five eggs annually. The crucial significance of the availability of remedies is pointed up in Lord Coke's formulation of the matter in issue:

And the doubt was what remedy the terre-tenant should have for the hens and eggs; for if the terre-tenant has no remedy for them, then the commoner should have his common sub modo, scil paying so much, etc. and then it would be against the plaintiff. But if the terre-tenant has a good remedy for the hens and eggs, then as the verdict is found it is not modus communiae scil. a manner of commoning, now parcel of the issue as to the common, but a collateral recompence to be paid for the common, whereof every one has equal remedy.

Popham C.J., referred to an unreported Devonshire case which is well worth mentioning for it again highlights the connection between condition and remedy. It was adjudged in that case that:

(W)here a man prescribed to have pot-water out of the river, etc. and the jury found that he ought to have it paying 6d. yearly. And it was adjudged that he had failed of his prescription, for he had prescribed absolutely, and the jury had found it conditionally, or sub modo. And there if he did not pay the money he ought not to take the water, and the terre-tenant in such case might disturb him, which is all the remedy that the terre-tenant had.

However the instant case was different to that Devonshire decision because:

(I)n the case at Bar, the terre-tenant may distrain the cattle of the commoner on his own land for the hens and eggs; and therewith agrees 26H 8. 5. But in the case at Bar, if the jury had found, that the plaintiff should have common paying so many hens and eggs, the issue had been found against him because it is parcel of the custom: but in the case at Bar, the custom as to the commoning is perfect without the said payment, and the payment doth not limit

or qualify the custom, but it is a recompense for the common, for which recompense the terre-tenant has remedy. But if the terre-tenant had no remedy for the recompense, as in the case put by the Chief Justice, but only to 'make the said disturbance', and is aforesaid, then the said manner of payment (although it be found as it is in the case at Bar) is parcel of the custom (87).

Now the reader may well wonder at this stage what is the point of quibbling over the precise rationale for the qualification of a unilateral grant. What is the point of distinguishing between the factor of the nature of the grant as a whole and the factor of non-availability of mutual remedies when both factors are always present anyway?

The point will soon become clear, however, when we move on to consider the position of bilateral contracts; i.e. the situation where both parties are bound and therefore each has a remedy.

## CHAPTER II

### THE BILATERAL CONTRACT UNDER SEAL

#### (A) THE ORIGINAL PRESUMPTION OF INDEPENDENCY OF COVENANTS

When parties to a contract under seal covenant to perform certain things, they may intend such covenants to be absolute or they may intend them to be conditional on some event.

Of course, if conditional, the intended condition might have absolutely no connection with the other party's performance. We have previously noted that the concepts of condition, consideration and covenant are separate, and the facts may show them to be quite independent of one another.

Now a man may make a covenant with no conditions and for no consideration, and it may be enforced if it is under seal. Again, a man may make a covenant with a condition that has absolutely no connection with the matter at hand, (for example, I will pay you \$2,000 for your car if the twentieth person that walks past that door is wearing a hat). More realistically, the condition may have no connection with the promisee's performance or obligations, but will have some relevance to the matter in hand for the promisor, (for example, a contract to buy a house provided that the sale of the purchaser's own house goes through by a certain date).

But although we can thus separate the concepts it is far more likely that they will coincide with one another. This is because, in the great majority of cases, party A wishes to obtain a performance from party B and is willing to purchase it with his own contractual performance; thus

covenant and consideration merge. Furthermore, the parties may be concerned with order of performance (as a whole or of particular parts of the contract) and so A makes a condition requiring previous or concurrent performance by the other party before A is required to perform; thus condition merges with both covenant and consideration.

Now, the discussion in the previous sections has been concerned with the general concept of a condition, and this will include a condition the subject matter of which is quite irrelevant to the contract, as in the hat example.

We now turn to a slightly more narrow, but important, sphere of enquiry - the situation where it is alleged that the condition precedent to the promisor's liability to perform is the performance by the promisee.

The problem to be discussed is the relation between conditions of enforceability of a promise and consideration for a promise. Is it possible to say that, in a bilateral contract under seal, the promise of one party furnishes the consideration for the promise of the other party and must therefore be performed before the other party's performance can be enforced?

Perhaps the most simple way to formulate this problem is this: If A covenants to do X and B covenants to do Y, each making no reference to the other's covenant, can B enforce A's covenant irrespective of the performance of his own covenant? From the earliest times it was accepted that this problem was to be considered in this form: Was the promise(s) of the one party dependent on or independent of the promise of the other

party? In other words, did the performance of one party's promise constitute a condition precedent to the enforceability of the other's promise, or were they both independently enforceable? And from the earliest times it was accepted that such covenants were independently enforceable. Before exploring the reasons for and rationale of this doctrine, let us illustrate the basic doctrine's operation. Two cases will suffice to illustrate this basic doctrine, though many others might be referred to (88).

In Ware v. Chappel (1649) the plaintiff covenanted in an indenture to bring 500 soldiers to a port and the defendant covenanted to provide shipping and victuals for them at the port. The plaintiff brought an action against the defendant for not providing the shipping and victuals, and the defendant pleaded that the plaintiff had not raised the soldiers at that time. The question therefore became, were the covenants dependent or independent?

It was decided that they were independent; i.e. that the plaintiff could sue without showing performance of his own covenant.

Roll C.J., with whom Ask and Nicholas JJ. concurred, held that:

(T)here was no condition precedent but that they are distinct and mutual covenants, and that there may be several actions brought for them: and it is not necessary to give notice of the number of the men raised, for the number is known to be 500 and the time for the shipping to be ready, is also known by the covenants; and you have your remedy against him if he raises not the men, as he hath against you for not providing the shipping (89).

The case of Trench v. Trewin (1696) affords a further example.

Trench, the executor of Squire, brought an action of covenant for £30 upon articles between Squire and the defendant, Trewin, that Squire should assign to the defendant his interest in a house and the defendant should pay Squire £30. The defendant pleaded that Squire had not assigned, to which the plaintiff demurred. The case was decided for the plaintiff because:

(T)hese are mutual and independent covenants, and the parties may have reciprocal actions; and therefore the plaintiff may bring his action before the assignment of the house. And the defendant has a remedy after; if the other party does not perform his part (90).

(B) AN EXPLANATION OF THE DOCTRINE OF INDEPENDENCY

The doctrine of independent covenants has been attacked at various times for various reasons, among which are that the decisions 'outrage common sense', and that they are contrary to the parties' 'true intention'. However, it is most important to put the doctrine into true historical perspective, and if we do so, we find that the doctrine is quite understandable and quite logical.

Now it is true that to lawyers steeped in doctrines of 'breach going to the root of the contract' etc., a dependency/independency dichotomy may seem an artificial and too rigid way in which to formulate what is very often an extremely involved problem. And it is true that with respect to an executory oral contract it may well be artificial to try to list the promises and decide which are linked to which, but this is because the promises are not prima facie independently enforceable as they are in a deed, enforceability depending rather upon questions of consideration, and failure of consideration, doctrines which tend to depend on the substance of the contract as a whole rather than individual components of it.

But the rules pertaining to construction of bilateral deeds were developed many years before the advent of enforceability of executory contracts based on mutual promises. Furthermore, although personal actions could be enforced by other means such as Debt, it was settled that these actions were based on the fact that the consideration was executed - quid pro quo - or that the property was deemed to have passed.

The action of Covenant sharply contrasted with such actions, and it was natural that the general principles of construction of bilateral deeds, and indeed the very concept of such a deed, should parallel not the modern all embracing 'law of contract' but rather the contemporary real property law.

The point is that, as already submitted, the law of real property played a crucial and dominant part in the early law. It is in real property law that the original concept of condition was formulated and developed, and it was also in this field, and in the related field of the lease for years, that the condition/covenant dichotomy took shape and developed. And it is in the law of real property that we can find the seeds of the independent approach to the construction of bilateral deeds. There are several important factors in this early law that contributed to the adoption of this approach.

(i) The Condition/Covenant Dichotomy

We have already traced the story of the condition/covenant dichotomy from the original insistence on a construction based on the words actually used in the deed toward a more flexible approach whereby other factors,



such as suitability and availability of remedies could be taken into account. And in Hayes v. Bickerstaffe (91) we saw the end of this process of development, the Court holding words which, 100 years before, would have been certainly conditional to be mere clausula clericorum. The construction in that case was against a condition because such a result would be too harsh, for 'if the lessee broke a covenant of the value of a penny, it would excuse the lessor of the breach of a covenant of £1000 value'.

But Hayes v. Bickerstaffe represented a late stage in the development of conditions and covenants, and it is to the very much earlier stages that we must refer for an explanation of the matter with which we are now concerned, dependency and independency.

As I have attempted to demonstrate, the concepts of condition and covenant were originally quite separate and in fact mutually exclusive. As was stated in Michell v. Dunton (1587) (already examined supra):

(T)he will expressing that the first lessee should have the land observing the first covenants, it shall not be now taken to be a condition, by any intent that may be collected out of the will: for a covenant and condition are of several natures, the one giving action, the other entry ... (92).

The point I wish to make is quite a simple one. In a deed stipulations were either viewed as covenants or conditions. If it was decided that parties had covenanted with each other, then these covenants were absolute; the covenant of the one party (or rather performance of that covenant) did not qualify the enforceability of the covenant of the other party, for they were covenants not conditions. This clear distinction was to change but it

did originally form a basis for the courts' approach to the problem of the relation between the covenants of the two parties to a bilateral deed. Covenants were prima facie absolute and conditions were odious. Therefore, although the requirement was not so rigorous as in the case of estates, 'proper' words of condition were deemed necessary. But the fact that the consideration for the giving of one covenant was the giving of a reciprocal covenant was not enough to establish a condition.

Closely related to this idea of the condition/covenant dichotomy is a further important factor which goes to explain the early courts' attitude with regard to the independency of covenants. This is the very nature of the contract under seal itself.

(ii) The Nature of the Contract Under Seal

Chitty defined contracts under seal in the following way:

Contracts under seal, or specialties, such as deeds and bonds, are instruments which are not merely in writing, but which are sealed by the party bound thereby, and delivered by him to or for the benefit of the person to whom the liability is incurred. In no other way than by the use of this form could validity be given to executory contracts in early times (93).

Perhaps the most important point to note is that the basis of enforceability of a deed was the formality and solemnity of executing a promise under seal and not any consideration for that promise. This point is so well established and fully dealt with by the treatises on contract that there is little point in pursuing the matter further. Perhaps, however, I might refer to an interesting contemporary exposition by counsel in Sharlington v. Strotton (1564):

(W)hen a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation, and lastly he delivers the writing as his deed, which is the consummation of his resolution; and by the delivery of the deed from him that makes it to him to whom it is made, he gives his assent to part with the thing that is contained in the deed to him to whom he delivers the deed, and this delivery is as a ceremony in law, signifying fully his good-will that the thing in the deed should pass from him to the other. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made (94).

As to the importance of the contract under seal, although all commentators recognise that there have always been important differences between contracts under seal and simple contracts (whether written or oral), most tend to denigrate the role of the contract under seal in the development of our law of contract.

For example, Pollock observed that:

The writ of covenant remained a solitary and barren form of action, without influence on the later development of the law (95).

And Sutton and Shannon stated:

A promise under seal to do or to abstain from doing anything was the solemn act and deed of the party making it, and it was for this reason that the law enforced it, and the fact that it involved an agreement was not the important consideration; this writ, therefore, has not been the means of developing the law of contract (96).

Such statements may be correct in the sense that the actual number of contracts under seal has declined, but they are wrong if they suggest that the general law of contract developed separately and independently of the principles applicable to deeds.

The action of covenant preceded a general theory of contract by hundreds of years, and we shall see that the principles applicable to deeds were in fact vital to later development (97).

For now, the important point to note is that, even though a deed was bilateral, the Common Law took the view that each party had solemnly covenanted, and each was bound not just because of the other's entry into agreement but because of the very solemnity of covenanting under seal. Each party had made a covenant, or grant as it was still often termed, and prima facie that was binding. In the case of unilateral grants we have seen that there were reasons for interpreting the expressed consideration as part of the grant, or as a condition precedent to the enforceability of the grant. In the present situation, however, these reasons did not exist.

First of all, we are assuming that there is no reference in the one party's covenant to the consideration for that covenant, through words such as pro etc., and therefore one could not say that there was an express condition precedent to the covenant.

Secondly, due to the very nature of the bilateral deed, there are mutual remedies available and the possibility of interpreting the consideration as a condition precedent to the grant because there is no other remedy for it also disappears.

Now, given the background of real property law that we have reviewed, and the very nature of a contract under seal, it seems most natural that the Courts should have viewed the matter in terms of a simple presumption: the covenant of each party was enforceable, unless this presumption was rebutted by the express intention of the parties to make enforceability dependent on the performance of another covenant.

Nevertheless, although all this seems quite logical when viewed in its historical context, we are still faced with the fact that, as has already been stated, it is sometimes observed that these decisions are against the parties' true intention and outrage common sense.

Once again our terms should be carefully defined. Suppose we wish to examine the present situation of A covenanting to do X and B covenanting to do Y, (with no words of connection,) and to ignore all thoughts of judicial precedent and doctrine. We decide to proceed directly to the true intention of the parties, but we still find that it is not necessarily the case that it was intended that the non-performance of one promise was intended to bar the performance of the other. It might be that there are a number of promises made by each side and that promise X is of quite insignificant importance to the contract as a whole, whereas promise Y is vital. Again, it might be that the promises are not connected at all, each being related to two quite separate transactions and each really in the nature of a deed poll executed by each party, but in the one bilateral deed.

(iii) The Intention of the Parties

The ascertaining of the parties' intention and the very meaning of intention in the law present great difficulty, and we should briefly consider this problem before proceeding further. When two parties decide that they wish to enter into a contract of some kind, they may advert to an infinite number of eventualities concerning that contract. If an eventuality occurs that causes the contract to be litigated upon in court, there are any number of possible facts situations but the cases may be divided into two broad categories.

- (1) First of all, the parties may have actually adverted to the eventuality in their contract. If so, the question then arises as to the meaning of words used by the parties and the legal consequences of the use of those words. Naturally, there are many other vital issues likely to arise such as mistake, rectification, the parole evidence rule and difficult questions of subjective and objective intention, but these issues are outside the province of this work, and we put them to one side. The question, as it is formulated in the majority of cases and textbooks, is: 'What should the words used by the parties reasonably be taken to mean?'

Words have no absolute meaning in themselves but are only useful when considered in conjunction with known objects and concepts. Words can describe, modify and distinguish objects and concepts, but their meaning is always subject to the circumstances in which they are found. The allusion to Humpty Dumpty is hackneyed but at least it points up the fact that

to know what a word means we must first know how the parties used it. Even if such difficult problems as technical meanings, local custom and usage etc., are not present in a case, and neither litigant has the initials H.D., the fact remains that the interpretation of, and effect placed upon, the words used may radically differ from era to era, and from judge to judge. So, our first problem is, how do we decide what words mean and how do we determine their legal effect?

- (2) The difficulties multiply in our second situation. This is the case in which the parties have not expressed themselves upon the eventuality that occurs and it is therefore up to the court to decide the consequences to be attributed to it.

These two problems, in particular the second, involve construction of a contract and implication of terms, problems once again outside the scope of this work. But, in order to proceed, it is necessary to say something about the two categories of fact situations outlined above and the terms to be used in relation to them.

There are three important concepts to be considered: interpretation, implication and construction (98).

Intepretation answers the first question: what do the words used actually mean? It is concerned with the language of a contract (though this may include symbols and acts) rather than the drawing of inferences and the ascertainment of legal consequences.

Construction is a far broader term; it means the determination of the legal effect of the contract. Thus Professor Corbin:

By 'construction of the contract', as that term will be used here, we determine its legal operation - its effect upon the action of courts and administrative officials. If we make this distinction, then the construction of a contract starts with the interpretation of its language but does not end with it; while the process of interpretation stops wholly short of a determination of the legal relations of the parties.

He continues:

When a court gives a construction to the contract as that is affected by events subsequent to its making and not foreseen by the parties, it is departing very far from mere interpretation of their symbols of expression, although even then it may claim somewhat erroneously to be giving effect to the 'intention' of the parties (99).

So, construction involves a large measure of value decision: if the parties did not consider an eventuality, what legal result is to be reached? As we all know, the answer to that question is that it is a matter of construction of the legally admissible evidence and circumstances.

Granted, this definition is hazy in the extreme, but perhaps the third concept will clarify it a little.

Implication is distinguished by Corbin from the process of construction because he believes it most aptly describes the process of ascertaining what the parties actually intended (although they did not say it), as distinct from a policy of construction based on the courts' idea of fairness and social policy. As Corbin says, it is a



process of logical and factual inference and not a pure construction or creation by the court. An implied promise, therefore, is here treated as a promise implied in fact, a promise that the promisor himself made, but a promise that he did not put into promissory words with sufficient clearness to be called an express promise (100).

Of course, this distinction between construction and implication only stands up if we recognize that in some situations the courts resolve problems in a manner quite independent of what the parties actually thought, or might have thought, about the eventuality.

Naturally, this principle may be formulated in many ways and in different degrees of boldness dependent on one's philosophy of the judicial process or, perhaps, merely one's degree of cynicism. But although we may be loath to endorse some of the sweeping statements made by those of the 'Realist' persuasion, I think we can safely accept that a degree of social policy and justice enters into the resolution of contract cases.

The result of this is not altogether happy. If we accept on the one hand that the true meaning of implication is the derivation of parties' actual, though unexpressed, intentions and on the other hand that terms may be imposed by the court through a separate process of construction, what is the correct word to describe this imposition of terms by law?

The answer, and Professor Corbin would be the first to recognize it, is that the courts use the verb 'imply' to refer both to the ascertainment of what the parties actually intended and also to the process of imputing terms by law. Perhaps, therefore, we need a further term to describe this imputation process - and the logical choice might be 'imputed terms'.

Divisions and classifications are all very well, but the most important thing is what the courts actually do. Corbin points out that:

Frequently, however, the holding of the court will be so stated as to make it appear that it is based upon a 'presumed' intention or even upon actual intention that is discovered by some mysterious kind of interpretation or inference. In many cases, indeed, it may be difficult to determine whether the parties intended such a condition or not; and this need not be determined at all if the court is willing to hold that justice requires the condition whether the parties intended it or not (1).

With respect this seems correct, although I would prefer to place less emphasis on the courts' deliberate dressing up of policy decisions in terms of intention, although this undoubtedly occurs, and more emphasis on the genuine dilemma faced by the courts in deciding how to decide what the parties should be taken to mean when they have not said anything.

Now the point of all the foregoing is that it is rather meaningless to talk of a party's, or the parties', intention in the abstract. Even when the parties express their intention, the problem is by no means resolved; and when the parties do not express themselves, intention becomes very much at large. Indeed, intention is really a concept used by the law to implement justice, contracts in truth being built up by the courts through the medium of intention. The meaning of certain words may be strained and whole terms may be implied or imputed in the name of intention - and this is what is known as the process of construction. But there must be some guidelines for the courts to follow in order to construe a contract. There must be limits on how far the courts are to

inquire into the parties' true intention, but these may vary from very narrow limits to the widest possible discretion by the court. If very narrow limits are taken, e.g. confining the court to what the parties actually said, this does not mean that the courts are trying to ignore something called the true intention of the parties; it merely means that they are keeping to predefined guidelines for ascertaining that intention.

Given the background of property law already adverted to, it seems logical, or at least understandable, that the early Common Law should have adopted a test of intention which depended on the actual words used by the parties. And, if there were no words of condition expressed in a promise, there was not thought to be a vacuum, but rather the intricate nature of the covenant under seal governed the construction. The covenant was prima facie enforceable per se and it was therefore up to the covenantor to manifest clearly his intention to limit this intrinsic nature.

#### (iv) The Availability of Mutual Remedies

Again, just as in the case of unilateral contracts, there is a further related factor to be considered, that of the availability of remedies. Just as performance was construed as a condition precedent in the case of a unilateral contract because there was no remedy, so it came to be often stated that the fact that mutual remedies were available on a deed meant that there was not a condition precedent. This conclusion does not necessarily follow, for while the absence of a remedy may be a positive reason for one construction, the presence of a remedy is not really a reason for an opposite construction. In truth, it merely negates the positive reason and returns us to a neutral position which is, as we have seen, resolved in favour of independency because of such factors as the intrinsically binding nature of covenants under seal and the mutually exclusive condition/covenant

dichotomy. At least, this would be the position if the factor of mutual remedies went no further than mere availability. However, there was another aspect of the availability of remedies which did furnish a positive reason for the doctrine of independency, and this was the possibility of inequality of damages, which may be explained thus. If party A covenants to perform things V, W, X and Y, and party B covenants to do Z (e.g. pay a sum of money to A), does the payment of the sum depend upon the performance of all of A's covenants? If it does, then although A may have performed V, W and X, if he has neglected Y, he has no claim to B's performance; he is entitled to no payment at all.

When faced with such a problem today, we immediately bring forth tests of 'importance of the term', or 'importance of the breach', or 'frustration' etc. etc., but we must remember that this problem of partial performance predated these concepts by many years and originally had to be tackled within the framework and setting of the contemporary law of deeds.

Given that problems were couched in the terms of dependency and independency, the solution adopted was that the covenants should be independent, and that each party should be relegated to his own remedy whereby the true damage could be ascertained. Thus, in the example above, A could recover the covenanted sum (say £50), and B could recover damages for non-performance of the covenant Y (say £ 10) rather than A losing all reimbursement as he would if a doctrine of dependency had been adopted.

To take an example from the cases, in Cole v. Shallet (1681) the plaintiff brought covenant on a charterparty for the payment of freight and demurrage. The defendant attempted to plead in bar that the plaintiff

had breached certain of his own covenants in relation to the freight and demurrage, but this was not allowed by the court:

per totam curiam judgement was given for the plaintiff; for the covenants are mutual and reciprocal, whereupon each hath his action against the other; and can not plead the breach of one covenant in bar of the other and perhaps the damage of the one side and the other was not equal, and therefore the one not pleadable in bar of the other; but each party is by his action to recover against the other the certain damage he sustained, and so was adjudged Hill 13 Car. 2, B.R. inter Thompson and Noel (2).

Despite the foregoing, the modern reader might still object that the doctrine produced ludicrous results. Thus in Ware v. Chappel *supra*, it seems ridiculous that the plaintiff could sue for damages for not providing food and transportation when the plaintiff himself had not provided the men for which they were intended. However, a partial answer is that in some circumstances the non-performance of the plaintiff's own part of the contract could be taken into account in assessing the quantum of damages. As counsel for the plaintiff said in Ware v. Chappel:

(T)he defendant ought to have provided the shipping and victuals against the time, though the soldiers were not raised; for the not raising the soldiers can only be urged by way of mitigation of damages, and not pleaded in discharge of the breach assigned (3).

But the main point is that the doctrine of independency did aim to compute exactly the true quantum of damage, and achieved this by leaving each party to his own separate cause of action. If the covenant was to pay a certain sum of money, for example, £100, then that was an end of the matter; the plaintiff recovered and the defendant was left to institute

his own action to establish damages. If, on the other hand, the plaintiff's damages were at large the action of the defendant could be taken into account, not to bar the action but to compute the amount of the plaintiff's loss.

It is therefore submitted that, despite much criticism, the substance of the doctrine was basically sound for it theoretically produced logically correct results. A valid criticism may, however, be levelled not so much at the substance of the doctrine, but at the related procedure by which it was administered. The rule was that, since each party was relegated to his own action, these actions could and should be brought at different times. This of course meant that a man of straw could recover £ 500 on a defendant's covenant and then abscond, leaving the defendant with a worthless cause of action only. Furthermore, even if a party did not abscond, it was obviously inconvenient to have to engage in two separate actions which involved the same facts and parties; and, for a defendant who had to raise the amount of the judgment and pay it over, it must have been cold comfort to be told that he could recover it all back when he brought his own action, which might get to court in another two or three years!

It was considerations such as these that were to bring about changes in the law. However, the transition to the modern law will be dealt with in later chapters. For now, let us examine this presumption of independency a little more deeply.

#### (C) THE EXPANSION OF THE DOCTRINE OF INDEPENDENCY OF COVENANTS

I have tried to show that the doctrine of independency, far from being a pernicious and capricious frustrator of the parties' true intent, was really a genuine attempt by the courts to establish guidelines whereby that intent might uniformly be ascertained. Because of the nature of covenants

under seal the presumption was in favour of independent enforceability. But ex hypothesi a presumption may be rebutted, in our case by showing that there was a condition to what seemed prima facie enforceable. We have seen that in the case of real property estates mere manifestation of intention was not sufficient but legal and formal words were necessary to make an estate conditional. We have also seen that the interpretation of leases for years, while based on the same framework, was slightly more flexible in that some factors other than the strict words used might be taken into account. In the case of pure contract law the courts always professed to base their decisions on the parties' intention. To give an early example, Saunders J., in Throckmerton v. Tracy (1554), stated that:

(D)eeds ought to have a reasonable exposition, which shall be without wrong to the grantor, and with the greatest advantage to the grantee... And he said he was of the like opinion that Brudmel (C.J.) seemed to be of in 14 H. 8 (22A) that contracts shall be as it is concluded and agreed between the parties according as their intent may be gathered. And to cavil about the words in subversion of the plain intent of the parties, as Tully says in his Book of Offices, est calumnia quaedam et nemis callida sed malitiosa juris interpretatio, ex quo illud, summum jus summa injuria ... (4).

But once again I wish to emphasise that although the courts could justifiably express this as their position with regard to contracts in contradistinction to estates in fee, the means of ascertaining this intention were far more narrow than those to which we are now accustomed.

Indeed, the true position was really this: there were certain rules of law laid down, the foundation of which was the rationale of ascertainment of intention; this being so, these rules of construction should not be interfered with purely in the name of the 'true intention' in a specific case, for such notion was just too vague. Thus the courts wished to ascertain intention, but that intention must be consonant with the rules of law. Thus in Knight's Case (1587), after the problem at issue there had been resolved, the following comment was made:

And such construction agrees also with the true intent of the parties, which is always to be observed, when it may by reasonable construction consist with the rule and reason of the law (5).

The logical manner to proceed to examine the problem, therefore, is to ask, first, how the presumption of independency might be expressly rebutted and secondly whether it might be impliedly rebutted.

(i) Rebuttal of the Presumption by Express Condition Precedent

We have seen that a condition precedent in contract law was thought of in narrow and precise terms: something to be performed before a cause of action accrued.

This was particularly apparent in the action of debt where the performance furnished the very foundation for the action but it was nonetheless true in the action of covenant. If a condition to a covenant demonstrated that a thing was to be performed before performance of the covenant, then that thing was a condition precedent.



To take an interesting example, in Slater v. Stone (1621) the lessor of a house sued the lessee in covenant for allowing part of the premises to fall into ruin. The lessor succeeded at the trial, but the lessee moved in arrest of judgement that the lessor had not complied with an express condition precedent. The defendant had covenanted, quod ab et post emendationem et reparationem dicti messuagi by the lessor, the lessee would repair etc.; so the objection was that the lessor had not averred that he had first put the house into repair, and this argument was accepted:

(F)or the court held, that the covenant being 'quod ab et post reparationem by the plaintiff, then he would sustain, etc.' it is conditional, that the plaintiff ought first to repair it: so although it were in good reparation at the beginning, if it afterwards happen to decay, the plaintiff is first to repair it before the defendant is bound thereto (6).

So one act by the promisee (the lessor) was specifically made a condition to the liability of the promisor (lessee) to perform another act under a continuing contract (a lease) containing many stipulations on either side.

Similarly, the whole performance by one party could be required before the other party was to perform at all. Brocas' Case in 1587 furnishes a convenient example, and the decision of the Court of King's Bench was thus:

Brocas, lord of a manor, covenanted with his copy holder, to assure to him and his heirs, the freehold and inheritance of his copyhold, and the said copyholder in consideration of the same performed,

covenanted to pay such a sum: it was the opinion of the whole court, that the said copyholder is not tyed to pay the said sum, before the assurance made, and the covenant performed: but if the words had been, In consideration of the said covenants to be performed, then he is bounden to pay the money presently; and to have his remedy over by covenant (7).

Although the practical determination of such cases might seem to us to turn on rather fine distinctions, the actual basis of their resolution is clear. One looks to the actual words that are alleged to express a condition and, if one decides that they do constitute a condition, there is no question but that it must be performed to entitle the grantee to performance of the grant. The grant and the condition are quite inseparable; the condition forms part of the definition or delineation of the grant, and without fulfilment, the grant does not start to work.

In other cases, the decision turned not on the precise wording of the defendant's covenant, as in Slater v. Stone and Brocas' Case, but on the question of the precise status that was to be attributed to another phrase found in the document. The easiest way to explain is to give an example. In Thomas v. Cadwallader (1744) the facts were, very simply, that a lessee covenanted to repair, but the deed went on to state (the plaintiff) 'finding allowing and assigning timber sufficient for such reparations during the said term ...' The plaintiff brought an action of covenant against the defendant for not repairing to which the defendant pleaded that the plaintiff had not supplied timber.

Now the problem, once more, was as to the status of certain words (finding, allowing etc.) Did the phrase constitute a condition or a covenant? The plaintiff argued that it was a covenant and therefore not a condition. Serjeant Bootle insisted:

That the finding of timber by the plaintiff was not a condition precedent, but a mutual or reciprocal covenant; and consequently that the breach of it cannot be pleaded to an action brought on the covenant of the lessee (8).

The defendant, naturally, insisted that the words were properly to be construed as a condition, or qualification of the plaintiff's covenant, and the court agreed with this construction. The words did constitute a condition precedent because 'this finding of timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant'.

It is to be noted, however, that the important point was that the words were found to be a condition, or qualification, of the defendant's covenant, and not merely a reciprocal covenant by the plaintiff to supply timber. As Willes L.C.J. observed:

I expressed my dislike of those cases, though they are too many to be now over-ruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make two actions instead of one, and to a circuitry of action and multiplying actions, both of which the law so much abhors. If therefore this were a new point I should be inclined to be of opinion that, though where there are mutual covenants relative to one another in the same deed a plaintiff is not obliged in an action brought for the breach of them to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff: but this has been so often determined otherwise that it is too late now to alter the law in this respect.

However, as Willes L.C.J. went on to say, the case was different here:

But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification (9).

We now proceed to examine this very point that Willes L.C.J. adverted to in Thomas v. Cadwallader. If each party has positively covenanted, then can the performance of one party's covenant be alleged to be a condition precedent to the performance of the other party's covenant?

(ii) Performance of Consideration as an Implied Condition

We have seen that, as in Slater v. Stone (quod ab et post emendationem et reparationem dicti messuagi), the parties may specifically refer to the question of performance of consideration as a condition precedent to liability to perform, and in such cases the question becomes one of interpretation of the language actually used. But what of the situation where there is no such express condition precedent, but there are merely promises expressed by both parties? For example, if A promises X and B promises Y, can A enforce B's performance without himself performing X, even though X is plainly the consideration for Y?

In the case of real property estates we have seen that conditions were viewed with disfavour and that specific legal words of condition were required rather than a mere manifestation of intention. But this doctrine was based on the independent entity of the real property estate and the need for certainty and finality.

We have also seen that there was also a presumption in favour of enforceability of promises under seal, but that this presumption was based on rather different grounds.

Now in the case where there is no reference in the covenant of party A to the covenant of party B, both covenants will be independently enforceable. And in the case where the performance of covenant B is expressly made a condition precedent to the performance of covenant A, covenant A will not be independently enforceable.

We now move on to consider the situation where reference is made to the other party's covenant, but it is not made an express condition precedent. For example, this occurs when covenant A is expressed to be 'for' covenant B, and brings into sharp focus the relation between condition and consideration.

We have already examined the position with respect to 'unilateral' contracts and noted that while the expression of consideration did constitute a condition precedent, there were two possible rationales. The first was the concept of a grant, the expressed consideration being a part and hence a condition of the grant, and the second was the absence of mutual remedies.

The choice of which rationale to apply to bilateral contracts will be crucial. The first rationale would tend to make covenants linked by such words as pro dependent, for deeds were thought of as grants by both sides, and hence the consideration is part of the grant to be enforced. But the second rationale would mean that pro should be ignored, for mutual remedies were available and this fact, coupled with the considerations of inequality of damage and the presumption of enforceability of deeds outlined above, would strongly favour independency.

The courts were therefore placed in something of a dilemma with respect to bilateral contracts and therefore it is not surprising that, initially, the decisions were not consistent.

In one of the earliest cases available, a doctrine of dependency, with relation to deeds in which words of consideration were expressed, was favoured.

In Anonymous (1499) Fineux C.J. noted:

If one covenant with me to serve me for a year, and I covenant with him to give him £20, if I do not say for said cause, he shall have an action for the £20 although he never serves me; otherwise, if I say he shall have £20 for the said cause. So if I covenant with a man that I will marry his daughter, and he covenants with me to make an estate to me and his daughter, and to the heirs of our two bodies begotten; though I afterwards marry another woman, or his daughter marry another man; yet I shall have an action of covenant against him to compel him to make this estate; but if the covenant be that he will make the estate to us two for said cause, then he shall not make the estate until we are married. And such was the opinion of the court. And Rede J. said it was so without doubt (10).

Yet despite the seeming clarity and certainty of such a statement in favour of dependency, the seeds of a doctrine in favour of independency, based on the availability of mutual remedies, were readily to be found.

Thus in Ughtred's Case (1591) the court treated the earliest known case on this subject, Pool v. Tolchester (1374) as establishing a broad doctrine of independency. After stating the position with respect to unilateral grants, Lord Coke contrasts the position of bilateral contracts by reference to Pool v. Tolchester:

But the case in 48 E III 3 & 4 was affirmed for good law where it appears, that indentures were made between Sir R. Pool, Knight of the one part and Sir R. Tolcelser of the other part, by which Sir Ralph did covenant with Sir Richard to serve him with three esquires of arms in the wars of France, and Sir Richard covenant therefore to pay him 42 marks: in the case each party had equal remedy, one for the service, and the other for the money; and therefore in debt for the 42 marks he may choose either to declare in general, or specially at his pleasure, by the rule of the court (11).

For a time, then, the position was far from clear, but in 1639 we find a clear adoption of the rationale of mutual remedies in preference to the grant concept.

In Caton v. Dixon (1639) the court held:

If by articles of agreement made between A (in behalf of B) and C, A covenants that B, for the consideration afterwards in said deed expressed, shall convey certain land to C in fee, and afterwards C covenants on his part pro considerationibus praedictis to pay to B £160 etc.; in this case, though B do not assure the land to C, yet C is bound to pay the money; for the assurance of the land is not a condition precedent, but these are distinct and mutual covenants. Adjudged upon demurrer (12).

And in 1669 the famous case of Pordage v. Cole was decided. Though later thought to be a leading case on the doctrine of independency of covenants, the case was, in fact, at its time of decision regarded as only one of the relevant authorities, its later fame being almost entirely attributable to the action of Serjeant Williams in appending his famous notes to the case.

The essential facts of the case are reasonably simple. The defendant had covenanted, in a deed, to give the plaintiff £775 for his lands and the plaintiff brought debt for this sum, less 5 shillings earnest money paid. The chief defence was that the plaintiff had not performed or offered to perform the consideration for this covenant, namely the conveyance of the land. The court rejected this argument on the specific ground that both parties had a remedy on the deed and therefore the covenants were independent in the absence of an express manifestation of dependency. Indeed, it seems that the major point at issue was not this doctrine of independency but whether there were or were not mutual remedies available. Thus counsel for the defendant clearly based his argument not on the invalidity of such a doctrine but on its inapplicability to the facts in issue:

The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them, for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them for the money. And it was argued by Withins, that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part...

The report in Saunders makes it clear that the judges and counsel were agreed on these matters but judgement went for the plaintiff because it was found that the defendant did have a remedy, for it was decided that he was a party to the deed in question and that there was a covenant by the plaintiff to assign:



But it was adjudged by the court, that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said, that both parties had sealed it; and therefore judgement was given for the plaintiff, which was afterwards affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second (13).

This doctrine of independency was treated as settled law by an important group of cases in the early eighteenth century involving contracts to transfer stock. In these cases, of which Blackwell v. Nash (1722) (14), Wilkinson v. Myer (1722) (15), Wyvil v. Stapleton (1723) (16) and Dawson v. Myer (1726) (17) are examples, the plaintiff covenanted to transfer and the defendant covenanted to pay.

Although the plaintiff was willing to perform, defendants in these cases were able to raise numerous objections about the sufficiency of the plaintiff's performance or offer to perform (18) and the question therefore arose whether any such averment of performance was necessary. It was decided that it was not, for each party had a mutual remedy. Thus in one case it was stated:

(T)here were mutual covenants, viz. an express covenant from the defendant to pay the plaintiff £ 730-10-0 and then a distinct covenant from the plaintiff to transfer the produce of the annuities to the

defendant, and the covenants therefore being mutual, they held that the tender was not of the case, and the plaintiff was not obliged to answer it; for if the plaintiff did not tender, the defendant had his remedy against him for not doing it (19).

At this point we must pause momentarily. We have thus far been considering only the position with regard to contracts under seal, but we have now come to, and proceeded beyond, that point in history when the simple or parol contract was born. We now turn, therefore, to examine the development of the parol contract.

## CHAPTER III

### THE SIMPLE OR PAROL CONTRACT

#### (A) HISTORICAL INTRODUCTION

We have thus far been concerned to examine the position with respect to contracts under seal only. This approach is justifiable in the light of the fact that the problems of performance with which we are concerned could not occur while the action of Debt and, of course, Assumpsit in its early stages of development, required that the consideration be executed. In other words, the question of order or dependency of performance could not arise when these matters went not to construction but to the cause of action itself.

However, it is clear that from sometime near the middle of the sixteenth century it came to be recognised that an executory promise made by the defendant could be enforced by a plaintiff who had given a promise in return for it, the basis of enforceability being the giving of the reciprocal promise.

Although a case in 1555 is sometimes cited as the first reported decision on the topic (20), the first clear statement is usually said to be the note of the case of Strangborough v. Warner in 1588:

Note, that a promise against a promise will maintain an action upon the case, as in consideration that you do give me £10 on such a day, I promise to give you £10 such a day after (21).

And it became well established in a number of cases soon after Strangborough v. Warner that 'a promise against a promise is a sufficient ground for an action' and this, of course, is one of the very foundations of modern contract law (22).

However, although this innovation is hailed by commentators as a decisive step forward by the law, a related development has been much criticised. This development was that the courts, having decided that executory promises were enforceable also held that they were independent of each other or, in other words, the enforceability of a defendant's promise was not related to the performance of a plaintiff's own promise.

Some examples will make this clearer.

In Bettisworth v. Campion (1608) the plaintiff sued for arrears of payment under an agreement whereby the defendant was to have all the iron produced by a certain blast furnace and to pay so much per ton for it. The plaintiff averred that the defendant had received a certain number of tons and therefore claimed remuneration at the contract rate, but the defendant objected that he had not had all the iron so produced and therefore the performance of the plaintiff was defective. However, the court made it clear that this sort of argument was irrelevant, for the consideration - the basis of enforceability - was not the giving of the iron, or all the iron, but the giving of an enforceable promise. Thus the court stated that:

(T)he consideration ex parte querentis was not, that the defendant should have all the iron; but that the testator promised that the defendant should have all the iron, so that the consideration of each part was the mutual promise the one to the other (23).

Similarly, in the case of Beany v. Turner the defendant objected, after a verdict had been found for the plaintiff, that the plaintiff had not sufficiently averred his own performance, but the court quickly disposed of this objection:

But by the whole court, here being mutual promises, there needs no averment at all of the performance, and therefore an ill averment of that which needs no averment, shall not hurt, and thereupon they all affirmed the judgement (24).

The popular argument is, of course, that this was not the correct way to approach a matter of construction, for the results were quite contrary to what we would consider the intention of the parties to have been.

The well known, though scantily reported, case of Nichols v. Raynbred (1641) is often cited as a typical illustration of this strange doctrine adopted by the courts and, as the report is short, it is here reproduced:

Assumpsit. Nichols brought an Assumpsit against Raynbred, declaring that in consideration that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 shillings: adjudged for the plaintiff in both courts, that the plaintiff need not to aver the delivery of the cow; because it is a promise for promise. Note here the promises must be at one instant, or else they will be both nuda pacta (25).

Now, at first sight, this does seem strange for one would think that the defendant bargained for a cow rather than a lawsuit; if the plaintiff did not deliver the cow it would seem reasonable that the defendant should retain the fifty shillings rather than be forced to pay it and then sue for the detention of the cow! And the usual explanation for such a state of affairs is that the judges were confused about this point. The position advanced by a number of learned commentators is that there were two distinct issues, that of enforceability and that of construction but, in deciding the first issue, the courts became confused and jumped to an unnecessary and erroneous conclusion with regard to the second. This point is well made by Dr. S.J. Stoljar, and it certainly merits close examination. He states:

When mutual promises became enforceable in the later sixteenth century, the concomitant shift of emphasis from formal covenants to informal agreements brought forward a whole range of simple and indeed the most ordinary types of bargains. Yet there were no precise rules to meet and resolve the disputes arising from them. Left to improvisation, the courts transferred to mutual promises the ideas applied to covenants. This was to create incredible confusion. For mutual promises began to be treated as presumptively independent; like covenants they were seen as two separate undertakings. But since mutual promises were enforceable because they were consideration 'for' each other, a promise 'for' a promise was much more similar to mutual covenants linked by words of dependency or condition. The courts, in other words, turned our doctrine upside-down, with results that were correspondingly peculiar (26).

And later he poses, and answers, the following question:

(W)hy did the courts show this preference for independency when a rule of dependency could at any rate in some cases have yielded better results? In the first place, to hold mutual promises independent may have appeared like a powerful re-affirmation of the enforceability of the bilateral 'consensual' contract: to say that both parties had separate 'remedies over' was, in a sense, to confirm the perhaps still unsettling truth that mutual consideration had an effect equal to that of mutual and sealed covenants. This led, particularly in the case of simple contracts, to great confusion between contractual formation and contractual performance, or rather between those rules making promises enforceable or irrevocable and those rules becoming increasingly necessary to guide the parties' performatory relations...(27).

This argument is certainly persuasive and, indeed, the statement that the two issues of enforceability and construction are separate and distinct sounds almost tautologous. However, it is submitted that that is because such a statement is in line with what we now regard as settled and fundamental principles of contract law. We do not now argue with such a statement, for we cannot. But it is a rather different matter to take such a premise and then state that the courts of an earlier time must have been confused, because they did not deliver judgements in accordance with this premise. Rather, what we must do is put ourselves into the shoes of the lawyers of the period and gaze about us at the historical and contemporary background.

Of course, an examination of the history of Assumpsit is quite beyond the scope of this work, and I will not even refer to any of the major cases, for they have been admirably dealt with in any number of learned works. Merely for the sake of coherence, the briefest of summaries would seem to be this.

Assumpsit was originally an ingredient in the development of the action of Case, a process whereby the original requirement of force and violence in trespass was gradually ameliorated. Assumpsit meant that the defendant undertook to do something, and the plaintiff placed trust in this undertaking. If, then, the defendant performed badly, the plaintiff could have an action on his case based on the defendant's conduct in inducing reliance and then betraying that reliance by misfeasance. In short, the action was in what we would now call tort rather than contract, and at first assumpsit for nonfeasance as distinct from misfeasance was not allowed. However, during the fifteenth century it became established that if a plaintiff had performed his own promise but the defendant had positively put it out of his power to perform himself (for example, P pays D for a manor, but D conveys it to a third party) then an action could lie, even though this was nonfeasance rather than misfeasance if we analyse it in a technical fashion.

The next stage of development was that, by the early seventeenth century, an action had come to lie for the mere nonperformance of a promise even though the defendant had not positively put it out of his power to perform, provided that the plaintiff had himself performed in reliance on the defendant's promise.

The final stage of development with which we are concerned occurred when, in the late sixteenth century, it was held that the mere giving of an executory promise would support the enforcement of a reciprocal promise. But how was this last result achieved? Though a detailed examination of this question is outside the scope of this work, some answer is nevertheless important for it may help to explain much that



seems strange concerning the construction of these parol executory contracts. The answer would seem to be that it is not possible to trace a logical progression or evolution of the law here, for what really occurred was a conceptual jump between two different bases of enforceability. Assumpsit had previously been based on what we would call tort, the gravamen of the complaint being positive damage due to a detrimental reliance on the defendant's positive undertaking. Some positive detriment to the plaintiff was more than crucial to his complaint; it was his complaint. However, when we reach the stage at which mutual executory promises are enforceable, we find that our actual basis of enforceability has changed; the claim is no longer that the defendant has tortiously caused damage, but that the defendant has not kept his promise, damage being the result rather than the foundation of the cause of action.

It has been pointed out by a number of commentators that there were several compelling reasons why it should have been wished to establish a contractual remedy, other than Covenant, at Common Law (28). Professor Milsom, for example, has noted not only the issues of wager of law (29), technicality of pleading and competition with Chancery but has also explained in an impeccable fashion the relation between the local jurisdictions and the Common Law courts.

It will be remembered that actions involving more than 40 shillings had to be brought in the royal courts and that those courts, for historical reasons with which Professor Milsom has also dealt, required a deed to enforce contractual claims. Many claims, therefore, that were enforceable in the local courts were not allowed at Common Law. With the fall in the

value of money (which meant more claims had to be brought in the royal courts) and the actual decline of the local jurisdictions themselves, large substantive gaps were found to exist in the Common Law. Something besides the limited remedies of Covenant and Debt was needed, and the expansion of Assumpsit was destined to provide this remedy. As Professor Milsom states:

As a matter of social history, therefore, the rise of Assumpsit is another transfer from local jurisdictions, and the transfer is of cases there remedied directly on the basis of promise. Even some of the formulae of Assumpsit actions seem to echo earlier claims in London and elsewhere. Conceptually, it is not as was once thought the dawn of the idea of enforcing promises: it is the difficulty of accommodating that idea within the framework already established (30).

Of course, it is one thing to explain why litigants should have sought a remedy or why the courts should have been favourably disposed to an extension of the law, but quite another thing to explain how the extension came about. Indeed, perhaps we cannot explain in a logical fashion how this occurred for, as stated above, what is really involved is a jump between two different concepts, or, as Mr. Fifoot put it, 'between the tortious and the contractual aspects of assumpsit a gulf is fixed across which no logical bridge can be built'.

Naturally, some ropes had to be utilised to span the abyss and, as Professor Milsom has pointed out, the main concept pressed into service seems to have been 'deceit'. For many years a central element in the development of the action on the case, deceit was now used to place the appearance of a tortious claim upon the breach of the defendant's promise. Thus, because the defendant has craftily broken his promise the plaintiff

alleges that he has lost the profit he would have made from connected transactions or that he has lost commercial reputation due to his not being able to honour his own obligations, and so on. But, as Professor Milsom again points out, these machinations are scarcely enough to justify or explain the deep change that the law was undoubtedly undergoing:

The more regularly deceit is alleged, in short, the more various do its particular manifestations become, and the more vague, and the pleadings descend into that solemn abuse supposed, wrongly, to be characteristic of the middle ages. The common law lacks a convincing argument and is beginning to shout (31).

Thus once again we come back to our logical abyss. It is submitted that, as usual, the formulation of an answer is facilitated if we look a little beyond our immediate problem and consider a wider background. In this instance, I refer to the development of indebitatus assumpsit, the well known process culminating in Slade's Case, whereby indebitatus assumpsit virtually became an alternative to the action of Debt.

There are, however, two views as to the relation between the development of assumpsit (Special) that we have been considering, and the history of indebitatus assumpsit. One view is that the two developments were intimately connected, and Professor Holdsworth propounded this theory. After outlining the history of both he grasped each branch and formulated the following question and answer.

(I)f payment would give rise to an action when the promise on the faith of which the payment was made was not fulfilled; and if the fulfilment of the promise for which payment was expected would

give rise to an action on a special promise to pay - why should not any promise be actionable if given for a promise?

The cases would seem to show that it was the growth of indebitatus assumpsit, in which the idea of promise was the gist of the action, which brought this idea to the front.

He then outlines the development which was noted as established law in Strangborough v. Warner (32), and then says of that case:

This case was quickly followed by other cases in which the same point was adjudged; and it was finally sanctioned and justified by all the judges in Slade's Case ... Slade's Case, then, marks the culmination of these two developments of the action of assumpsit which had been going on throughout the sixteenth century, and the terms of the resolution in that case which has just been cited show clearly the interdependence of these two developments ...(33).

Before making any comment, let us briefly advert to the contrasting view which is that the developments of Special and indebitatus assumpsit should be kept entirely distinct. Mr. A.W.B. Simpson took this view. After pointing out that in Slade's Case itself the declaration was not founded on mutual promises but rather on a consideration of an executed bargain and sale, he states:

Once this is appreciated the famous statement that 'every contract executory imports in itself an assumpsit' (34) can be given an intelligible meaning. Contract in the sixteenth century and early seventeenth is not synonymous with agreement; it means (inter alia) 'a situation where debt lies' - for example a bargain and sale or a loan of money is a contract. The dictum, translated out of the contemporary jargon, means that whenever a situation has arisen

where the writ of debt sur contract would lie against a person and that person has not paid the debt ('executory') an assumpsit to pay the money will be implied (35).

Mr. Simpson concludes:

The rule that mutual promises are considerations for each other belongs wholly to the sphere of Special assumpsit and has no relevance to the indebitatus action, conversely Slade's Case has no relevance to Special assumpsit.

With respect, the article written by Mr. Simpson is of great technical excellence, and the learned writer is quite correct in stating that the issues of Special assumpsit and indebitatus assumpsit are logically distinct. However, my point is that we are not here dealing with a matter of strict logical development but rather with a change in conceptual thinking of a more abrupt nature than is usually experienced in the Common Law. But it is possible to discern a basic line of development and this was that, at a stage when the remedy was still grounded in tort, the fact of the assumpsit nevertheless started to be emphasised. As this idea of assumpsit was utilised and talked about in more and more fact situations, it was only natural that lawyers would start to think of the assumpsit giving a remedy per se - because of the assumpsit alone - rather than as merely the way by which a cause of action was described in certain situations.

It would seem fair to say that the talk about indebitatus assumpsit would have been one of these factors in this somewhat illogical transition. Lawyers talked of such issues as when Debt barred the

availability of assumpsit, when an assumpsit could be implied; and of course the idea of consideration - what was a sufficient promise to ground an assumpsit was also being discussed. Given this background, it would seem natural that a shift of emphasis should take place toward the assumpsit itself, and away from the tortious concept of which it had hitherto constituted a part.

Thus it was that assumpsit came to be applied to mutual executory promises. It is true, of course, that Debt was not applicable and, therefore, whatever the true nature and extent of the doctrine of the exclusiveness of remedies and the disputes between the Courts of Common Pleas and Queen's Bench, there was no such problem here (36). But to say so much is not, as Mr. Simpson thought, to establish that Slade's Case decided nothing about mutual executory promises. The true view would seem to be that the case did much to consolidate a doctrine that was still in its incipient stages and was not yet supported by any great number of decided cases.

It is undoubtedly true that some accounts given of these developments prove, in the light of Mr. Simpson's research, to be perhaps a little oversimplified in the face of strict analysis and logic. In particular, Mr. Simpson's analysis of the statement in Norwood v. Norwood and Read (37) that 'every contract executory imports in itself an assumpsit' is certainly justified by the historical background and concepts of contract and grant that went to make up the Action of Debt. Furthermore, it is quite true, as Mr. Simpson points out, that the doctrine traceable to the reign of Henry VI that, on a parol bargain to sell specific goods, the buyer could bring Detinue and the seller bring Debt before any delivery

had taken place, was not based on the giving of mutual promises but rather on the concept of mutual grants of remedies (38).

However, it is submitted that this analysis, albeit quite correct, does not conclude the matter, for it would seem that a proposition concerning the enforceability of mutual promises was laid down in Slade's Case and that these two points were treated as factors justifying the following important resolution:

It was resolved, that every contract executory imports in itself an assumpsit, for when one agrees to pay money, or to deliver any thing, thereby he assures or promises to pay, or deliver it, and therefore when one sells any goods to another and agrees to deliver them at a day to come and the other in consideration thereof agrees to pay so much money at such a day, in that case both parties may have an action of debt, or an action on the case on assumpsit, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case, as well as actions of debt, and therewith agrees the judgement in Read and Norwood's Case, Pl. Comm. 128. (39).

It is submitted that, whatever the original rationale, such doctrines were now used to justify a much wider statement, and a statement which is in terms of mutual agreement rather than of grants or of executed quid pro quo (40). With Slade's Case, then, the enforceability of mutual executory promises was established. Of course, our main concern is not the history just outlined but rather the problem of construction of the parties' promises adverted to by Dr. Stoljar and certain other commentators. However, the point of all this discussion has been to establish that the very distinction between enforceability and construction at this time in history is a little artificial. It is submitted that although the idea

of contract was now rapidly developing and that the enforcement of executory promises was due to the fact that the promises rather than deceit were now being focussed upon and stressed, it is vital to bear in mind the historical background to this development.

The point is that the development of the idea of contract had been long and devious, growing originally from trespass and tort. And putting aside the local jurisdictions and the law merchant, there was no a priori Common Law concept of contract - that is the regulation and enforcement of arrangements between parties on the basis that they had each contracted together; rather, the courts sought to establish a party's cause of action, the foundation of which was the other party's conduct and damage caused by it. In other words, the courts did not seek to regulate the performatory conduct of both parties to a 'contract' but rather looked to the plaintiff and asked whether he had a cause of action.

Although the law had gradually developed towards an idea of contract founded upon promise rather than tort, it was most natural that this mode of analysis should continue. The courts had always approached the cases in this way and there was, as yet, no compelling reason why they should drastically alter their ways. It is true, and we shall later discuss the point, that a change of approach did later take place in the law but, it is submitted, this does not mean that the judges of an earlier time were confused as Dr. Stoljar has suggested. The law was destined to change because performatory problems, previously not known to the law, arose because of this concept of enforceability of mutual promises or, more correctly, because of the general ascendancy of assumpsit over Debt. It is a mistake to say that the judges concerned with specific



stages of development of the enforceability of mutual promises should have foreseen the later vast changes that were to take place because of the general ascendancy gained by the remedy and were confused because they did not immediately make such changes themselves.

However, although this historical review might help to explain, or provide a rationale for, the broad statements to be found in such cases as Bettisworth v. Campion and Beany v. Turner, the position may not be as simple as this. Before proceeding further we must examine the problems of procedure and the relation between procedural matters and substantive law, and it is to these issues that we now turn.

#### (B) THE RELATION BETWEEN PROCEDURE AND SUBSTANTIVE LAW

Professor H.R. Lücke prefaced his definitive work on Slade's Case - Slade's Case and the Origin of the Common Counts, (41) with the observation that it is 'necessary to attribute to problems of procedure and of pleading the overriding importance which they must have had in the minds of Elizabethan and Jacobean lawyers; to focus attention exclusively on the substantive principles, which were merely by products of procedural rulings, would inevitably lead to a distorted account of the historical facts'. One of the major theses of his work is that much of the history of contract law up until Slade's Case is explicable only if we remember that a major obstacle to the availability of assumpsit was the doctrine of exclusiveness of remedies; if the facts pleaded disclosed a cause of action in, say, Debt this was a bar to the availability of a different remedy, for there could, so the old law said, be only one remedy for one set of facts. Professor Lücke therefore submits that many innovations in the law at this time are attributable to the machinations of pleaders in

disguising the true substantive facts and putting them into a form that would be immune from the objection - either on demurrer or after verdict - that Debt was the true remedy.

For our purposes, the important point is that Professor Lücke convincingly argues that the initial development of the enforceability of mutual promises was one facet of this practice of the pleaders. After noting some early decisions concerning wagers and advance payments which do seem to have been examples of the direct application of the doctrine to the true facts in issue, he makes the following observation:

Statements which treat the advent of the 'promise for promise' formula as the dawn of our modern law of contract must be treated with some reserve. This formula nowadays supports actions such as the action for anticipatory breach, and is therefore of wide general significance. Its general application in the late sixteenth century, however, was limited to special situations, such as contracts of wager and contracts providing for advance payment. It is true that, towards the close of the sixteenth century, when assumpsit in lieu of Debt had become an unsafe form of pleading, the 'reciprocal promises' doctrine was carried by pleaders into ordinary synallagmatic contracts, but when thus used, assumpsit on mutual promises possessed all the characteristics of an evasive pleading device, designed to overcome the objection that Debt was available on the facts stated in the declaration (42).

The example with which Professor Lücke illustrated this proposition is Wicals v. Johns decided in 1599. The declaration is briefly reported as follows:

And declares that in consideration that the plaintiff at the instance of the defendant, had promised to pay £120 to one Rogers, wherein the defendant was indebted to the said Rogers; that the defendant assumed he would pay to the plaintiff this £120 when he should be required.

One of the objections, after a verdict for the plaintiff, was that 'it is not alleged that he paid it to Rogers', but the court gave judgement for the plaintiff:

Popham and Clench held it to be well enough; for there is a mutual promise, the one to the other; so that if the plaintiff doth not pay it to Rogers, the defendant may have his action against him: and so also the defendant shall be charged as to him; and a promise against a promise is a good consideration (43).

Professor Lücke concludes:

The possibility that the plaintiff had the audacity to bring this action without having in fact paid the money to Rogers in accordance with his promise, and that the jury gave a verdict in his favour despite this, can be discarded as fantastic (44).

With respect, this is a most convincing theory and while it is, of course, largely supposition it certainly has the ring of truth. The only problem, however, is that it is rather difficult to find other early cases that follow the same pattern. Indeed, the usual fact situation in these early cases seems to be that the plaintiff did aver performance in the declaration but that, after a verdict for the plaintiff, the defendant objects that the performance as proved at the trial did not fully correspond with that set out in the declaration.

This was the position in the two cases outlined earlier, Bettisworth v. Campion (45) and Beany v. Turner (46). In Bettisworth v. Campion the plaintiff alleged delivery of iron and asked for payment at the contract rate but the defendant objected that not all the iron from the blast furnace had been delivered. In Beany v. Turner, the plaintiff did surrender his copyhold land in performance, for which he claimed payment, but the defendant alleged that there was a defect in the mode of the plaintiff's performance.

Similarly, in an Anonymous case decided in 1662 the plaintiff brought an action on an agreement whereby he was to take the defendant's son as apprentice and the plaintiff was to give a bond to pay £40. The defendant did not give this bond and the plaintiff, having declared that he had accepted the son into his service as apprentice, recovered a verdict from the jury. The defendant now moved in arrest of judgement on the ground that 'it is not said that the son was bound apprentice, but (only) that he had received him into his service as apprentice, and this he might do and turn him out of doors the next day'. There was, of course, a possibility that this allegation was true but, on the other hand, the plaintiff alleged some performance and the jury had found a verdict for the plaintiff. To hold that each party had mutual remedies does seem the best solution to such a case. If the complaint of the defendant after verdict was a real one - that is that the plaintiff really had not fulfilled his bargain as distinct from not correctly averring performance in the declaration - he was free to bring his own action. But, the plaintiff having recovered a verdict, the onus was on the defendant to prove this in his own action rather than to set up now a technical and unproved objection to the plaintiff's declaration. Thus the judgement was that:

(T)he agreement to take him apprentice, is a promise whereon the defendant might have his action; and so it is a promise against a promise, and needs no averment (47).

Indeed, on further investigation, it becomes apparent that almost all of these early cases which lay down this type of rule as to the enforceability of mutual promises in fact involved an allegation by the plaintiff that he had performed. The defendant then objects that he has not made a technically precise averment, and the court solves the difficulty by stating that this is no objection, for the plaintiff had no need to make any averment of performance (48).

The significance of this pattern will be discussed a little later. For now, it is respectfully submitted that Professor Lücke is correct in drawing his distinction between substantive law and procedural matters, and in stating that these early cases on mutual promises had a procedural aspect that must be considered. And he does not stop there, for, although he does not fully develop the point, he suggests the significant part that these procedural machinations were to play in the development of the substantive law:

Elizabethan lawyers, eager to achieve their procedural objects, tended to enunciate substantive propositions in particular rules of construction, in a way which was little better than frivolous. The unsound construction inherent in the mutual promises doctrine remained part of the law until Lord Mansfield, in a case where the application of the doctrine would have been no less absurd than it was in Wicals v. Johns, freed the substantive law from the contortions into which the exigencies of sixteenth-century procedure had forced it (49).

And so the theory is that what started in life as a device of pleadings later invaded the substantive law, there to remain until it was rooted out by Lord Mansfield. I respectfully agree with this basic proposition, but a number of difficult questions now appear. Just how did this transition take place? And when did it occur? To put the problem in a form more conducive to analysis, what do we really mean by this distinction between pleadings and substantive law? A tentative answer might be that we cross from the realm of mere pleading devices into substantive law when we find parties actually winning their causes - that is proceeding to judgement - even though they themselves had not complied with the true intent of the contract as to their own performance. However, even in these terms, it is still difficult to tackle our basic problem, because the bulk of the available reported decisions concern objections taken by a defendant after a verdict had been found for the plaintiff by a jury. Now, as Professor Lücke has stated, it is quite likely in such cases that the jury did find that the plaintiff had performed, or they would not have found for him a verdict, and therefore it is unwise to use a case such as Wicals v. Johns as indicative of substantive law. Furthermore, it has already been pointed out that in the majority of these early decisions, it is clear that the jury did find for the plaintiff on the basis that he had performed, for he had averred performance in his declaration, the defendant now objecting to the mode or precision of that averment.

Will cases decided on demurrer help us any more than those concerning objections after verdict? Unfortunately, not a great deal. If a defendant demurred on the basis that the plaintiff had not sufficiently averred performance, he would lose because, as we have seen, the doctrine of

mutual promises was certainly well enough established to support a declaration in law; but, again, we do not know what the true relevance and importance of the doctrine was when the parties proceeded to the trial stage. At least this division of demurrer and trial stage of the proceedings highlights and puts into focus the problem with which we are faced. This is: just what is substantive law in such a situation, and of what, if any, significance is a distinction between substantive law and procedural matters?

It appears that some commentators do not place a great deal of stress on the importance of this distinction in the development of the law. Dr. Stoljar, for example, saw the problem rather as one of confusion in the substantive law and its consequent remedial evolution. In his excellent articles in the Sydney Law Review he traced this evolution from the beginnings in the condition/covenant dichotomy, through a period of total confusion, a struggle for concurrency of performance and, finally, towards a synthesis and conclusion, and I have already attempted to explain some of the difficulties which Dr. Stoljar points out by adverting to the development of the action of assumpsit and the development of the mutual promises doctrine. However, I think Professor Lücke is correct when he submits that there is something more here than the normal process of evolution of legal concepts that we encounter and make use of every day. On the other hand, it may be that Professor Lücke goes a little too far when he states that the true substantive law was limited to very restricted fact situations, the great majority of the early instances of statements concerning mutual promises being attributable to matters of pleading.

My submission, then, is that we cannot look either to the realm of procedure or to a pure process of evolution of legal concepts alone and say, 'This is how the law moved from position A to position B'. Nor can we wholeheartedly adopt the slightly more sophisticated theory that what started life as a creature of procedure later influenced and eventually dominated the substantive law. The true position is more complicated, for considerations of pleading, procedure and structure of the court system on the one hand and concepts of substantive law on the other really interacted on each other, each developing separately but each gaining spasmodic impetus injected by ideas from the other sphere. Perhaps this idea of interreaction will become clearer as I proceed with discussion of more specific matters.

Let us begin this discussion by an examination of those cases Professor Lücke concedes to be true examples of the early application of the mutual promises doctrine, betting cases and cases involving advance payment.

In the case of West v. Stowel (1577) the plaintiff bet the defendant £10 that a third party, Lord Effingham, would beat the defendant in a shooting match. The plaintiff and defendant each gave reciprocal promises as to the payment of the £10 and, as it happened, the defendant lost the shooting contest. However, counsel for the defendant urged that the promise was not enforceable. The submission was that although such a bet would be enforceable between competitors for the reason that they had undertaken labour in actually participating in the match, the plaintiff had done nothing of the kind and had therefore furnished no consideration. The issue of enforceability of mutual



executory promises was thus squarely raised and, although we cannot be sure of the judgement, Mounson J. thought the action sustainable:

(T)he consideration is sufficient, for here this counter promise is a reciprocal promise, and so a good consideration, for all the communication ought to be taken together (50).

The case of Strangborough v. Warner (1589) is a further example of the application of a substantive doctrine. As will be remembered, it was noted in that case that the following facts constituted an enforceable contract: '... in consideration that you do give me £10 on such a day, I promise to give you £10 such a day after'. As Professor Lücke observed, 'If in this case the first promise is to be enforced, it can only be done on the strength of the counterpromise, not the counter-performance, since that, under the terms of the contract, is to be rendered at a later date' (51). As we have seen, Professor Lücke gave a restricted interpretation to such cases, stating that these were special situations to which the genuine application of the doctrine was limited and that the vast majority of the early cases were explicable on the basis of procedural matters.

However, it is submitted, with respect, that cases involving wagers and advance payments were not really isolated examples but were, in fact, manifestations of a broader principle of enforceability of mutual executory promises. The problem is, of course, to decide what is and what is not a genuine application of such a principle. However, it seems reasonably clear that we may equate this principle with the idea of the true intention of the parties; did the parties really intend performance of one to be enforceable without prior performance of the

other? But within such a formulation are at least two factors of great uncertainty. First, what do we mean by intention and secondly what do we mean by performance. Let us examine these two considerations in this order.

In cases involving wagers or advance payments we say that the performance of the defendant is enforceable purely on the basis that he has given his promise because ex hypothesi, the performance is to be rendered without a previous performance by the defendant. But this is really only another way of saying that this was the intention of the contracting parties and, if we remember this, it then becomes reasonable that the courts should decide, in some circumstances, that the intention of the parties to a given synallagmatic contract is that each should perform irrespective of the other's performance. We have already noticed that this word intention may mean many things, and it has been submitted that intention is really a concept or tool used by the courts to reach reasonable conclusions. Thus, there is a certain amount of flexibility built into the concept but there are always guidelines laid down by which the intention is to be ascertained in a particular case. We have also seen that these guidelines were originally fairly narrow, the actual words used by the contracting parties being of paramount importance.

Before proceeding with discussion of the early courts' use of the intention concept, it will be useful briefly to advert to a somewhat different approach to these problems adopted by modern courts. Today, we are accustomed to something of an ex post facto approach to the problems of contractual breach and breakdown. By this I mean that the

nature and seriousness of the breach or repudiation that has actually occurred is taken into account in deciding the nature of the available cause or causes of action. It is, indeed, appropriate to think of this approach in terms of regulation of the parties' contractual relations for, where some questions as discharge, rescission etc. occur, we are equally concerned with the conduct of both the plaintiff and the defendant.

However, we have seen that this was certainly not the approach originally taken with respect to contracts under seal. Because of the intrinsically binding nature of the covenant under seal the plaintiff had a good cause of action once he had established a breach of covenant, unless there was a condition precedent to that cause of action. Of course, the covenantee's own performance could be made the condition precedent, but we have seen that, after some vacillation, it came to be established that express words were needed to do this where mutual remedies were available.

With regard to simple or parol contracts, we have briefly traced the evolution of assumpsit and have noted that, due to its derivation from tort, the courts were once again primarily concerned with the establishment of the plaintiff's cause of action rather than a regulation of the relations between the parties based on a general theory of contract. Now, when the question of enforceability of mutual promises had been decided, it was natural that the courts should decide that the plaintiff's cause of action was established when the promise of the other party was established. It is therefore understandable that, when a defendant objected that his promise should not be enforced because

the plaintiff had not himself performed, the obvious way for the courts to approach the matter was via the dependent/independent test applicable to contracts under seal. In other words, was there an express condition precedent to the plaintiff's cause of action? It may be thought that we have strayed from the present matter under discussion, the idea of intention, back toward another issue, the problem of enforceability. However, it has already been submitted that it is not really possible to separate these issues of enforceability and construction, and we shall now see that the concept of intention perhaps provides the best approach to this problem of interaction between these concepts.

In the case of deeds, the possibility of inequality of damage was a powerful factor in the triumph of the doctrine of independency of covenants. If, as in Cole v. Shallet (52), the plaintiff was to do a number of things in return for a money payment by the defendant, it was decided that the defendant could not insist on the performance of each covenant as a condition precedent to the plaintiff's cause of action, for to do so would be to deprive the plaintiff of any payment for what he had actually done. In other words, the damages suffered by the parties would then be unequal and therefore, to avoid this, each party was limited to his own independent action of covenant. The parties had stipulated in express words, and these words were to be taken as manifesting their intention; thus the guidelines for ascertaining intention were narrow, and one reason for this was that this independent result produced satisfactory practical solutions.

Once we remember that there was not yet any concept of a breach going to the root of a contract etc., we realise that similar performatory problems would arise in the case of parol contracts, and it was natural that the courts should substantively solve them in a similar fashion. And so it is that we find the very wide statements in favour of the enforcement of executory promises without reference to the performance of the promisee. Of course, such a doctrine seems to suit the case of partly executed contracts in which, if all performances by the plaintiff were held to be a condition precedent to his cause of action, the plaintiff could not recover anything if he had committed a single breach. This, it will be remembered, was the fact situation presented in Bettisworth v. Campion (53) in which the plaintiff sued for payment for the iron he had actually delivered, the defendant objecting that he had not had the whole produced of that blast furnace. An independent construction in this, and other similar cases noted above, meant that the plaintiff could recover his payment and the defendant was relegated to a cross-action to establish his damage, if indeed he had suffered any.

However, in different fact situations such as the 'pure' executory situations exemplified in the oft cited case of Nichols v. Raynbred (54) the doctrine does seem to work strange results. The doctrine is stated in exactly the same way but, as applied to these different facts it seems quite out of place. This phenomenon is due to the history of the growth of assumpsit. Despite deserved praise for the introduction of a general theory of contract law, the advent of this general theory presented a number of problems. One of these problems was that this new action of assumpsit covered a variety of fact situations which were previously governed by other 'formed' actions, and these actions governed the rules

not only as to enforceability but also as to construction.

In the action of Debt, the fact that the quid pro quo was executed was the very essence of the action; if the plaintiff had not performed he could have no action at all. Thus the question of construction with which we are concerned did not arise.

In the action of Covenant, of course, executory promises were enforceable but the respective promises were clearly set out in the deed and the rule of construction was reasonably simple. Was the performance of one specific covenant intended to be dependent on the performance of another - and this was to be answered by reference to the words actually used in the deed. But the important point is that deeds were formal documents, solemnly and carefully executed. Rules of construction and the legal effect of various phrases were known to the contemporary lawyers who were no doubt often consulted, and it seems understandable that the courts should refuse to imply conditions that were not expressly stated. Each party was thought to be making a solemn grant and therefore each had a remedy as to the other's grant, quite apart from the question of his own performance.

The advent of a doctrine of enforceable mutual promises meant that, in the executed situation, precise performance of the quid pro quo was no longer needed to get an action off the ground and, as explained above, this seems all to the good. But it also meant that purely executory promises, not expressed in a deed, were also enforceable and, without the formal words of a deed and the attendant well known rules of construction, this was to create difficulties. The suggestion has been made that one of the reasons an independent approach was applied to executory contracts was that the judges had found that it worked well in the context of executed

contracts and therefore thought that it was uniformly applicable. Thus Dr. Stoljar stated that since 'independency had worked entirely satisfactorily in executed contracts, this again strengthened the belief that it was uniformly valid' (55), and he then mentions the case of Beany v. Turner (56). One cannot say that this may not have been one factor in producing some of the sweeping statements that we find but I think the major reason is that outlined above. The courts now saw the promise as the basis of enforceability and so the executed/executory distinction hitherto governed by the rules applicable to the earlier formed actions now became obsolete. The problem was not that the court consciously applied rules applicable to an executed situation to an executory one, but that the one rule was applied to all cases of assumpsit, the executed/executory distinction being quite foreign to the rule.

This conclusion brings us back to the heart of the matter. We began discussion with the facts of a case such as Nichols v. Raynbred, and posed the question whether the defendant really intended to buy a cow or a law suit, for he seems to have been saddled with the latter. But such a fact situation seems commonplace enough. How had the law originally dealt with it? Let us trace briefly the history of the simple and personal sale of goods. We have already noted (57) that there had grown up, by the reign of Henry VI, a doctrine that was somewhat exceptional to the usual quid pro quo requirement in the action of Debt. Basically, on the sale of a specific chattel, the buyer was now allowed to sue in Detinue and the seller in Debt before any delivery had taken place. As Professor Ames and others have rightly pointed out, this doctrine was not originally conceived of as being based upon a theory of mutual enforceability of promises but rather on a grant by

both parties of the property in the things to be exchanged, and therefore each had a proprietary action to gain possession of that in which he had property. However, quite apart from its rationale, the actual extent of the doctrine is perhaps a matter of some doubt. From some formulations we might easily gain the impression that the doctrine was of very wide ambit indeed, and applied to almost any agreement concerning a specific chattel. For example, Professor Holdsworth, after tracing the more usual requirements of actual execution, stated:

In Henry VI's reign, however, it was said that upon an agreement to sell a specific chattel the vendor could sue in Debt, and the purchaser in Detinue. The right to get the chattel gave a right to sue in Detinue, and this applied both to the case of the purchaser in an agreement to sell, and to a third person to whom goods were to be handed by a bailee of the owner ... (58).

However, if we look to the cases, we find that such broad statements are to be accepted with some reservation. In truth, the right to possession, and hence the right to sue for possession, only passed if the parties intended it to pass. In many simple cases of sale of specific chattels there would be no such intention. Thus in an Anonymous case (59) decided in 1478, Littleton J. noted:

(I)f I come to a draper and ask him how much I shall pay him for such a piece of coth and he says so much, and I say that I will have it, but I do not pay him any ready money and yet take the cloth, here he shall have a good action of Trespass against me, and it will be no plea for me to say that I have bought it from him, unless I show that I have paid him.

And further:



I cannot agree that the property is in him who buys by such words without payment; for it is not a clear bargain, but is subject to a condition in law, that is to say, if he pays me it shall be good, and if not it shall be void.

Similarly, Choke J. pointed out:

A contract cannot be perfect without the agreement of each party. For if you ask me in Smithfield how much you will give me for my horse and I say so much, and you say that you will have him and do not pay the money, do you believe that, for all this, it is my will that you should have him without paying the money? I say no; but I may at once sell him to another and you shall have no remedy against me. For otherwise I shall be compelled to keep my horse for ever against my will, if the property is in you, and you would be able to take him when you pleased, which would be against reason.

Mr. Fifoot thought that Choke J. was here confusing three separate questions of contractual rights, the passing of property and the right to possession. An examination of these topics would take us far beyond the matter under discussion. It seems fair to say, however, that Choke J. was concerned to show that the parties would not mean their contract to bestow such proprietary rights in such a simple market situation. In other words, he construes the contract with the aid of proprietary considerations. As to confusion between the passing of property and the right to possession, it is true that Brian C.J. in that case seems to have taken a different view. However, the main concern of Choke J. was to state that, in such a casual situation, the contracting parties intended nothing to pass until payment, and with this proposition Littleton J. agreed.

The following exchange from the earlier case of Veer v. York, in which Choke J. also figured may illustrate the position more clearly. A priest brought Debt on a unilateral contract whereby he was retained by the defendant to chant for the soul of a dear departed friend for one year, for the sum of ten marks. The plaintiff gave up the task before the year expired and one question was whether he was entitled to pro rata payment. Choke J. was concerned to distinguish this situation from that of the possibility of suing on the executory sale of a specific chattel:

Choke J.: This duty is entire, and he must serve for a year or otherwise he will have no salary, and he cannot demand his salary until he has served his term; and it is not the same where I buy a horse from a man for twenty shillings, for there the twenty shillings are due to the seller immediately, because by the purchase the property in the horse has passed to me, and I can have possession (60).

Now although the facts and first part of this judgement are not strictly relevant to the matter in hand, their inclusion is important for it shows, once again, that judicial statements which are quoted in support of broad propositions should always be read in the light of their context. For instance, here we see that Choke J. was concerned to resolve the matter in issue and used the debt/detinue doctrine as a useful contrast; he was not concerned to formulate a precise statement of that doctrine. And the interchange amongst counsel and the bench immediately following shows that the position was, indeed, fairly complex:

Catesby: If I buy a horse of you for twenty shillings, you can keep the horse until I pay you.

Choke J.: I did not speak to that intent; but I say that the property is vested in me by the purchase, so that if a stranger take him I will have an action of trespass.

Brian, to Catesby: Sir, in your case, if you give him a day of payment, you cannot keep the horse (61).

Without going further, we can at least state that the early law did go a long way toward implementing what may be called the true commercial intention in such a situation. If there was a firm bargain, sufficient proprietary right in the chattel passed to ground an action of trespass by the purchaser against a third party. Whether the purchaser was entitled to possession as against the vendor before payment was a further question and was to be answered with reference to the facts in issue; thus, if a certain date of payment was stipulated, this would indicate a credit sale was intended and therefore an action would lie before payment.

This approach, despite the triumph of the independent construction in the case of contracts under seal, remained the same and perhaps even strengthened in favour of dependency. Thus in an Anonymous case in 1526 the Court of King's Bench decided thus:

And this diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon it without payment, but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he does not pay the money at the price agreed upon immediately, but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue (62).

A dependent approach was again emphasised in 1552 in the important case of Andrews v. Boughey. In this case the plaintiff declared that the defendant undertook (assumpsit) for twenty marks (the moiety of which was in hand, paid, and the residue agreed between them to be paid within a certain time), that he would deliver goods and merchantable ware. After alleging various complaints of deceit, loss of reputation etc. (which are immediately understandable in the light of the history of the action of assumpsit to which he have already adverted), the complaint was that the ware was bad. The plaintiff lost his action. The defendant was able successfully to plead an accord and satisfaction and this disposed of the complaint that the ware was not as the plaintiff had undertaken it would be. The second contention of the plaintiff that he had a cause of action on a warranty or the deceit of the defendant was also rejected because first, the accord also covered this element, in the circumstances of the case, and secondly, the warranty was alleged to have been given after the formation of the contract, and therefore the plaintiff could not have relied on it (63).

But the court expressed obiter yet another reason why the plaintiff could not succeed and it is with this reason that we are concerned. The point was that the assumpsit had been expressed to be for twenty marks, but the plaintiff had not averred either that this had all been paid or that the time at which the residue was agreed between the parties had not yet arrived:

(I)f it appear to the court, that the plaintiff in any action had not good cause to have his action, the court will never give judgement for him; here it appears in the beginning of the count that for twenty marks, the moiety of which was paid, and the other

moiety was to be paid at a certain time agreed on between them;  
non constat whether that time was past, or to come, at the time  
of this action brought, and if it was past, as it shall be  
intended most strongly against the plaintiff, and the money not  
paid or legally tendered, then the contract and undertaking is  
void, for this word (for) makes the contract conditional ...  
(underlining in judgement).

After adverting to the case of unilateral grants, the court  
stated:

(S)o it is in contracts; as if for an hawk to be delivered to me  
on such a day, you shall have my horse at Christmas, if the hawk  
be not delivered at the day you shall not have the action for  
the horse, etc. (64).

The contracts here mentioned are, of course, the traditional  
proprietary contracts of Debt as distinct from the new action of assumpsit  
and the proposition being stated is simply that the defendant must truly  
have what was intended to be the quid pro quo before he could be sued for  
his own failure to perform.

We have already examined Cowper v. Andrews (1612) (65) in which Hobart  
J. was concerned to show that words such as pro did not make a condition in  
a grant, but he did recognise some exceptions to this. The principal one  
was the case where the thing granted was executory, and the grantor had no  
remedy for the consideration other than stopping the thing granted. But  
there was another exception:

In another case it works by condition precedent, as in all personal  
contracts, as I sell you my horse for ten pounds, you shall not take  
my horse except you pay me ten pounds, 18 E. 4. 5. and 14 H. 8. 22

except I do expressly give you day, and yet in this case you may let your horse go, and have an action of debt for your money, and so may the taylor retain the garment till he be paid for the making, by a condition in law (66).

Now it is to be noted that, although the doctrine of dependency is still couched in terms applicable to Debt and Detinue, the date of this pronouncement is 1612, well after Slade's Case. Just as Slade's Case blurred the barriers between Debt and assumpsit, it is logical to assume that this rule of dependency applicable to the sale of personal chattels also entered this new general law of contract. It has already been stated that the word 'contract' as used in a case such as Andrews v. Boughey (67) referred to the contract of Debt, but it is logical to assume that such pronouncements, by their very appearance of general applicability, soon were thought to be applicable to assumpsit.

Thus it is that in 1675, when the doctrine of independency of covenants and promises was at its peak we find the remarkable case of Smith v. Shelbury decided. We shall return to examine this case more fully later, (68) but for now it is enough to say that it concerned the transfer of a lease, and was decided on the doctrine of independent mutual remedies. Its present importance, however, is that the court contrasted the position concerning such formal matters with that of the simple sale of goods:

And in this case it was agreed, that in all personal contracts the party is not bound to deliver his goods till he have the money unless there be a day expressly agreed upon for the payment of the money ... (69).

Now the point of all the foregoing is this. Simple transfers and sales of goods are as old as mankind, and contracts with respect to such transactions were enforceable long before the advent of assumpsit. But although assumpsit may have changed the conceptual basis of enforceability, it goes without saying that the everyday life and the intention of the common people who made such bargains were in no way affected by such a sophisticated process occurring in the law courts. While this change in the basis of enforceability resulted in broad statements of principle being laid down by courts concerned with the technical matters of demurrer and challenges after verdict, we must accept them with a certain degree of restraint. Indeed, our examination has shown that the true position was nowhere near as stark as we might at first think.

First of all, we have seen that most cases actually involved a plaintiff who had attempted to fulfil his side of the bargain, the defendant objecting about the quantum or mode of performance on rather technical grounds. In these cases an independent construction seems to achieve fair results: the defendant is relegated to a cross action if he wishes to pursue his complaint about the plaintiff's performance, and the plaintiff is not deprived of remuneration for what he has undoubtedly done under the contract.

Secondly, it may well be that, as Professor Lücke has pointed out, some of the declarations which seem to involve a purely executory contract may in fact have involved an executed contract, but were intentionally framed in this way to escape the objection that Debt was the correct, and hence the only, remedy available.

And thirdly, in the sphere of purely personal executory contracts, it is highly doubtful if a cause of action was even technically constituted by the mere promises on both sides. True, one can point to Nichols v. Raynbred, but that case is so sparsely reported that, in itself, it is virtually meaningless. Hitherto, its citation has been used as an obvious and stark illustration of what was thought to be a clear and well established principle of substantive law. I have, I hope, thrown some doubt on this premise.

The truth, then, seems to be that there was no flood of charlatans suddenly using the courts as a means of cheating honest men out of their expected consideration for a promise, and enforcing contracts in a way manifestly contrary to the expectation of the parties and of society as a whole. Consider the situation in the late sixteenth century. Could a man of straw come to a court and say that he had promised to deliver to the defendant a flock of sheep and the defendant had promised to pay a certain sum and therefore he claimed the sum, though he had not even attempted to deliver the sheep?

First of all, no lawyer would take the case, for it would be obvious that he would be laughed out of court. Just as some cases, such as cases of advance payment or cases where the plaintiff had really performed the substance of his bargain, would succeed before a jury - because the action was obviously in accord with the parties' intention - a case such as this would obviously fail, because it was completely divorced from commercial reality.

Secondly, if the case did somehow come to court, it would be most likely that the trial judge would direct a verdict for the defendant,



and even if he did not, the jury would certainly decide for him.

Perhaps in these factors of 'commercial reality' we have at last grasped the true meaning of a distinction between procedural and substantive law. With all this in mind, something of an outline of this process of interaction between substantive law and procedure adverted to above may now be attempted.

With the advent of the action of assumpsit, the giving of the promise was seen as the basis of enforceability, and very wide statements were laid down by the courts as to the irrelevance of performance etc.

It may be that some judges thought this was really the law. But, despite the wide nature of such statements, they did not in fact lead to obviously incorrect results, and such an approach was in line with both the history of the development of assumpsit and the rules applicable to deeds. Furthermore, the vast majority of cases in which these wide statements are to be found involved contracts partly or wholly performed by the plaintiff. Now, no doubt Professor Lücke was right in attributing some cases such as Wicals v. Johns to the cunning tricks of the pleaders, but it may be that in the cases where execution was expressly pleaded we are dealing not so much with counsel's technical sophistication but with much more human attributes, such as mediocrity in pleading, unforeseen difficulties of proof or just plain bad luck. It may well be that it was the judges, in some of these cases, who were prepared to aid a meritorious case with a somewhat technical doctrine. Perhaps it was they who were prepared to lay down broad rules as to the nature of enforceability of promises in what was really an attempt to manipulate a technical doctrine to reach a substantive end (70). But whatever the reason was, the

result was that we start to find reported statements by the courts to the effect that mutual promises are enforceable in much the same way as covenants under seal, and this was to produce a sharp interaction between technical and substantive law.

It may well be that, for a period, it was really the practical lawyers and the juries, rather than the broad pronouncements of courts concerned with demurrers and objections after verdict, to whom we should look for the real administration of the law. As already stated, the lawyer would not take a case if it were likely to be laughed out of court, and the jury would not give a verdict for a plaintiff if his case was quite out of touch with their ideas of fairness and commercial reality.

However, as we find this buildup of broad, general statements by the appellate courts, it seems inevitable that something of a change must take place at the trial level. Perhaps the psyche of juries would not change, but two other things would.

First of all, lawyers would begin to think that such statements did constitute the law, and that an action could be brought without performance - and thus these actions might start to come to court.

Secondly, although juries are at times independent, they do pay respect to the directions of the presiding judge. And the judge would, like the lawyers, be familiar with these statements - indeed he may have made them himself while sitting in another place - and would tend to direct juries accordingly.

The conclusion is that sooner or later abstract statements of law will permeate through to the level of practical administration. It is true that juries could still give verdicts in the teeth of counsel's argument and the trial judges directions, but that is not really the point. The point is that such a verdict, apart from being rather exceptional, would now rightly be regarded as being contrary to substantive law itself. By this stage our distinction between technical matters and substantive law - always of the most nebulous nature anyway - has blurred and merged to such a degree that we must say that such a verdict would be against the law.

Perhaps the case of Smith v. Shelbury, already briefly adverted to (71), best exemplifies the end result of this process. The plaintiff and defendant agreed that the plaintiff should assign a certain lease to the defendant, who proinde would pay £250. Each then mutually promised to perform the agreement. The plaintiff attempted to perform, but the defendant did not co-operate and the question, on demurrer, was whether the plaintiff could recover the £250. Quite naturally, counsel for the defendant argued that the assignment of the lease was a condition precedent to payment, but:

Pemberton, Serjeant, for the plaintiff, held the declaration good, and that it was a mutual promise, and that the plaintiff need not aver the performance, for in such cases each has his remedy against the other; and it is as reasonable that the plaintiff should have his money before he makes the assignment, as that the defendant should have the term assigned before he paid the money (72).

The court accepted this argument and gave judgement for the plaintiff, only Atkins J. doubting.

Now it is to be noted that cases such as this involved a rather difficult problem or set of problems - cooperation of both parties in contracts or transfer and the concepts of tender and refusal and so on. These matters will be dealt with in the next section, but for now the important point is that the matter was now being treated as if it were a general principle that plaintiffs could actually sue, and recover, on the promises alone without reference to the true nature of the transaction. Thus the force of the word proinde, which would seem to indicate a condition precedent in the performance of the agreement, was brushed aside in Smith v. Shelbury; the court looked only to the promises to perform the agreement and did not ask the logically prior question, 'What was the agreement promised to be performed?'

Furthermore, the older cases were now seen as bearing out a rigid theory of independency of promises, without reference to the possible distinctions outlined above between statements as to sufficiency of a cause of action and real administration by juries, or without reference to the fact that such cases often involved deeds to which more formal rules of construction were better suited.

Thus Ellis J. in Smith v. Shelbury cited, in support of the court's judgement, the case of Ware v. Chapple (73):

Ellis J. cited a case adjudged in the King's Bench which was, as he thought, very hard, viz. an assignment was made between A and B that A should raise soldiers, and that B should transport them beyond sea, and reciprocal promises were made for the performance (as in this case): that A who never raised any soldiers may yet bring his action upon this promise against B for not transporting them, which is a far stronger case than this at Bar (74).

It is submitted, with respect, that the general observation made by Professor Lücke is sound indeed and bears repeating:

Elizabethan lawyers, eager to achieve their procedural objects, tended to enunciate substantive propositions, in particular rules of construction, in a way which was little better than frivolous. The unsound construction inherent in the mutual promises doctrine remained part of the law until Lord Mansfield, in a case where the application of the doctrine would have been no less absurd than it was in Wical v. Johns, freed the substantive law from the contortions into which the exigencies of sixteenth century-procedure had forced it (75).

We turn now to the developments leading up to this liberation.

## CHAPTER IV

### THE BEGINNINGS OF A NEW APPROACH

By the end of the seventeenth century a formidable body of case law could be collected in support of a strict doctrine of independency. However, it has already been submitted that the real extent of this doctrine, and the depth of its roots can easily be exaggerated. In the case of the parol contract, we have seen that a number of factors besides general statements extracted from a few of the cases should be considered, and in the case of the contract under seal, we have seen that the early decisions were not at all consistent as to the true extent of the doctrine of independency when words such as pro etc. were present. Furthermore, although a rigid doctrine in favour of mutual remedies seems to have been adopted in the majority of cases for a short period after Pordage v. Cole, there are certainly exceptions to be found. For example, in the book of Levinz is to be found the surprising case of Johnson v. Carre decided in 1664, the report of which is as follows:

Debt, for rent on a lease for years, the defendant pleads in bar a covenant by the lessor, that the lessee might deduct so much for charges: and upon demurrer it was adjudged, that the covenant being in the same deed, is well pleadable in bar, the thing being executory; and the party shall not be put to a circuity of action, viz. to bring an action on the covenant (76).

Of course, it is unsafe to rely too much on such a scantily reported decision, but a case decided in 1671 is much better reported. Peeters v. Opie, the plaintiff brought assumpsit on an agreement whereby the plaintiff was to perform certain building tasks and the defendant was to pay him £8

'for his work'. After a verdict for the plaintiff, the defendant moved in arrest of judgement that the plaintiff had not averred the performance of the work, this being a condition precedent. Naturally, the plaintiff argued that the promises were independent, each having his own remedy, but the court agreed with the defendant on this point. Hale C.J. stated:

(T)he words for his labour make a condition precedent, so that the plaintiff ought of necessity to have shewn the work done, or at least that he was hindered from doing it by the plaintiff, before he can demand the money. And he further said that if the said agreement had been put into writing under the seals of the parties, it had been clear that the plaintiff could not maintain an action of covenant for the £8 without such an averment; and no more can he do so here; and although there were mutual promises in the case, yet the defendant's promise was on the performance of the agreement, which in itself was only conditional on the defendant's part, namely, that if the plaintiff performed the work, then the defendant was to pay him £8 for his labour, but otherwise not; and here it appears that the plaintiff has not performed the work.

Hale C.J. then made a comment which makes it absolutely clear that he did not agree with the broad statements that are to be found in the cases in favour of strict independency, but rather viewed the matter as a question of construction:

But he said that if by the agreement it had been that the £8 should be paid on any certain day, perhaps the law would be otherwise, because then it might be construed that the defendant relied on the plaintiff's mutual promise for his security; but here no certain time being limited when the money should be paid, the law makes a construction that it shall be paid when the work will be finished and not before, unless the defendant himself was the cause why it was not finished, which does not appear here in this record (77).

Of course, this approach is perfectly sensible and, to the modern mind, it is remarkable only for the fact that it appears to be in conflict with the general view concerning performance of simple contracts at this period in history. As has been submitted, the answer would seem to be that the true position was not quite as stark as some commentators suggest. While it seems that broad statements were made in some cases, either through a certain confusion caused by the relation of procedure to substantive law or because attention was only being paid to the facts of the instant case under review, other judges did not lose sight of commercial reality, of the real intention of parties to simple contracts for labour, sale of goods etc. Nevertheless, it is fair to say that there was a certain amount of confusion in the law at this time, but in 1701 a case was decided which did much to alleviate the problem, Thorpe v. Thorpe (78). The facts in essence are these. The plaintiff had mortgaged land to the defendant, and later agreed to release his equity of redemption, in consideration of which the defendant agreed to pay £7 to the plaintiff. The plaintiff executed the desired release to the defendant of 'all manner of actions, suits, debts, duties, sum and sums of money etc.', but the defendant did not pay the £7. At the trial the plaintiff was given judgement by the Court of Common Pleas, but on error the defendant boldly argued that the release which had been executed also covered the claim for the £7 and therefore he should have judgement. As counsel put it,

(T)he payment of the money does not arise from the release, but from the promise; and the promise, and not the release, being the consideration of the debt, action lies upon the mutual promises before the release. Ergo the release comes after the cause of action, and consequently destroys it (79).



Counsel then cited such cases as Nichols v. Raynbred to establish that there was a cause of action without any performance being undertaken, a cause of action therefore perfect before the release and destroyed by it. Perhaps somewhat surprisingly the Court of King's Bench accepted the framework of this argument. Holt C.J. agreed with counsel to the following extent:

It was urged at the Bar by Mr. Cowper, that if the plaintiff might have founded an action upon the mutual promise and agreement before any performance on his part, that certainly this release would have barred him; and the consequence is very true and necessary, if that were the case. And by the same reason, if he could not bring an action before such time as he had made a release, there is no colour for the release to bar him; for till he makes the release in this case, if he has no title to the seven pounds, then till release there is no right of action; and then they do not lie in demand till release; and that a release of 'all demands' will not release a thing that does not lie in demand at that time ... (80).

An investigation of this preliminary matter would be outside the province of this work, but it seems to me to be a matter of speculation whether, if there were no other points in the case, the court would have found this preliminary stage in counsel's argument either compelling or conclusive. Is it not possible that, by accepting it, the court seized the opportunity to examine the confused maze of precedents concerning dependency and independency and to inject some certainty into the law? As Holt C.J. stated, the result of accepting counsel's framework was that the question of whether or not there was a condition precedent here became vital to the decision, his honour later observing, perhaps somewhat optimistically, 'And whereas there seems to be a variance in the books upon this learning it will be fit on this occasion to settle it ...'

Whether or not this decision should be regarded as a 'test case', the remarks of Holt C.J. were of great importance (81). First of all, he firmly based the matter on the true intention of the parties. A promise could constitute a good cause of action by itself, but only if it were so intended. If it was the performance that was bargained for, then it was performance that was necessary:

(I)t has been urged, that in this case there were mutual promises, and the one promise is the consideration of the other; and that then he that brings the action needs not aver any performance of his side; and this ... would be a true and necessary consequence, if the promises were true. But where the one promise is the consideration of the other, and where the performance, and not the promise, is it, is to be gathered from the words and nature of the agreement, and depends entirely thereupon; for if in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay seven pounds, then the one might bring his action without any averment of performance; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him seven pounds; so that the release is the consideration and therefore being executory is a condition precedent; which must be averred (82).

Thus it was a question of construction, words such as 'for' being quite appropriate to constitute a condition precedent. The case of Nichols v. Raynbred was explained on the rather doubtful basis that there were two positive undertakings, the one to transfer the cow and the other to pay the money, and therefore no condition precedent was intended. Other cases were to be explained on the basis of certain rules of construction for ascertaining the contracting parties' intention which Holt C.J. derived from the cases. These rules were to the effect that

if the day for performance of the consideration for the defendant's promise was to, or did, occur after a fixed day set for the defendant's performance, then the plaintiff could sue immediately after that stipulated day was past, for a condition precedent, even though 'for' or 'in consideration' were used, would be repugnant to the nature of the agreement. Conversely, if the fixed date was to occur after the plaintiff's performance, then the latter was a condition precedent (83).

Naturally, some parts of the judgement seem somewhat stilted, even a little doubtful, in the light of precedent, but this is because of the very nature of the judgement. It is an attempted rationalization of a number of decisions which were not based on consistent principles and therefore defy the application of one clear rule to them, and Holt C.J. seems ruefully to admit that there are a number of 'scattered authorities in the books' which are rather awkward.

But we should make allowances for these shortcomings and accept the judgement for what it is, a clear endorsement of a method of resolution of contractual problems based on the true intent of the transaction rather than a rigid rule of independency:

But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that A shall have the horse of B and A agree that B shall have his money, they may make it so; and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be then averred: as

where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse (84).

As for the plaintiff in Thorpe v. Thorpe, it was decided that his judgement should be affirmed. The execution of the release being a condition precedent to his cause of action, the cause of action was not affected by the release. Since such execution was held to be a condition precedent, an allegation of performance was, of course, necessary, but in the circumstances this was found to be satisfied (85).

Naturally, it is possible, as some learned commentators do, to criticise this decision on the basis that it is couched in stilted and artificial language and that a doctrine more in line with direct ascertainment of the so called parties' 'true intention' should have been stated. From what has already been discussed, it will be apparent that I do not agree with such an approach. The idea of intention and the way in which it is to be ascertained are far from simple concepts and, as has been submitted, necessarily somewhat artificial. It seems a great deal to expect of the contemporary judge that he should cut through the maze of precedent confronting him and adopt, in one masterly stroke, an approach that we now adopt today. Rather, it seems to me that Lord Holt produced a substantial achievement. Faced with a doctrine of independency that had, for various reasons, gone to seemingly extravagant lengths, he was able to put the law on a sensible and understandable basis once again. It became clear that the nature of the transaction and the parties' intention were important and words which manifested this intention, such as pro etc., were sufficient to rebut a presumption of independency.

Lord Holt was quick to consolidate his advance. In 1701, in the case of Atkinson v. Morrice, he decided that the particular covenants involved were independent, but it was clear that such a result was to be reached through an analysis of all the circumstances rather than a rigid reliance on a doctrine of mutual remedies. The defendant had agreed to give the plaintiff a sum of money for the use of a coach and horses for a year, and the plaintiff agreed further that he would keep the coach in repair. In the declaration it was averred that the coach and horses were delivered to the defendant, but nothing was said as to repair. The question was, could the defendant rely upon the agreement to repair as a condition precedent to his liability to pay the price? It was decided that he could not.

And Holt C.J. held upon this evidence, that repairing was not a condition precedent, and therefore need not be averred: but if the agreement had been, that A had agreed to give M a coach and horses for a year, and to repair the coach, and that for that M promised so much money, then the repairing had been a condition precedent necessary to be averred ... (86).

And in 1703, in the case of Callonel v. Briggs, Lord Holt reiterated his credo. The facts of the case are sparsely reported, but the agreement itself seems to have been of the simplest nature. The defendant promised to pay a sum of money over, the plaintiff transferring certain stock to him and in turn the plaintiff promised to transfer stock, the defendant paying etc. Lord Holt again stated the basic tenet that one such promise could not be enforced quite independently of the corresponding promise:

If either party would sue upon this agreement, the plaintiff for not paying or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender, for transferring in the first bargain was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for performance: 1 Saund. 319. If I sell you my horse for £10 if you will have the horse I must have the money; or, if I will have the money, you must have the horse; therefore he obliged the plaintiff either to prove a transfer, or a tender and refusal within the six months (87).

The result was that these cases, of which Thorpe v. Thorpe was the first and perhaps the most important, established a foundation on which a new approach to contract law could be built (88). We have seen that there were understandable reasons for a strict doctrine of independency and, further, these were not inconsistent with an attempt to implement intention when we bear in mind the complexities of the concept of 'the parties' intention'. Nevertheless, the doctrine had become both ossified and confused and it was past time for a new analysis of the problem. What I have submitted to be the beginnings of this new analysis were to culminate in the celebrated decision of Lord Mansfield in the case of Kingston v. Preston, decided in the latter part of the eighteenth century (89). But before we examine that decision we must first look to a different, though related, problem.

At the time when the pendulum of the law was thus swinging to this new doctrine of dependency, agreements of an executory nature requiring performance by both parties, at roughly the same time, were becoming increasingly common. As Doctor Stoljar has pointed out (90), one important illustration of this development was afforded by the purchase and transfer of stock and

shares in the corporations proliferating at this time. If parties agreed to buy and sell stock, the position now seemed to be that the transfer and payment were somehow connected. But if so, could a party simply escape his contractual obligations by refusing to accept a transfer (or payment), and then, when sued, set up the other party's performance as a condition precedent to his liability. In essence, this is the problem of concurrency of performance and it is to this development that we now turn.

P A R T   I I I

THE CONDITION CONCURRENT



## CHAPTER 1

### THE HISTORY OF CONCURRENT PERFORMANCE

#### (A) INTRODUCTION

We have already considered the concept of a condition, and have examined its early development with regard to conditions of estates and conditions in contracts. We have seen that conditions were considered to be either precedent or subsequent, and the logical question, 'precedent or subsequent to what?' found a ready answer. Conditions were precedent or subsequent to legal rights. In the case of land, the right was the legal estate itself. In the case of contract, the right was a cause of action on the contract; the condition was precedent to the completion of a right to sue the other party for non-performance, or to compel him to perform. In other words, the law took an a priori approach to the solution of contractual problems; the terms of the contract as at formation were crucial, and these were to be construed and applied to the circumstances in question to see if there was a good cause of action. We have also noted that, for various reasons, the law had come to construe contractual undertakings in a literal and legalistic manner and that, as was to be expected, there came to be a reaction against this tendency.

But there was more than a change in canons of construction of individual contracts. A basic change in the very foundation of contract law and the ways in which problems were formulated and solved had occurred when conditions could be classified as precedent, subsequent and concurrent, because a clear concept of a concurrent condition was quite unknown to the

early law. This was because the concept of a condition concurrent necessarily involves an analysis and approach different from that of conditions precedent and subsequent, for the question 'concurrent to what?' can only be answered in terms of the other party's performance rather than the cause of action to which the condition precedent and subsequent relate.

The point is that our modern concept of a concurrent condition belongs to a comparatively recent period of the law's development. The modern approach may be said to be concerned with something that can be termed an ex post facto approach. By this I mean that contractual problems are examined and resolved in the light of developments subsequent to contractual formation, actual damage suffered, or likely to be suffered, and so on. This approach contrasts with the earlier approach of the law which we have been concerned to examine, i.e. an interpretation of the words of the contract themselves, more or less in vacuo, and a consequent fairly strict application of fixed canons of construction to the facts in question. I have termed this approach a priori.

One important effect of these differences in analysis is the attitude taken to the problem of order of performance and extension of credit in bilateral contracts. We have seen that in many situations, the presumption was in favour of complete independency so that either party could sue the other party without regard to his own performance, but there were other situations where the promises were dependent, the categories of which had become clearer after Thorpe v. Thorpe.

The enquiry, then, in these cases consisted of two levels or tiers. The first tier concerned the issue of dependency and independency. If the covenants were independent, the enquiry was at an end, for the

plaintiff's cause of action was established. But if the covenants were adjudged to be dependent, then the courts passed on to the second tier. Here the question was, what will constitute performance of a dependent stipulation? In other words, 'what will suffice to discharge the condition precedent to a plaintiff's cause of action constituted by the dependent stipulation?'

In the previous sections of this work we have been concerned with the first mentioned tier, and have traced its development up to those cases, headed by Thorpe v. Thorpe, which injected a measure of certainty and rationalization into the law, and which arrested the trend toward independency. But although a strict doctrine of independency could seemingly produce strange results, an insistence on the strict performance of conditions precedent was soon revealed to be equally mischievous. There are at least two distinct problems that must be examined.

(i) Performance of Dependent Stipulations

First of all, let us assume that in a contract where there are dependent promises A demands performance by B, and B pleads that his performance is dependent on A's performance. A wishes to reply that he has performed and the question then becomes, 'what degree of excellence of performance must be shown to satisfy the court that the condition precedent to A's cause of action is discharged?' From the earliest times, the answer to this question was that strict performance was required.

For example, in the case of Raynay v. Alexander (1605) the parties contracted to transfer 15 of 17 tods of wool owned by the defendant to the plaintiff, the defendant promising to deliver the praedictas 15 tods

of wool. The plaintiff alleged that he was ready on the day arranged to pay the agreed sum but the defendant did not deliver 15 tods of wool, and judgement was given for the plaintiff. However, this judgement was arrested when it was shown that the plaintiff had not elected which 15 tods (of the 17) he wished to have:

And the matter aforesaid is much enforced by the word praedictas in the declaration; for that can be referred to nothing but the communication, by which the plaintiff of his own showing ought to make election: then the plaintiff omitting it in his declaration shews the fault is in himself which ought to be removed before he can charge the defendant ... (91).

This requirement of complete performance of all conditions precedent was often expressed in terms of pleading, in that the plaintiff was required not only to allege performance, but to aver how he had performed. So in Thornton v. Kemp (1595) the plaintiff brought an assumpsit, the plaintiff's consideration being that he would abate part of a debt. He averred that he had done this, but the court held that this allegation was not sufficient:

Upon this plea the plaintiff demurred. - First, because he alledged that he abated £10 and doth not shew how; so as the Court might take conusance, whether it were a sufficient discharge. And of that opinion was the whole Court (92).

Thus some degree of precision in pleading was required to enable the court to see if the dependent stipulation had been strictly performed (93). But the matter was one of substance and not merely pleading, by which I mean that strict performance was required in fact

as well as in allegation. Holt C.J. put the matter clearly in

Armit v. Bream:

Where a man has obliged himself to make a deed, and is sued for not doing it, it is not enough to say, that he made the deed, viz. lease, bond etc. but he must set it forth, that the court may judge of its sufficiency; for it ought to be a good deed, but if it be to deliver, or shew or produce a deed, that is, a deed already made, there it is enough to say, that he delivered, or shewed, or produced it (94).

Thus if the performance in question was a simple act, e.g. delivery of a deed in esse, it was enough to aver that delivery. In the case of a complex act, such as the making of a deed, one had to show how one performed so that the court could judge if it was a sufficient performance. And, of course, in either situation the complete performance had to be proved at the trial.

(ii) Performance Requiring Co-operation by Both Parties

The second situation occurs when the performance of the plaintiff depends on the conduct of the defendant for fulfilment. For example, if the condition precedent to the plaintiff's payment be a transfer to the defendant, can the defendant avoid payment merely by refusing transfer and then setting up the transfer as a condition precedent? Such a result would appear shocking, and even in the time of Lork Coke it was rejected. Thus Lord Coke stated:-

If a man make a feoffment in fee upon condition that the feoffee shall re-enfeoffe him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for the feoffor

is the cause wherefore the condition cannot be performed and therefore shall never take advantage for non-performance thereof (95).

To give a further simple example of this general principle, let us again look at the case of Raynay v. Alexander. It will be remembered that in that case the plaintiff was held unable to recover because he had not elected which 15 tods of wool he would take. However, if he had been in any way hindered by the defendant in his election, the result would have been different. Thus Popham C.J. there observed:

(I)f the defendant had sold one of the tods of wool before election made by the plaintiff, that had destroyed the election, and made the promise absolute, and had been the breach of it: the same law if the defendant would not have permitted the plaintiff to fee [see] the wool that he might make election, for that had excused the act to be done by the plaintiff, and had been a default in the defendant (96).

Similarly in the case of bonds, if the obligee was responsible for the impossibility of performance of the condition, the obligation became void as against the obligor. Thus in an Anonymous case in 1537, the condition of the defendant's obligation was that he should surrender a certain copyhold to the plaintiff and should suffer the plaintiff to enjoy possession without interruption from anyone. The lord subsequently re-entered, and the plaintiff sued on the bond, but it was held to be a good defence that the lord re-entered, because the obligee had not paid the rent to the lord for which he was liable:

And this was holden a good plea. And the law is the same if the obligee were tenant at Common Law, and determined the tenancy the obligation is saved, because it was the act of the plaintiff himself (97).

Similarly, in Sir Anthony Maynie v. Scot (1593) the plaintiff brought Debt on a bond for the performance of a covenant that the defendant would, if the plaintiff surrendered a lease, grant a new one.

The defendant replied that the plaintiff had never surrendered his lease, but the plaintiff replied that the defendant had accepted a fine and granted to a third party for 80 years.

Naturally, the defendant's counsel argued that 'there ought a promptness to appear in him to do that on his part that is to be performed', but the court found for the plaintiff, on the ground that since the defendant had disabled himself from performing, the plaintiff was not obliged to surrender his lease, for that surrender was only necessary in case he wanted a new lease, and the granting of a new lease was now impossible:

(I)t would therefore be in vain for him to offer his surrender: but the covenant is broken of itself (98).

Thus, if the plaintiff made the performance physically or legally impossible, that was an excuse without more. It is perhaps sufficient to mention the illustrations collected by Bacon to make this point clear:

- Bro. Coven. 31      If a man be bound to build a house, etc., he is  
Rolle Abr. 453      excused if the obligee will not suffer him to  
                         build it; for he cannot come upon the land against  
                         his will.
- 9 H. 6. 44b.      So, if a condition be to repair a house, he is  
Rolle Abr.      excused thereof, if a stranger, by the command of  
453      the obligee himself, disturbs him, and will not  
                         suffer him to do it.
- 3 H. 6. 37      If the condition be to erect a mill, and the  
Rolle. Abr.      obligor comes to the obligee, and says all is  
453, 4.      ready for the erecting thereof, and demands of  
                         him when he shall come with the mill to erect it;  
                         if the obligee says he will not have the mill, and  
                         entirely discharges him of the mill, this shall  
                         excuse him of the performance (99).

Yet while these illustrations are to be found, one must be careful not to derive too broad a principle from them. They do not form a basis for a broad theory of 'frustration of commercial purpose' etc. but stand for a rather narrow principle that, if the co-operation of the defendant is required in the performance of the plaintiff's condition precedent and he actively refused to co-operate or prevents performance, the performance of the condition precedent by the plaintiff will be excused.

It should be noted that there are two ingredients here. First there is the question of whether the participation of the defendant was necessary at all to the plaintiff's performance of his condition precedent. Consonant with the general requirement of strict performance of conditions precedent, the courts did not look so much at the usefulness of the performance actually rendered to the defendant as whether or not the performance could be rendered without his co-operation. Thus Comyns sets down the following principles from Rolle's Abridgement:



So the performance of a condition shall be excused by the absence of the feoffee or obligee, when his presence was necessary for the performance; as, if a condition be that he enfeoffe the obligee, and he, having notice of the time is absent. 1. Ro1. 457 l. 30. 32.

If a condition be to pay rent, and the lessee is ready, but nobody comes to receive it for the lessor. 1 Ro1. 459 l. 35.

But if his presence is not necessary, his absence shall not excuse, though the act is to be done to him, as if a condition be to sing matins at such a day, in his manor, for A and his family though they be absent, he ought to sing. 1 Ro1. 457. l. 45. (100).

Secondly, if the plaintiff alleges interference by the defendant, he must show that he himself has done all in his own power to perform the condition precedent. Thus in Blanford v. Andrews (1598) the plaintiff brought Debt on an obligation of £80, the condition of which was that if the defendant procured the plaintiff's marriage with a certain lady, the obligation to be void, etc. The defendant pleaded that the plaintiff himself had hindered his performance of the condition, (by calling the lady in question a whore, threatening to tie her to a post if they were married etc.), but to no avail:

Williams, Serjeant, moved that this was not any plea; for he hath not shewn that he used his endeavour to procure the marriage; for it may be that, notwithstanding these words they would have inter-married. - And of that opinion was all the court; for the defendant ought to shew that there was not any default in him, and that he did as much as in him lay to procure it ... (1).

Austin v. Jervoyse (1614) furnishes a further example of this doctrine. In this case Austin, who was under age, declared by his next friend that he had bought a horse from Jervoyse for 22 shillings paid, and £11 more to be paid at his death or marriage for which he should become bound with sufficient surety by their writing obligatory. The defendant, in consideration thereof, promised to deliver the horse. The plaintiff declared that he had offered to become bound and provide a sufficient surety, but the defendant refused to deliver the horse. Despite this, judgement went against the plaintiff:

(H)e could not have judgement, for he should have tendered the obligation sealed, he should set down the sum, that the Court might judge if it were sufficient for the £11, the surety should have been named (2).

A final illustration is to be found in Fraunces's Case (1609) (3), which is best summarised in the words of Lord Holt C.J. in a later case, thus:

Upon this reason of law is the case in 8 Co. 92. One makes a feoffment, upon condition that the feoffee should re-infeoff the feoffor; or one binds himself in a bond to infeoff obligee by such a day, and before the day the feoffee, or obligor, is disseised by him that was to be infeoffed, and then the bond is put in suit, it is not a good plea to say that you were always ready to infeoff him, but that he himself before the day ousted you, but you must proceed farther and say, that he kept you out of the possession till after the day, with force; for though he had interrupted you, perhaps you might have come upon the land afterwards and performed the agreement, or make a tender, which if he refused would have been tantamount; for you ought not only to show a disturbance by him, but also such continuance of that disturbance as made it impossible for you to perform on

your side; and in that case he ought to shew, that he came to endeavour to make a feoffment, but could not do it by reason of the force he met with from the plaintiff; and that had been a good excuse; for if he, to whom a thing is to be done, hinder the other that is to do it ever so much; yet the other must use his utmost endeavour on his side to perform; and shew that he has done it, or else he forfeits his bond, or breaks his agreement (4).

Now it may at first appear to the reader that there is no consistent principle at work here, for while it is understandable that strict performance should be insisted upon in the basic case of a dependent covenant, how can this apply when the performance of that covenant necessarily involves the participation of the covenantee, and he refused to co-operate? Furthermore, it might at first appear that the decisions on this point are irreconcilable in themselves, for on the one hand we have cases such as Sir Anthony Maynie v. Scot and the cases collected by Bacon, referred to supra, which seem to decide that a refusal by the defendant is enough to excuse the plaintiff, while on the other hand we have cases such as Blanford v. Andrews which seem to decide that the plaintiff must make every endeavour, no matter how obviously hopeless and absurd in the circumstances, in the teeth of the defendant's obstruction. It is submitted however, that the contradiction is only apparent and its resolution actually illustrates some very basic and important concepts of the period.

The group of cases outlined are to be distinguished on this basis. In the first group, the performance was quite obviously made impossible by the other party's refusal to co-operate; if the obligee refuse the obligor entry to build the mill, that is per se an end of the matter, for the obligor can do no more. If the defendant has disposed of an estate, as

in Sir Anthony Maynie's Case, the plaintiff may immediately sue for refusal to convey, for conveyance is once and for all impossible. In the second class, however, while the defendant does not co-operate, the plaintiff's performance is not impossible and it is therefore possible that the defendant might alter his mind and perform once the plaintiff has completely performed his part of the agreement. It is therefore up to the plaintiff to do all possible on his side, so as to show there is no default in him. Now to modern minds this may sound quite illogical; if a man refuses to accept a deed of release which is prepared with wax affixed, he will surely refuse to accept it if the defendant, in addition, affixed his own seal to it. Similarly, if a man calls a lady a whore etc., and makes it clear he has no wish to marry her, it would seem pointless for a person to continue making exhortations to the lady to marry the man. But the reason modern lawyers would tend to make these objections is that we now think in terms of performance of the essence of the contract, by both parties, terms which promote consideration of substance, and an examination via the ex post facto approach outlined previously. However, as also stated previously, the law originally viewed bilateral deeds as a collection of grants by both parties; the grant of the one party being prima facie enforceable without regard to the other party's. Because of this approach the law, for hundreds of years, focussed on the individual's cause of action. Was it absolute or was there a condition precedent to it that had to be fulfilled? Once it was decided in a particular case that there was such a condition precedent, this condition had strictly to be performed and the focus of examination was on the plaintiff himself and his actions, rather than what the defendant happened to be doing at the time. This approach meant that prima facie the plaintiff had fully to perform his part of the agreement before he could enforce the other party's performance - and so the plaintiff had to make

overtures to the reluctant lady, had to affix his seal as well as the wax to a deed, because these things were to be performed by him. It was only if the defendant actually made it physically or legally impossible for the plaintiff to perform the condition precedent that he was excused without more - and this is the explanation of the cases outlined above.

#### (B) THE CONCEPT OF TENDER

The concept of tender, properly understood, was originally nothing more than the application of the ideas and principles just discussed to one particular fact situation, a contract involving an exchange of some sort. If the condition precedent to A's cause of action was that he was to deliver something to B, we have seen that B could not frustrate A's rights by merely refusing acceptance. But A had to do all on his part that was stipulated under the contract, and in the exchange situation this requirement could be expressed in the terms of the need for a valid tender. The essence of tender, then, is that the plaintiff must give the defendant every opportunity of accepting the plaintiff's complete performance; if the defendant still refuses this formal tender of performance, the tender may be treated as performance for the purpose of the plaintiff's condition precedent to his cause of action.

Discussion resolves itself into two questions:

- (i) When must a party make a tender?
- (ii) What constitutes a valid tender?

##### (i) When Must a Party Make a Tender

Just as in the other areas of law which we have been examining, much of the early discussion relating to tenders concerned land. Usually the

question arose in the context of the feoffor's (or lessor's) right to re-enter or distrain for nonpayment of rent, the tenant objecting that he had been ready and willing to pay and that therefore the landlord's act was unjustified. Much of this learning is dry and technical, concerning the place at which the rent should be demanded (and where and when the tenant should attend to establish a tender), distinctions between rent-secks and rent-services, distinctions between rents and sums in gross (5).

Perhaps of more immediate interest is the question, discussed from the earliest times, as to which party is to move first in the performance of a bilateral contract when the order of performance is not made explicit. Or, in other words, who must make the first tender of performance? Again, the early resolution of this issue often turned on nice distinctions concerning real property law or, quite often, according to the mundane practicalities of the fact situation before the court. Thus Lord Coke, after observing that in one situation it was up to the feoffor to tender money, then observed:

But if a condition of a bond or feoffment be to deliver 20 quarters of wheat, or twenty load of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffee, but the obligor or feoffor before the day must go to the feoffee, and know where he will appoint to receive it, and there it must be delivered. So note a diversitie between money and things ponderous, or of great weight (6).

Again, where the parties were to execute a deed, for example a release, it was often a nice question who was to prepare and tender it. Again this was resolved in an ad hoc fashion according to what seemed

the logical chronological sequence involved on the facts. To give one example, in Halling's Case (1595) the plaintiff brought Debt on a bond for the performance of covenants one of which was that the defendant should make an estate in fee before a certain feast. Making an estate was a complicated business and the question was who should move first? It was held that the obligor (i.e. the covenantor) had to move first, and was therefore liable on his bond, the court holding that:

(T)he covenantor ought to do the first act, Scil. notify to the covenantee what manner of estate he would have, so that the covenantee might know what sum of money to tender. ... if nothing can be done before the day, the covenant is broken, because the covenantor ought to have done the first act, and so the default is in him (7).

(ii) The Nature and Effect of a Tender

It is discernible from the earliest cases that, provided the strict requirements of time, place and degree of performance by the plaintiff are fulfilled, a tender is equivalent to performance. This is by no means a startling proposition or, indeed, a new and distinct proposition at all, for it logically follows from the ancient rule that if one party has done all possible to perform a condition precedent to his cause of action, the other party cannot take advantage of that condition precedent if its non-performance is occasioned by his own act (8). It is vital to remember that the concept of tender was thought of in terms of performance rather than in such modern terms as repudiation or failure of consideration etc., and therefore the requirements of a valid tender were stringent.

The case of Lea v. Exelby (1601) provides a convenient example of the contemporary requirements of tender in a contractual context. The parties there agreed that in consideration that the plaintiff promised to pay the defendant a certain sum of money at a certain time and place, the defendant promised super solutionem inde to surrender to him a lease. The plaintiff alleged that he had tendered the money at the time and place, but that the defendant had not surrendered the lease. The plaintiff succeeded at the trial, but it was moved in arrest of judgement that the words super solutionem inde constituted an express condition precedent to transfer, and that either payment or an express tender and refusal was required. The court accepted this contention, for while the plaintiff had alleged an offer on his part, he had not mentioned any refusal by the defendant:

And when he saith quod obtulit, and saith not that the other accepted it or refused it, his allegation of the tender is not to any purpose, for he shall never say quod obtulit only, but he ought to plead further that none was there to receive it, or that he refused; or he ought to alledge payment; and here it is matter of substance, for want whereof the declaration is not good (9).

This approach appears to have been consistently adopted by the courts (10), though it is fair to say that some cases at first seem to suggest some discord. One of these cases that apparently presents some difficulty is Shales v. Seignoret (1699). In this case the plaintiff covenanted to transfer to the defendant £1000 of Bank-stock before or on the 19th of November 1695, and the defendant covenanted to accept it, upon three days' notice, and to pay the plaintiff £940 for it. The plaintiff averred that Bank-stock was only transferable by law in the



office of the Bank of England, in the presence of both parties. Further, that he had given the defendant three days' notice that he would transfer on the 19th and that he had attended all that day at the office, but the defendant did not appear. He therefore brought an action of Covenant for the £940. Despite all this, the court found against the plaintiff. The transfer was, according to the words of the deed, a condition precedent to payment, and the court held the consequence of this to be:

That this action will not lie for the plaintiff in this case, because it appears that the plaintiff has not transferred; and without transfer to the defendant, the defendant is not bound to pay the money, for the money was to be paid upon the transfer; and therefore no transfer, no money (11).

This may seem rather odd, for it would appear that the plaintiff had done all in his power only to be frustrated by the defendant. Thus Dr. Stoljar makes the following comment:

The Court purported to return to the old rules of dependency, but they went beyond its previous limits. For whereas before even an express dependency had generally been thought to be excusable by a buyer's own obstruction, the present dependency gave the buyer almost complete freedom to thwart the completion of the contract (12).

In fact, however, we find that the case is consistent with the earlier decisions if we refer to the second resolution of the court:

2. The Court held, that it did not appear to the Court but that the Bank-stock was transferable at another place than at the office of the bank; for though the Act says, that no transfer shall be but as the King shall appoint, and the King has appointed it to be at the

office of the bank, and not in any other place, yet that ought to have been pleaded, or otherwise the Court cannot take notice of it; and therefore notwithstanding anything that appears here to the contrary, the transfer might have been in any other place, and then a tender ought to have been made to the person (13).

Dr. Stoljar, referring to this passage comments:

The Court curiously insisted that his patient attendance at the bank should have been specially pleaded by the plaintiff, for 'otherwise the Court cannot take notice of it' (14).

With the greatest respect, it is submitted that this is not quite right. What the court was insisting on was the pleading that stock could only be transferred in the bank, and nowhere else. The case was decided on a demurrer and therefore, without this special pleading, the matter stood as if the transfer might have taken place anywhere. And if this were the case, a tender needed to be actually made to the defendant's person, which had not been done (15).

While this result was rather technical, it is understandable, I hope, in the light of the material previously examined. First of all, pleading, as we know, was of great importance in the early law of contract and if, on demurrer at least, a matter essential to a cause of action was not pleaded the court could not assume judicial knowledge of it. Secondly, and more particularly, in the light of the rather technical way in which the problem of which party was to make the first move had always been resolved, it is understandable that the court should have held that it was up to the plaintiff to make the first move in discharging his condition precedent, and therefore a personal tender was required in the absence of the special pleading above.

However, it must be admitted that this state of affairs was somewhat unsatisfactory in that the result in this type of case does appear to have turned on rather technical distinctions.

The situation was clarified, if not liberalised, in the next case of importance, Lancashire v. Killingworth decided in 1700. Again, the defendant had covenanted to accept shares and to pay upon the transfer, but did not attend when the plaintiff had given notice to do so. Holt C.J. first of all definitively stated the role and status of tender:

It does appear that the money was to be paid upon transfer of the stock; and it is to be admitted, that when the money was to be paid upon the transferring of the stock, or doing any other thing, if he that is to make the transfer, or do such other thing, make tender, and the other refuse, then he is as much entitled to the money, as if the transfer, or other thing, had been actually done; for though the words be, that the money shall be paid upon the transfer, yet if the party does all that lies in him, he is thereupon as much entitled to the money, as if he had done all effectually (16).

However, although the concept of tender might have been set on a clearer footing, it was by no means extended in favour of plaintiffs. Thus in the instant case it was found against the plaintiff, because he did not aver that the defendant refused to accept or alternatively, that the plaintiff made tender at the proper time appointed by law and no one came to receive it. The stringent requirement of performance had not changed:

(W)hen a man has covenanted and agreed to do a thing, in excuse of himself, for not doing thereof according to agreement, he ought to shew that he has done his utmost endeavour to perform it, and shew how it came to pass that he did not, or could not do it. And here was an agreement by the plaintiff to transfer his stock, and here-upon the money was to be paid: the plaintiff indeed says he tendered the transfer, and so shews he did whatever he could towards the performance of his agreement, but that is not enough, for he ought likewise to shew how it came to pass that it was not performed, as that the defendant was there and refused to accept, or was not there at all, or on the last convenient time of the day which the law appoints for doing the matter. And all this the plaintiff ought to shew to entitle himself to this action (17).

Thus once again we see that performance of a party's condition precedent was stringently insisted upon, and the absence of such averment could be fatal on demurrer (18). Moreover, while the concept of a tender was now clearly recognised (19), the solution to particular cases was still formulated in terms of dependent and independent promises, or conditions precedent, the tender being equal to performance of dependent stipulations or conditions, and was definitely not a new concept which per se discharged a party's obligations.

We now, however, proceed to investigate a change in the very structure of contract law, the advent of the concurrent condition.

### (iii) The Beginnings of Concurrency

In Turner v. Goodwin (1714) (20) the facts were as follows. The plaintiff had recovered judgement on a bond against a third party, Dibble, but Goodwin, upon consideration that Turner would forbear from suing out execution upon Dibble, had promised to pay the money to Turner on request,

he assigning over to him the judgement against Dibble. Turner brought Debt on a bond to this effect, but Goodwin pleaded that Turner had not assigned the judgement, to which the plaintiff replied that he had always been ready so to do, and the parties then joined in Demurrer. The traditional way in which a problem like this was solved was to ask whether the clause pertaining to the assignment was a condition or a covenant and, if a condition, was it precedent or subsequent to the plaintiff's cause of action?

Indeed, the defendant's counsel founded upon this supposition and their argument proceeded in the following stages. First, the phrase 'he assigning over to him' could not be said to be merely an independent covenant to assign the judgement, because there is no covenant at all on the plaintiff's part to do so. Thus cases such as Pordage v. Cole (21) did not apply, for they turned on the very point that both parties did have mutual remedies. Secondly, was it a condition? The defendant's counsel argued that it was, but found a little difficulty here because the words were not express words of condition, such as sub conditione etc. Counsel for the defendant therefore argued that it is the intention of the parties that is most important, and the lack of mutual remedies means that the intention should be taken to be to impose a condition. As Serjeant Pratt stated:

The law lays such a stress upon supporting the intention of the parties, that it will interpret words not at all proper to amount to a condition, rather than the intention of the parties should be violated; as the common case in Co. Litt. 204, of the grant of an annuity pro concilio impendendo (22).

We have already discussed two possible rationales for the conditional status of the performance of consideration in unilateral contracts, namely, the condition is a part of the grant because of the very words pro etc. or, because there is no mutual remedy, the law implies a condition. We also saw how the adoption of one or other of these rationales would be crucial in the sphere of bilateral contracts, and how the adoption of the latter rationale led to the triumph of the doctrine of independency.

Here again, in the instant case, we see the clash between these two rationales, a clash that involved not just theory but substance. Although either rationale would originally have yielded a similar result in this situation, a rationale based on the performance of the consideration being part of the grant because of the words used was now unsafe for the defendant. As we have already seen, words such as 'paying and performing' etc., originally went to estate in the case of lands but, by the complex process culminating in Hayes v. Bickerstaffe outlined above, a wide range of such phrases had acquired a non-conditional interpretation and this was likely to be followed.

Counsel for the defendant therefore preferred to base themselves upon the broad principle of the parties' intention via mutual remedies rather than via the words actually used in the contract. Salkeld formulated this dichotomy most clearly when he stated:

That in law, proper and formal words of conditions are not required, either in wills, grants or contracts. Nor in wills. Nor in grants, as in the grant of an annuity pro concilio impendendo: but the reason assigned by Coke (is) not a good one; for the true reason is, that the law implies a condition, because else there would be no remedy (23).

The next stage of the argument was that, assuming the words constituted a condition, the condition must be precedent to the plaintiff's cause of action according to the following analysis.

First, there were only two kinds of conditions known to law, conditions precedent and subsequent:

Conditions are either precedent or subsequent, and acts cannot be done uno flatu at the self-same time, but there must be some precedency (24).

Secondly, it was precedent rather than subsequent because, once again, there would be no remedy for enforcement of a subsequent condition:

It cannot be taken as a condition subsequent, for then it would not be effectual but void, for the money being once paid would not be brought back again, in the case of non-performance (25).

This, then, was the traditional approach and foundation of argument, and the counsel for the plaintiff, while naturally opposing the above arguments on the facts, did not attempt to challenge the essential framework and classification of conditions.

First of all, counsel for the plaintiffs submitted that the words were not fitting to make a condition precedent per se (26). Of course, as much had been virtually admitted by the defendant and, therefore, the second submission was that there was no condition precedent to be derived from the intention of the parties or the nature of the transaction, but rather that

it was purely a question of order of performance, and because of the nature of the transaction it was the defendant who should have moved first (27). Thirdly, it was submitted that even if the assignment were originally a condition precedent to the plaintiff's cause of action, it was excused by the defendant's conduct as stated in the pleading:

Serjeant Chesshyre for the plaintiff relied much upon the replication of the plaintiff, which, the defendant having demurred to it, must be admitted as true. In this replication the plaintiff says, that he was ready to assign etc. and requested the defendant to pay the money, which the defendant refused. This refusal the serjeant insisted to be an absolute refusal, and not a conditional one, viz. unless the judgement was assigned. And this absolute refusal of the defendant to pay the money he insisted upon to be a sufficient discharge to the plaintiff from preparing the assignment (28).

Perhaps this outline of the arguments has been rather tedious, but I think it demonstrates well the framework within which both sides conceived the law to function. Thus, one first asked, was there a condition to a cause of action? If so, was it precedent or subsequent? If it was precedent, was it excused by the defendant's own conduct? However, no doubt to the surprise of all, the court delivered a judgement that broke completely new ground. Parker C.J. first succinctly outlined the problem in these cases thus:

The question is, whether the plaintiff's assignment be the first act to be done or not. This differs from the other cases, where the time and the consideration were mentioned. Here are no words that expressly show the priority of the act. The defendant would have assigning to be first assigning, and the plaintiff would have it assigning thereupon, that is, after payment.



This is supplying words supposed to be understood, for here are no express words (29).

Now this, of course, presents a keen dilemma for:

If the plaintiff is to do the first act, then assigning implies a deed, he must not only seal it but deliver it too. Fitz-Herb. Action 79, 3 Cro. 143, Noy 18, Hob. 69. And if he must deliver it, he must find the defendant out, so 'tis not in his own power to make it have a certain effect: on the other side, if the defendant must do the first act, after he has paid the money, he has no remedy to get an assignment (30).

This was the old problem, but the solution now proposed was new. We have seen that previously a party's performance of his condition precedent could be excused by proof that his own complete performance was prevented by the defendant, but the solution now was that this process could be short-circuited, for now neither party's performance need necessarily be prima facie precedent or subsequent:

(W)e are all of opinion, that there is one way that will solve all these difficulties and that is, that this assignment shall neither precede nor wait, but shall accompany the payment, and both to be done at the same time.

The defendant ought to find out the plaintiff, to tender him the money, and at the same time to demand an assignment; and then if the plaintiff refuse, the defendant will be excused. He is not to tender the money absolutely, because he is not bound to pay it absolutely, but he is to tender it sub modo, on the same terms he is to pay it (31).

The argument of the defendant that the assignment was a condition precedent, because otherwise he would have no remedy, could now be convincingly rejected:

(H)e has the remedy in his own hand, and the money is here his security till the assignment; tho' the money be told over by the defendant and plaintiff yet it remains still the defendant's money, and the plaintiff cannot justify the taking it tho' laid on the table (32).

A shaky foundation was thus laid for the substantive doctrine of concurrent conditions, and was somewhat consolidated by two decisions following soon after, namely Meritt v. Rane (1721) (33) and Anvert v. Ennover (1732) (34) which, though adding little beyond that stated in Turner v. Goodwin did add support to that authority and to the concept of a concurrent condition by virtue of merely applying the decision (35).

And yet, while reported by three reporters and apparently of great significance, the case of Turner v. Goodwin was not to prove to be a truly decisive turning point in the law. Soon after the case was decided, a number of similar cases arose which also involved covenants to transfer shares. In these cases, the courts again reverted to the condition precedent/independent covenant dichotomy, although it must be admitted that the choice between the two seems at times to have been motivated by a desire to do justice rather than a strict application of ancient principle.

For example, in Blackwell v. Nash (1723) (36) the defendant covenanted to accept certain shares and pay for the shares, the plaintiff averring a personal tender of the shares and a refusal to accept. It would seem that,

on the pleadings, the tests in Lancashire v. Killingworth (37) and Shales v. Seignoret (38) would have been satisfied and, indeed, the court observed that if there were a condition precedent here, it would have been satisfied by the tender and refusal. Nevertheless, the court now based its decision on an independent interpretation of the covenants. The covenant of the plaintiff was given for the covenant of the defendant rather than its performance; each had mutual remedies and therefore there was no condition precedent. This, of course, was contrary to several previous decisions, but the court was prepared to go even further:

(I)n all these cases the great question is, who is to do the first act: but when the transfer is to be upon payment, there is no colour to make the transfer a condition precedent (39).

An independent approach was again adopted by the court in Dawson v. Myer three years later, in 1725. In this case the plaintiff brought an action of covenant to enforce the covenanted payment of £730-10-0 the defendant having covenanted to transfer the produce of £634-7-6 in lottery annuities. The company allowed £73-16-0 stock on these annuities and when the plaintiff made a tender of this to the defendant in pursuance of the agreement, the defendant, perhaps not surprisingly, refused to accept it. The defendant argued that there was no such tender, or at least it was insufficient, but the court avoided this by holding, once again, that no tender at all was necessary because the covenants were mutual and independent. Upon joinder in demurrer, the Court of King's Bench found for the plaintiff:

(T)here were mutual covenants, viz. an express covenant from the defendant to pay the plaintiff £730-10-0 and then a distinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, they held that the tender was out of the case and the plaintiff was not alleged to answer it, for if the plaintiff did not tender, the defendant had his remedy against him for not doing it (40).

Given the existence of the authorities since 1700 that we have been examining, this type of approach might well cause some surprise. However, the explanation seems fairly simple. The courts were becoming increasingly aware of the performatory problems of this type of mutual exchange executory contract, and were seeking ways to effect a sensible result. It seemed incredible that a transferee could escape his contract by refusing to accept, and then insisting that such acceptance was a condition precedent. True, there was always the possibility of the plaintiff proving a tender and refusal, but we have seen that the requirements of such proof were so stringent that such a path, at least in the early eighteenth century, was fraught with danger. The obvious answer still seemed to be to destroy the defendant's contention at the outset by holding that there was no such condition precedent, because the covenants were independent. One final example will perhaps illustrate this approach.

In Wyvil v. Stapleton (Shelburne v. Eudem) the defendant covenanted to accept shares and pay for them. The defendant did not attend at the appointed time, and so the plaintiff sold them to a third party, as he had a right to do under the contract, and sued the defendant for the deficiency. The defendant objected that his acceptance was a condition precedent to the payment. Naturally, this was a defence without merit,

since it was he who had caused the non-acceptance. The problem was, however, that the plaintiff had not properly pleaded a tender on his part. We have seen that in cases such as Shales v. Seignoret (41) this had been fatal, but the Court of King's Bench in Wyvil v. Stapleton neatly circumvented these problems by holding that the covenants were independent:

The construction the defendant puts upon this covenant is a very strange one, for it is no less than to discharge himself of one covenant by the breach of the other: it is true, says he, I did not accept the stock as I ought to have done, and therefore I am discharged from the payment of the money. This is so harsh, that if any fairer construction can be made of it, I am sure it ought. Now I think the natural import of it to be, that then (i.e. the word 'then') should not relate to the actual acceptance, but only to the time at which he covenants to accept. If so, then as there are mutual covenants, the breach is well alleged in non-payment of the money, and if the plaintiff has failed on his part, it will be no excuse here, because the defendant has his action to right himself (42).

To sum up this period of development, we may say this. The courts were becoming increasingly burdened with two problems, the solutions to each of which were proving to produce inconsistencies in the law when viewed as a whole.

On the one hand, there was the feeling that one party to a contract should not usually be able to enforce the performance of the other party quite independently of his own performance. If a horse was to be sold for £10, the money could not be demanded without giving up the horse. This was the problem reviewed in Thorne v. Thorpe and the answer was thought to be dependency.

On the other hand, there was the problem that if promises were dependent it would seem that one party could easily avoid his contract by refusing to let the other party perform his condition precedent.

The approach by the courts to this second problem was not consistent, and it is from the differences that most of the confusion emanates.

One solution was to fall back on the notion of tender, but although the equivalence of tender to performance was clearly and convincingly established in cases such as Lancashire v. Killingworth (43), the requirements to satisfy the notion of tender were of the most stringent nature, and therefore a plaintiff who relied on the doctrine of tender was liable to suffer defeat through the most technical of pleading points.

A second possibility was the adoption of a middle way, stipulations that were not either dependent or independent in the old categories, but nevertheless could be said to be conditions in that the performance of one party did depend on the co-operation and requisite degree of concurrent performance by the other. This was the new approach that, as we have seen, began to be canvassed in Turner v. Goodwin.

The point is that such solutions to particular problems were not part of one cohesive theory of law, but were rather a number of disparate attempts to deal with a difficult problem. It is not surprising, therefore, that despite the learning in such cases as Thorpe v. Thorpe, the courts also attempted to use the old doctrine of independency to regulate these problems of performance - and thus we have such cases as Blackwell v. Nash

and Dawson v. Myer. The problem was, of course, just how to deal with a contract the real intent of which was that the parties should perform concurrently. But although the beginnings of a solution to this problem were in the air, the precise analysis of developments that now is possible was, at the time, not clear. And thus we find courts realising that there should be 'no colour to make the transfer a condition precedent' and yet, by framing this conclusion in the old context of the condition precedent/independent covenant dichotomy, all certainty was being lost and precedents were becoming increasingly confused and inconsistent. With this background in mind, it is not surprising that a new and definitive approach should be adopted, and it is to this development that we now turn.

## CHAPTER II

### THE CONSOLIDATION OF CONCURRENCY

#### (A) THE CASE OF KINGSTON v. PRESTON

Kingston v. Preston (44), which was decided in 1773 but did not achieve prominence until a manuscript note of it was used by counsel in the subsequent case of Jones v. Barkley (45), perhaps best exemplifies the contrast between the old doctrines and the new doctrine of concurrent conditions.

The facts were that Preston had a large amount of stock in trade and covenanted with Kingston to assign it to him and a nominee of Preston at the end of one and a quarter years, when deeds of partnership were to be executed between Kingston and Preston's nominee. Kingston covenanted that he would procure security for the value of the stock before the execution of these deeds of partnership but, at the end of the one and a quarter years and without doing so, he brought an action of Debt against Preston for not transferring the stock.

It would seem that the question was simply one of dependency or independency of covenants and counsel argued along these lines, the plaintiff contending that the covenant as to this security was purely independent, the defendant replying that it was dependent and hence a condition precedent. But Lord Mansfield seized this opportunity to state, (or perhaps, in the light of Turner v. Goodwin, to emphasise and clarify) a threefold, rather than a twofold, classification:

There are three kinds of covenants:



- (1) Such as are called mutual and independent where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff.
- (2) There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant.
- (3) There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is alleged to do the first act (46).

After making this lucid division, Lord Mansfield stated that the classification of covenants depended on the intention of the parties rather than a strict construction of the words used, and that in the instant case the stipulation as to security was a condition precedent, for it was the intention of the parties that the defendant should have security before he parted with his stock to a man of straw.

The precise status and importance of Kingston v. Preston in the development of the law has been the subject of some dispute. Some commentators have credited the case with great significance while others, notably Dr. Stoljar, in his article "Dependent and Independent Promises" in the Sydney Law Review have rather denigrated its importance in the light of other earlier developments. There is certainly much in what Dr. Stoljar says for, as I hope I have

shown, Kingston v. Preston was the logical product or conclusion of a number of pressures and developments within the old system. Nevertheless, I think it a misplacement of emphasis to say that 'In view of its actual decision, it is curious why Kingston v. Preston should have been credited with a revolutionary innovation', and again 'All in all, Kingston v. Preston has far less analytical merit than has been believed' (47).

With respect, it is my submission that, while the case was not revolutionary in the sense that it did not suddenly overturn settled and entrenched principles, it nevertheless was of great importance in that it gathered together a number of strands of development in the law and fastened them together in a clear and cohesive judgement. Certainly we can point to cases and dicta before Kingston v. Preston that, if they had been emphasised, could have played a decisive role in development, but the point is that it was Lord Mansfield and it was Kingston v. Preston that clearly enunciated these principles and furnished a clear authority on which, as we shall see, later courts could found a new and clear method of interpretation.

There were actually two important doctrines involved in the case. First, the clear threefold classification of conditions and the emphasis on the separate status of the concurrent condition. Secondly, the actual result of the case was that there was a condition precedent to the defendant's obligation - the covenants were dependent. The important point here is that there were no 'words of dependency' present at all with regard to this covenant to provide security, not even the much discussed phrases 'in consideration', 'pro' etc. Hitherto, therefore, the case would almost certainly have been decided on the basis of mutual remedies and an independent construction adopted, but the decision now was that a condition precedent could be implied.

Perhaps of even more interest is the subsequent case of Jones v. Barkley (1781) where the old and new doctrines are superbly outlined and contrasted in the arguments of opposing counsel, the new doctrine of concurrent conditions as enunciated by Lord Mansfield being adopted by the judges. The defendant promised that, on the plaintiff assigning to him an equity of redemption he would pay the plaintiff a certain sum of money. The plaintiff tendered a draft of the necessary documents to the defendant, who refused to accept them, and the plaintiff brought a special action on the case for non-performance of the agreement. Counsel for the defendant insisted that the words 'on' or 'upon' made the assignment a condition precedent and, while the performance of a condition precedent could in some cases be excused, the plaintiff had not done all in his power to perform (he had tendered only drafts, not the actual executed documents) relying on such cases as Austin v. Jervoyse (48) and Blanford v. Andrews (49). Counsel for the plaintiff presented a twofold submission. First, if it were a condition precedent, performance was excused by the absolute discharge by the defendant. Secondly, and more radically, that there was not a condition precedent here, nor was it a purely independent promise, but it was a member of the third class of terms propounded in Turner v. Goodwin and Kingston v. Preston, whereupon counsel read his manuscript report of Kingston v. Preston. The court found for the plaintiff. For example, Buller J. tersely noted:

In Kingston v. Preston the principle is clearly laid down, that, where something is to be performed by each party at the same time, he who was ready, and offered to do his part, may sue the other for not performing his (50).

That this is truly a departure from the old cases is emphasised if we briefly advert to the point concerning discharge of conditions. Counsel for the defendant relied on such cases as Blandford v. Andrews to show that there was not a sufficient performance by the plaintiff here for him to rely on a discharge by the defendant. To this Lord Mansfield now replied:

Take it on the reason of the thing. The party must shew he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act (51).

This, of course, is not the old doctrine, for hitherto it was necessary for the plaintiff to continue to perform, unless the defendant made it physically or legally impossible to do so. This statement of Lord Mansfield is part and parcel of the new doctrine of concurrent conditions. This is made the more stark in the following passage from the judgement of Buller J.:

The questions on tenders are very different from this. They have arisen, not upon what shall excuse, but on what is, a tender. If the party pleads a tender, he must prove one. But the decision would have been very different in the case of that sort, if there had been any act of the one party stated on the record, which had prevented the other from making a compleat tender (52).

This is perhaps one of the most penetrating analyses that I have thus far cited in this work. The point is that in those situations in which one needed to prove a tender, it must be a complete tender, and hence cases such as Blandford v. Andrews were so decided because the tender was incomplete. But the position now was that those cases were no longer relevant because it is not necessary to prove a tender, for the decision now was that there may

be concurrent conditions rather than the condition precedent upon which the requirement of a tender depended. In other words, this new doctrine of concurrent conditions did not require actual performance and therefore did not require an actual tender, for the concept of a tender had hitherto been a mere substitute for performance.

(B) THE DEVELOPING NATURE OF THE CONCURRENT CONDITION

We have so far examined the process whereby the interpretation of contracts came to depend on what the courts thought was the true intent of the transaction rather than an a priori interpretation of the actual words used.

We have also examined the evolution of a new substantive concept, the concurrent condition, and the definitive classification of contractual terms into the categories of independent promises, conditions precedent and concurrent conditions. But this last concept was something quite new and foreign to the traditional patterns of contractual thinking, and we have not, as yet, examined exactly what the concept of the concurrent condition involved.

Indeed, despite what might appear to have been a measure of certainty introduced by such cases as Kingston v. Preston, within the new framework previously examined there was great latitude for skilful counsel to mould and shape this new idea (53).

Such an opportunity soon arose in the case of Phillips v. Fielding, decided in 1792, or eleven years after Jones v. Barkley. A copyhold estate was sold by auction, and it was stipulated that the purchaser should pay a deposit, and sign an agreement for payment of the remainder at a certain time,

on having a good title, and that he should have a proper surrender of the estate on payment of the remainder of the purchase-money. The vendor brought assumpsit for non-performance of this agreement, averring that he was ready and willing to make a good title, and frequently offered to do so, and to make a proper surrender on payment of the purchase money.

The traditional defence would have been to argue that the making of the estate was a condition precedent to payment, but this would have been a bad course for counsel to take in view of the then recent decisions in favour of concurrent conditions. Nor did counsel for the defendant make this mistake. He immediately conceded that the conditions were concurrent, but then proceeded to contend that the plaintiff had not sufficiently performed his condition (which was ex hypothesi also concurrent) to entitle him to his action:

The promises are to be fulfilled at the same time, each being the condition upon which the other is to be performed; and though it is not certain that either party is bound to do the first act, yet if either would have a remedy at law for the non-performance of the other, he must perform his own part; for unless he can shew a performance of his part, or an offer to perform and a refusal by the other party, he cannot support an action. Instead of this, the plaintiff in the present case brings an action against the defendant for not doing the first act: he says he has been always ready and willing, and frequently offered to 'make out a good title to the estate and a proper surrender, on payment of the purchase money'; so that the allegation imports that if the defendant had previously paid him the money, he would afterwards have made out a good title, thus making payment a condition precedent (54).

This argument is brilliant, a fine example of the skill and forensic ability often displayed by the Serjeants of the day. The argument admits the new status of concurrent conditions, but then emphasises that a concurrent condition is, after all, a condition and, says Serjeant Marshall, that must mean a condition to the plaintiff's cause of action, which can only be fulfilled by his own performance, or discharge by the defendant. Whenever faced with the word 'condition' we must ask, 'condition of what?' The answer to this question had been, 'condition of a legal right' - an estate or a good cause of action. With the introduction of the concept of a concurrent condition, however, came uncertainty, for this was a new concept and seemed more related to the regulation of continuing performance under a contract rather than the definition of the point at which a party's performance entitled him to a good cause of action. Thus the answer seemed now to be, 'condition of each party's performance' rather than condition of one party's cause of action.

This distinction was later to coincide with that between the a priori and ex post facto approaches outlined above, but at the time the distinction was hazy and unclear. But it is this very lack of clarity that made the Serjeant's argument possible, for he now deftly defined concurrent conditions with reference to the old system of conditions precedent to a cause of action. The conditions were concurrent, said he, but only in the sense that it was not defined who was compelled to move first. But if either wished to sue the other, then the condition applied to that plaintiff's cause of action,

becoming a condition precedent. Thus he had to aver actual performance, or at least a tender and discharge. Having laid this foundation, he could then skirt completely (in effect) the new doctrine of concurrent conditions and get back to the old, strict, doctrine of performance of dependent stipulations. Thus:

The general rule laid down by Lord Holt has never been departed from, but in cases which have been afterwards overruled. That rule is, that in executory contracts if the agreement be that one shall do an act, and for doing it the other party shall pay, etc. the doing the act is a condition precedent to the payment, for the party who is to pay shall not be compelled to part with his money till the thing be performed for which he is to pay. Thorpe v. Thorpe (55) Callonel v. Briggs (56) ... It follows therefore, that though the condition be concurrent, yet if either party would bring an action against the other for non-performance, he turns his part of the contract into a condition precedent, and he must aver performance or a tender and refusal; the reason of which is, that when a man undertakes to do a thing, he ought to shew his utmost endeavour to do it, and if it be not done, the reason why it is not done.

Whereupon cases such as Lea v. Exelby (57), Lancashire v. Killingworth (58), Large v. Cheshire (59) and Austin v. Jervoise (60) were resuscitated and thrown into the fray! In fact, Serjeant Cockell had the answer to this, for he rightly stated that 'If it be not certain, which party is to do the first act, but both are to do something at the same time, and one refuse to do his part, in that case, he who was ready and offered to perform his part, may maintain an action against the other, according to the mode of reasoning adopted in Jones v. Barkley, and Kingston v. Preston.' However, the argument for the defendant had been too persuasive, and the court found against the plaintiff because he 'had not distinctly averred a sufficient



performance of his part of the agreement, by stating an actual surrender to the Defendant or a tender and refusal...' (61).

Clearly, there was some confusion about the nature of concurrent conditions, but this was not to be settled in the next case of importance which must be mentioned. In Morton v. Lamb (1797) the plaintiff brought an action on the case for non-delivery of corn by the defendant, alleging that he had always been ready and willing to accept it. The plaintiff obtained a verdict at the trial, but the defendant argued in arrest of judgement that the plaintiff had said nothing of his own performance, i.e. to pay the price. The argument of defendant's counsel, Mr. Holroyd, was the same as had proved successful in Phillips v. Fielding:

The question then comes to this, whether the defendant was bound to deliver his corn, the plaintiff not being there ready to pay for it. For if not, then it follows, according to all the late determinations, that he ought to have averred a tender of the price, or that he was there ready to pay for it, if the defendant had been there ready to receive it, and deliver the corn. And for this purpose it is not necessary to show that the tender of the price was a condition precedent, strictly so considered; for according to Goodison v. Nunn (62) and Kingston v. Preston, if the acts are concurrent and in the nature of the transaction to be done at the same time, before one of the parties can maintain an action against the other for the non-performance of his part, he must aver that he performed or was ready to perform everything in his own part. Callonel v. Briggs is in point... (63).

And again this was accepted by the Court, the defendant having judgement. Thus Lord Kenyon C.J.:

The case decided by Lord Holt in Salk. 112 (Callonel v. Briggs), if indeed so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract (64) (my underlining).

It must be admitted that the phrase underlined makes the ratio of Lord Kenyon a little unclear but it seems fair to say from the context, and particularly with regard to the decision requiring strict performance in Callonel v. Briggs upon which his Lordship relied, that he meant that actual performance or its equivalent, viz. a tender or attendance at an appointed place until the last convenient time of day, was required and not merely an averment of willingness to perform.

And Lawrence J., made this requirement of actual performance or tender, its legal equivalent, quite explicit:

The payment of the money was to be an act concurrent with the delivery: and then the case is like that of Callonel v. Briggs which was on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock; and there Lord Holt said, 'If either party would sue upon this agreement the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender'. ... The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he must set out the whole of his title (65).

However, despite this rather confused start to the career of the concurrent condition the matter was soon to be clarified. In Rawson v. Johnson (1801) the buyer again sued the defendant for non-delivery of goods, and again merely averred readiness and willingness rather than an actual tender

of the price. This time however, the 'ready and willing' clause was expressed to pay as well as to receive, and counsel for the plaintiff sought to distinguish Morton v. Lamb on the basis that in that case there had only been a readiness to receive the goods. But here, an averment of readiness to pay was sufficient, for an actual tender was not required according to Turner v. Goodwin (66) and Merrit v. Rane (67).

Mr. Holroyd once again appeared for the defendant, and naturally used the arguments he had found so successful in Morton v. Lamb. He pointed out that in Morton v. Lamb:

Lawrence J., there said, that the plaintiff must either aver performance or a tender; and that is the result of all the cases collected in the report of that case.

Mr. Holroyd was also careful to emphasise (very likely with an eye on the passage in Lord Kenyon's judgement in Morton v. Lamb noted) that:

It is different ... where an act is to be done at a particular time and place, there if the party does not attend a tender is impossible, and therefore not necessary to be shewn; but such non-attendance must be pleaded in order to excuse the necessity of the tender (68).

Yet the decision of the court was now for the plaintiff, it being decided that a request to the defendant to deliver, coupled with the plaintiff's own readiness and willingness to perform, was quite sufficient. As Lord Kenyon C.J. now said:

To be sure, under this averment the plaintiffs must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it and to have delivered the goods: but it cannot be necessary in order to entitle them to maintain their action that they should have gone through the useless ceremony of laying the money down in order to take it up again (69).

And Lawrence J. was also able to find for the plaintiff, distinguishing his judgement in Morton v. Lamb on the basis that in that case there was only an averment of readiness to receive, and not, as here, to pay. As for his previous statements about tender:

I alluded there to some cases in order to show that the plaintiff must state in his declaration that he was ready to do everything that was required on his part to be done; but I did not mean to say, nor was the attention of the court called to it, that that averment was to be made in any particular form. In the case before the court there was no averment whatever of the kind (70).

But it was Le Blanc J., who had been involved neither in Phillips v. Fielding nor in Morton v. Lamb who was to deliver the most penetrating and lucid judgement:

According to the cases which have been determined on this question neither of the parties was bound to do the first act or to perform his part of the agreement before the other. If so, then neither can be bound to state that in pleading which is equivalent to performance. Now a tender and refusal has always been deemed to be equivalent to performance; therefore as performance in this case was not necessary, neither was it necessary to aver that which was equivalent to it. But all that is required of the plaintiffs to shew is, that they did everything which they were bound in fact to do. Then if they shew that they were ready to pay the price

provided the defendants were ready to deliver the malt, that is all that was necessary for them to do, and consequently their pleading a readiness to perform is equivalent to everything that they were bound to perform where the defendant refused to perform his part (71).

It is, of course, possible to find fault with this judgement in the light of its apparent inconsistency with the previous cases (72). However, although such a comment would be fair in the sense that the case of Morton v. Lamb did present rather more difficulty than Le Blanc J. admitted, the criticism does not alter the fact that the judgement was a masterful piece of judicial expertise. The judgement is in accord with the whole scheme and development of the law that I have attempted to illustrate up to the cases of Phillips v. Fielding (which seems a little known decision) and, of course, Morton v. Lamb, and since Le Blanc J. was party to neither of these last two decisions, it seems pardonable that in his analysis of the true legal position he should not have placed undue weight on the momentary uncertainty introduced by those cases.

Although we might have reservations about the case, (in particular as to the consistency of the judgements of Lord Kenyon C.J. and Lawrence J. with their previous pronouncements) the law of conditions of performance now seemed to be placed on a firm footing (73). Stipulations could still be interpreted as being conditions precedent and, if so, performance or tender, its legal equivalent for the purpose, was required. But stipulations could also now be conditions concurrent and, if so, commensurately less was required to be proved by the plaintiff, it being finally settled in Rawson v. Johnson that a readiness to perform coupled with the defendant's knowledge of this was sufficient.

### CONCLUSION

We have come to the end of the task set at the outset, the investigation of the early nature of conditions, and the history and development of this concept in relation to performance of contract. But the line drawn to curtail investigation is something of an arbitrary one, for very much more could be said.

For example, the famous rules in Pordage v. Cole (74), often thought to provide the starting point for discussion in this area, have not been discussed. However, these comments by Serjeant Williams cover a rather different time span than that with which we have been concerned, and merely consist of one commentator's summary of some of the relevant cases. For various reasons, it seemed better to omit yet another examination of the learned Serjeant's synthesis and instead devote examination to the original sources of the rules.

Perhaps a more important omission is the case of Boone v. Eyre. This case was decided in 1777 and therefore falls within our allotted time span; indeed, we have investigated cases connected with other strands of development that were decided a few years after this decision. However, it is not proposed to examine this decision, for to do so would put the entire modern law of contract under examination. In order to clarify this statement, the case should perhaps be briefly outlined.

The plaintiff had conveyed to the defendant the equity of redemption of a West Indian plantation, with the negro slaves, for a sum of money and an annuity for life. Subsequently, this annuity was not paid and the plaintiff brought an action of Covenant on the deed to enforce payment. To this

action, the defendant pleaded that the plaintiff did not have legal title to the negroes and so had not fulfilled a condition precedent, for the clause by which the defendant, Eyre, had covenanted to pay the annuity stated 'he, the said John Boone, well, truly, and faithfully doing, fulfilling, and performing all and singular the covenants, clauses, recitals and agreements in the said indenture contained', Eyre would pay the annuity.

Traditionally the resolution of the case would have turned on the status of the words 'doing, performing' etc. Did such words, as a matter of law, mean that the performance of all the defendant's stipulations was a condition precedent to his cause of action? We have traced the history of the courts' interpretation of such phrases and have noted that, well before this time, considerations wider than the mere words used could be taken into account. Thus we saw in Hayes v. Bickerstaffe that the idea of inequality of damages was thought vital, the phrase 'paying and performing' being dismissed as words so often inserted in such agreements as to be mere clausula clericorum (75). In Boone v. Eyre the words were, of course, of a more specifically conditional nature and it was perhaps a moot point, on the authorities, whether there was a condition precedent; i.e. were the covenants dependent or independent? Lord Mansfield, however, would have nothing of such a process of enquiry, and delivered a judgement which was to be cited verbatim in dozens of subsequent cases:

The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant 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.

Judgement for the plaintiff (76).

It is, of course, true that this approach was not entirely new, for we have already seen that the problem of inequality of damages lay at the very heart of the old doctrine of independency, and it may also be pointed out that the pronouncement was in line with the general judicial movement from a strict 'words' approach to a more flexible approach which took into account matters of suitability of remedy and the 'real intention'. However, one has only to look to the cases decided in the years following Boone v. Eyre to appreciate that that case was treated as establishing a much wider proposition or, more correctly, a judicial method of approach, for the resolution of performatory problems. Indeed, it is not too much to say that this single case forms a vital link between two distinct eras in the law. The ascendancy of the modern doctrine of a breach going to the heart of the contract and its attendant problems of failure of consideration and conditions and warranties over the older, more 'pure', concepts of conditions precedent, subsequent and, more recently, concurrent, can be traced to this single case.

Boone v. Eyre marks the end of a distinct epoch in the law and it is that epoch that I have been concerned to examine. The line must be drawn somewhere, for if an end could not be reached neither could a start be made. As Nicholas Boileau once observed, 'qui ne sait se borner ne sut jamais ecrire'.



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NOTES

1. "The Contractual Concept of Condition" [1953] 69 L.Q.R. 485 at 486 ff.
2. A.L. Corbin, Corbin on Contracts, West, St. Paul 1960 Vol. 3A, s.627.
3. See the treatments in 3 Comyns Dig. 87; 5 Viner's Abr. 40 FE;  
2 Bacon's Abr. 103 ff.; Co. Litt. 201 A ff.
4. These were not recognized as enforceable until the mid-sixteenth century, see post, Part II Chapter 3.
5. Two reasons the historian would advance for the advent of conditions such as rent in addition to traditional feudal service might be the use of mercenaries by the king replacing the need for service with a need for money, and the advent of a money economy.
6. Co. Litt. 201 A.
7. The question sometimes arose whether a grant (as distinct from a contract to transfer) of land could actually be made with a condition precedent. Thus it was sometimes said that an inferior estate, for example a life estate, could be granted to A with a condition precedent that if condition X were performed, A would have the fee. This raised numerous and complicated problems concerning seisin, necessity for ceremonial transfer and distinction between various types of estates and leases all of which, fortunately, need not be examined here.  
Co. Litt. 216 A ff.; 2 Bacon Abr. 123 ff.; 3 Com. Dig. 95 ff.;  
Colthirst v. Bejuskin (1552) Plowd. 21 at 34 and cases referred to at 34, n (m); 75 E.R. 33 at 56.
8. And see 5 Vin. Abr. 76 pl. 26 for another illustration, though perhaps a controversial one.
9. H.W. Challis, Law of Real Property, Butterworths, London (2nd ed.) 1892, 191.

10. I use the term 'estate' here rather loosely.
11. Still of importance, Hall v. Busst (1960) 104 C.L.R. 206. For contemporary expositions, see Stukeley v. Butler (1614) Hob. 168, 80 E.R. 316; 2 Bac. Abr. 130; Co. Litt. 222b ff.
12. Supra, n.8.
13. R.E. Megarry and H.W.R. Wade, The Law of Real Property Stevens, London 2nd ed. 1957, 74.
14. Co. Litt. 223 a; see 223b, 224 for the necessary incidents of estates tail and the matters which the parties could settle between themselves by private contract. See also 2 Bac. Abr. 130.
15. 3 Leon. 58; 74 E.R. 539.
16. Co. Litt. 206 a.
17. Co. Litt. 214 a.
18. Pollex. 70; 86 E.R. 515. See also Machel v. Dunton (1586) 2 Leon. 27; 74 E.R. 235; Moodie v. Garnance (1615) 2 Bulst. 153, 81 E.R. 131; Egerton v. Brownlow (1853) 4 H.L.C. 1, 10 E.R. 359.
19. 2 Bacon Abr. 108. This is stated in the context of personal contracts, but it was undoubtedly a rationale of general application when a grant of land was made for valuable consideration and conditions rather than question of limitation were in issue. See Lofield's Case (1612) 10 Co. 106 a at 106 b, 77 E.R. 1086 at 1087; Hill v. Grange (1555) Plowd. 164, 75 E.R. 253; Bullen v. Denning (1826) 5 B. & C. 842 at 850, 108 E.R. 313 at 316; Neill v. Duke of Devonshire (1882) L.R. 8 A.C. 135 at 149; Savill Brothers Ltd. v. Bethell (1702) 2 Ch. 523 at 537.

Care must be taken not to state the principle too broadly though, lest one forget the perilous areas of presumption in favour of resulting trusts and distinctions such as that between reservations and exceptions. However such technicalities may be left to the text books on Real Property;

the proposition stated in the text is correct in its application to conditions subsequent which defeat vested estates. See also S.M. Leake, An Elementary Digest of the Law of Property in Land Stevens, London (2nd ed. by A.E. Randall) 1909, 178.

20. (1853) 4 H.L.C. 1 at 144, 10 E.R., 359 at 417. For similar exposition of the position in the United States see 3 Corbin S.635 (p.534) and particularly the case of Hague v. Ahrens there cited.
21. Pollex 70 at 75; 86 E.R. 515 at 518. And see Co. Litt. 204 a.
22. Co. Litt. 203 a.
23. Ibid. It was a much debated question whether an actual clause of re-entry had to be given or if a stipulation that the estate would be void on a given event was enough to give title to enter. See 5 Vin. Abr. 48.
24. 5 Vin. Abr. 42 ff.; Co. Litt. 204 a.
25. Co. Litt. 203 b.
26. Co. Litt. 203 b.
27. See 2 Bac. Abr. 117 ff.
28. 1 Plowd. 60 at 67; 75 E.R. 96 at 107.
29. Cro. Eliz. 657; 78 E.R. 876.
30. Ibid.
31. Ibid.
32. Anon. (1538) Dyer 19 A pl. 110; 73 E.R. 40; Anon. (1649) March 9 pl. 22; 82 E.R. 388; Bush v. Coles (1692) Carth 232; 90 E.R. 739; Shower 388; 89 E.R. 657; 1 Salk 196; 91 E.R. 176 and authorities collected therein. Cf. Anon. (1571) Leon. 15; 74 E.R. 511: 'A made a lease to B for life, and further grants unto him, that it shall be lawful for him to take fuel upon the premises; proviso, that he do not cut any great trees; it was holden by the Court that if the lessee cutteth

any great trees; that he shall be punished in waste: but in such case, the lessor shall not re-enter because that proviso is not a condition, but only a declaration and exposition of the extent of the grant of the lease in that behalf'. But contrast Anon. (1562) Moore (K.B.) 49; 72 E.R. 430.

33. Supra, n.32.
34. 2 Dyer 221 b; 73 E.R. 490, see n (A) at 221 b, 490 for other reports. I think Dyer is to be preferred.
35. This case is outlined in Browning v. Beston (1552) 1 Plowd. 131 at 135; 75 E.R. 202 at 208.
36. And see V. Vin Abr. 45: 'Proviso added in the end of a covenant extends only to defeat the same covenant, unless there are words quod tunc the grant shall be void. But proviso put absolute in a deed, without dependance upon any particular covenant or exception, is to be construed for condition to all the estate. Agreed by all the justices. Mo. 106. pl. 249 Mich. 17 and 18 Eliz. in Andrews Case'.
37. For a good example of the application of this strict separation of the two concepts of covenant and condition see Michell v. Dunton (1587) Owen 54; 74 E.R. 894.
38. Popham III; 79 E.R. 1223; Cro. Eliz. 384; 78 E.R. 630; Gould. 130; 75 E.R. 1044.
39. Cro. Eliz. 385; 78 E.R. 631.
40. Popham 118; 79 E.R. 1224.
41. Popham 119; 79 E.R. 1225.
42. Cro. Eliz. 386; 78 E.R. 631.
43. Poph. 118; 79 E.R. 1224.
44. Poph. 117; 79 E.R. 1224.



45. 1 Dyer 7 b; 73 E.R. 15.

46. 1 Dyer 6 b; 73 E.R. 16.

47. For example, Browning v. Beston (1552) 1 Plowd. 131; 75 E.R. 202.

See too, Archdeacon v. Jennor (1597) Cro. Eliz. 605; 78 E.R. 847:

The case was, one made a lease for years the lessor covenanted that the lessee should have house-bote, hay-bote, and plow-bote, without committing any waste, upon pain of forfeiture of the lease: whether this were a condition? was the question.

Anderson (J.) The covenant is not more than what the law appoints, and therefore vain; and so all what is subsequent is vain - quod Beaumont (J.) agreed.

Walmsley (J.) It is a covenant on the part of the lessor; and therefore it cannot be a condition.

48. Thus 5 Vin. Abr.:

Note, for law, that proviso semper put upon the part of the lessee upon the words habendum, makes a condition. But contra of a proviso (to be performed) of the part of the lessor. Br. Condition, pl. 195 cites 35 H. 8.

As it is covenanted in the indenture, that the lessee shall make reparation, provided always, that the lessor shall find the great timber. This is no condition. Ibid.

49. 2 Bulst. 290; 80 E.R. 1129; Cro. Jac. 388; 79 E.R. 340.

In fact the bulk of authority had come to favour Fitzherbert J.'s opinion well before this. See the authorities listed in the reports to Whitchcocke v. Fox and also Thomas and Ward's Case (1589) 1 Leon. 245; 74 E.R. 224; Alfo and Dennis v. Henning (1610) Owen 151; 74 E.R. 967 and the majority in Pembroke v. Barkley (1595) supra.

50. Popham 118; 79 E.R. 1125.

51. 2 Co. Rep. 69 b at 70 b; 76 E.R. 574 at 577.

52. For a further example of a terse set of rules being laid down by a Court, see Ayer v. Orme (1562) 2 Dyer 221 b; 73 E.R. 490.

For further expositions, see II Bac. Abr. p. 340; V. Vin. Abr. p.47; Co. Litt. 203b; Scott v. Scott (1586) 2 Leon. 128, 3 Leon. 225, 4 Leon. 70; 74 E.R. pp.415, 648, 736; Pembroke v. Barkley (1595) Popham 116; 79 E.R. 1223 but especially Gould. 130 at 131; 75 E.R. 1044; Andrews v. Blunt (1571) 3 Dyer 311 A; 73 E.R. 704; Hayward v. Fulcher (1627) Palm. 491; 81 E.R. 1186.

53. Moo. K.B. 280; 72 E.R. 489.

54. Text at n. 33. See also Hollis v. Carr (1675) 2 Mod. 86; 86 E.R. 956, and the case in Rolle Abr. 518, referred to by counsel *ibid.*

55. 9 B. & C. 505; 109 E.R. 188.

One of the earliest cases on this point seems to be Barfoot and Treswell and Picard (1675) 3 Keb 465; 84 E.R. 826; for a discussion of the authority of this case, see Farrall v. Hilditch (1859) 5 C.B. (N.S.) 840; 141 E.R. 337.

See also Saltoun v. Houston (1824) 1 Bing 433; 130 E.R. 174; Lay v. Mattram (1865) 19 C.B. (N.S.) 479; 144 E.R. 874; Knight v. Gravesend & Milton Waterworks (1857) 2 H. & N. 6; 157 E.R. 3.

56. The principle was very early established. See Co. Litt. 139 b; Reade v. Bullocke (1543) 1 Dyer 57A; 73 E.R. 125; Swan v. Strarsham (1565) 3 Dyer 257A; 73 E.R. 570; Nape's Case (1598) 4 Co. 80 a; 76 E.R. 1056; Holder v. Taylor (1613) Hob. 12; 80 E.R. 167.

57. Cro. Jac. 73; 79 E.R. 62.

58. For an illustration from a slightly different context which points up this intimate connection of covenant and estate, see Bishop and Redmans Case (1583) 1 Leon. 277; 74 E.R. 252.

59. Williams v. Burrell (1845) 1 C.B. 407 at 429; 135 E.R. 596 at 607.

60. 2 Pollock and Maitland, History of English Law p. 31.

61. Plucknett, A Concise History of the Common Law p. 540.

62. (1828) 8 B. & C. 308 at 315; 108 E.R. 1057 at 1060.

63. Co. Litt. p. 204 a.
64. Cro. Eliz. 242; 78 E.R. 498.
65. Cro. Car. 129; 79 E.R. 713.
66. 4 Leon. 50; 74 E.R. 722.
67. See Proctor v. Johnson (1609) 2 Brown 1. 212; 123 E.R. 903  
and the cases referred to therein.
68. Style 387; 82 E.R. 800.
69. Style 406; 82 E.R. 816.
70. Cf. Harrington v. Wise (1596) Cro. Eliz. 486; 78 E.R. 737;  
Allen v. Babbington (1666) 1 Sid. 280; 82 E.R. 1105.
71. 1 Freem. 194; 89 E.R. 138.
72. Ibid.
73. Owen 54; 74 E.R. 894 at 895.
74. 1 Freem. 189; 89 E.R. 138.
75. E.g. Warren v. Asters (1681) Jones, T. 205; 84 E.R. 1219;  
Muckleston v. Thomas (1739) Willes 146; 125 E.R. 1103;  
Dawson v. Dyer (1833) 5 B. & Ad. 584; 110 E.R. 906;  
Edge v. Boileau (1885) 16 Q.B. 120.
76. E.g. Kay J. in Bastin v. Bidwell (1881) 18 Ch. D. 228 at 245:  

'I confess that I have some difficulty about this case, for this reason: If they were not conditional words, what was the effect of them? The lessee had previously entered into certain covenants in that lease, and if those words were merely a repetition of the covenants, then it seems to me they had no effect whatever'.
77. 2 Bacon Abr., p. 108. See too, 5 Vin. Abr. p. 67 where, amidst discussion of real property law, there is the heading 'To what Things Conditions may be annexed (And How. pl. 1)' under which it is noted: 4. A Contract May Be Upon Condition. 44 E. 3 28.  
As in Debt for a house sold to the Defendant for £10 who said that it was sold for £10 and that the Plaintiff should pull it down and carry it to him, and that then he would pay the £10 and said that he was at

all times ready to pay in case the other would pull it down and carry it, by which the other said that the Bargain was simple, and the other E Contra. Br. Conditions, pl. 28. cites 44 E. 3 27, 28.

78. 3 Com. Dig. 92.
79. 2 Bac. Abr. 121.
80. Williston On Contracts, 3rd edn. sect. 666.
81. 3 Corbin On Contract, p. 510.
82. Supra 2 Bac. Abr., p. 108.
83. Edgecomb v. Dee (1670) Vaughan 89 at 101; 124 E.R. 984 at 990. An interesting, but belated, protest against the relentless advance of Assumpsit after Slade's Case.
84. Though, of course, there might well be an action of Debt or Covenant for the price or performance of consideration, the executed, non-conditional, estate could not be divested.
85. 7 Co. 9b at 10b; 77 E.R. 425 at 427; and see the references there given.
86. Hob. 37 at 41; 80 E.R. 189 at 190.
87. 5 Co. Rep. 78b; 77 E.R. 174.  
  
See also Lovelace v. Reinalds (1597) Cro. Eliz. 563; 78 E.R. 807;  
Griffith v. Williams (1739) Say. 56; 96 E.R. 801;  
Kirchin v. Knight (1748) 1 Wils. 253; 95 E.R. 603;  
Waring v. Griffith (1758) 1 Burr. 441; 97 E.R. 392 and the cases there collected.
88. e.g. Bragg v. Nightingall (1649) Style 140; 82 E.R. 594; Smith v. Cudworth (1692) 1 Show. 390; 89 E.R. 659.
89. Sty. 187; 82 E.R. 633.
90. Ld. Raym. 124; 91 E.R. 980.
91. Supra (1675) 1 Freem. 194; 89 E.R. 138.
92. Owen 54; 74 E.R. 894.
93. Chitty On Contract 22nd edn. sect. 18 p.11.
94. 1 Plowd. 300; 75 E.R. 457.
95. Pollock On Contracts 13th edn. p. 110.

96. Sutton and Shannon On Contracts 5th edn. by K. Wedderburn.

97. Holdsworth's statement is clearly to be preferred:

In the Middle Ages the action of covenant, as thus developed so as to remedy the breach of any agreement entered into by writing under seal, was a more purely contractual action than any other known to English law. By means of it alone could unliquidated damages be got for breach of an executory contract. It is therefore an important action because it helped to familiarize English lawyers with the idea of contract. As we shall now see, debt was not properly a contractual action at all; and, owing to the limitations upon its scope which arose from this cause, and to other disadvantages from which it suffered, it was a very inadequate remedy for the enforcement of contracts...  
History of English Law, 4th edn. p.420.

98. The basic threefold classification adopted is Professor Corbin's.

As an examination of the abstract concepts of intention and construction is only undertaken here in order to provide a foundation on which to proceed, I adopt Professor Corbin's basic terminology, with which I fully agree, rather than put forward a new system merely for the sake of being different. See also, Patterson 'Constructive Conditions in Contracts' (1942) 42 Col. L.R. 903.

99. Corbin On Contracts, Vol. 3 A, sect. 534.

100. Ibid.

1. Ibid.

2. 3 Lev. 41; 83 E.R. 567.

For similar cases where this factor of inequality was no doubt important see: Shower v. Cudmore (1682) Jones T. 216; 84 E.R. 1224; Smith v. Cudworth (1692) Show. 390; 89 E.R. 659.

3. (1649) Style 187 at 188; 82 E.R. 633 at 633. It should be emphasised, though perhaps ex abundanti cautela, that this principle of mitigation was of limited scope. What was being taken into account in computation of the plaintiff's damages was not a set-off due to his own breach of

covenant, but rather a consideration of all the facts (i.e. that in fact there were no soldiers raised) to compute damages. In this aspect, the fact that the plaintiff had covenanted as regards this fact was really irrelevant.

4. Plowd. 145; 75 E.R. 223.
5. 5 Co. 54b at 55a; 77 E.R. 137 at 138. See also the opinion of Robert Brook C.J., (dissenting on the point) in Throckmerton v. Tracy (1554) Plowd. 145; 75 E.R. 223 (supra).
6. Cro. Jac. 645; 79 E.R. 556.
7. 3 Leon. 219; 74 E.R.; affirming the Court of Common Pleas. sub nom Broccus's Case (1587) 2 Leon. 211; 74 E.R. 486.
8. Willes 496 at 497; 125 E.R. 1286 at 1287.
9. Willes 416 at 419; 125 E.R. 1286 at 1288.

It is interesting to compare this case with the earlier case of Mucklestone v. Thomas (1739) Willes 146; 125 E.R. 1103, and, of course, with the case of Hayes v. Bickerstaffe discussed supra.

In Mucklestone v. Thomas, the defendant had covenanted to repair the premises he leased, but the deed went on to state: '5000 slates being found and delivered on the said premises ... (by the plaintiff) for and towards the repairing thereof'. The court did not find it necessary to decide the point, but they did express the opinion that these words 'ought rather to be considered as a covenant than a condition precedent'. The form of the argument in this case is quite consistent with cases such as Thomas v. Cadwallader, and the opinion expressed as to the status of the stipulation is obviously to be explained by the particular facts of the case. It may well be, for example, that the covenant to repair extended to a number of things, the slates to be supplied being needed for only one of these

things. As stated in Thomas v. Cadwallader, the reason for finding a condition precedent in such cases was that the facts showed that the stipulation necessarily qualified a covenant. But if the facts were otherwise, as was probably the case, it was in keeping with contemporary authority to find that a covenant was intended, especially after cases such as Hayes v. Bickerstaffe had emphasised the more flexible method of interpretation with reference to considerations such as suitability of remedies and inequality of damages. For more on this, see post.

10. Y.B. 15 Hen. VII, fol. 10b., plac. 7 (Translated by Langdell). The decision in Clark v. Gurnell (1611) 1 Bul. 167; 80 E.R. 858 in favour of dependency might also thought to be relevant. However, this case involved the actual wording of the defendant's covenant (payment pro tota transfretatione omnium praemissarum) rather than the interpretation of a word such as pro, and is therefore not a strong authority.
11. 7 Co. Rep. 9b; 77 E.R. 425. It should perhaps be noted that the court may have misinterpreted the case of Pool v. Tolcelser, see the observation of Lord Holt in Thorp v. Thorp (1701) 8 Mod. 456 at 461; 88 E.R. 1448 at 1451. Nevertheless, the important point is that the court in Ughtred's Case did understand the case to stand for such a doctrine and did approve of the doctrine.
12. (1639) 1 Rolle's Abr. 415, plac. 8.
13. Wms. Saund. 318 at 320; 85 E.R. 449 at 450.

It should perhaps be noticed that Dr. Stoljar thought that the basis of this decision was not clear, and that perhaps it went on the rule of construction that where a certain day is fixed for the performance of a covenant, that covenant is independent of the consideration for

it. ('Dependent and Independent Promises', 2 Sydney L.R. 217 at 228). With the greatest respect, it is submitted that while such a rule undoubtedly existed, it is quite clear from the extract from Saunders (supra) and also the reports in 1 Levinz 274 and Sir T. Raym. 183 that it was clearly thought that the issue of availability of remedies was sufficient to decide the case.

For a further illustration of the crucial importance of the availability of remedies, see Lock v. Wright (1723) 1 Str. 569; 93 E.R. 703 where the defendant had judgement precisely because the deed was a deed poll and so mutual remedies were not available.

14. 1 Str. 535; 93 E.R. 684.
15. 8 Mod. 173; 88 E.R. 127.
16. 1 Str. 615; 93 E.R. 735. For discussion of this case, see Part III, Chapter 1 post.
17. 2 Str. 712; 93 E.R. 801.
18. This problem of the offer to perform and tender will be discussed post, Part III, Chapter 1.
19. Dawson v. Myer (1726) 2 Str. 712; 93 E.R. 801.
20. Pecke v. Redman 2 Dyer 113 A; 73 E.R. 249. However, the facts of this case are rather unclear and I am not at all confident that the case does stand as authority for the proposition for which it is often cited.

However, Fifoot, History and Sources of the Common Law relies on the case, inter alia, and states, at p.340, that 'the note of a reporter (i.e. in Strangborough v. Warner) in 1589, that a promise against a promise will maintain an action upon the case was remarkable not as a novelty but as the belated recognition of a fait accompli'.



21. 4 Leon 3; 74 E.R. 686.

However, Professor H.R. Lücke has discovered a case, West v. Stowel (1577) 2 Leo. 154; 74 E.R. 437, which is indeed an earlier decision based on mutual remedies. 'Slade's Case and the Origin of the Common Counts' (1965) 81 L.Q.R. at 539. This case will be described post, in part B of this Chapter.

22. See, for examples, Kirby v. Coles (1589) Cro. Eliz. 137; 78 E.R. 384, Whitcalfe v. Jones (1597) Moore K.B. 575; 72 E.R. 768 Gower v. Capper (1597) Cro. Eliz. 543; 78 E.R. 790, Wicals v. Johns (1599) Cro. Eliz. 103; 78 E.R. 938, Bettisworth v. Campion (1608) Yelv. 133; 80 E.R. 90, Nicols v. Raynbred (1614) Hob. 83; 80 E.R. 238, Flight v. Crasden (1625) Cro. Car. 8; 79 E.R. 612.

23. Yelv. 133; 80 E.R. 90.

24. (1670) 1 Lev. 293; 83 E.R. 913.

25. Hob. 88; 80 E.R. 238.

26. 'Dependent and Independent Promises', 2 Syd. L.R. at 217.

27. Ibid.

28. See, for example, R.F.C. Milsom Historical Foundations of the Common Law, Chapter 12.

29. See also on this point, H.R. Lücke, 'Slade's Case and the Origin of the Common Counts' (1965) (pt. 1) 81 L.Q.R. at 425, 426.

30. R.F.C. Milsom Historical Foundations of the Common Law, p. 295.

31. R.F.C. Milsom, Historical Foundations of the Common Law, p. 288.

32. Supra, 4 Leon. 3; 74 E.R. 686.

33. History of the Common Law, Vol. III p.444.

34. A dictum in Norwood v. Read (1558) 1 Plowd. 180; 75 E.R. 277.

35. 'The Place of Slade's Case in the History of Contract' 74 L.Q.R. 381 at 390.

36. This statement is generally true, but there may be an exception. The well known exception to the requirement of actual execution of a promise in the action of Debt is to be immediately noted (this page) and more fully post. It may be, therefore, that before Slade's Case one could not bring an assumpsit on the executory sale of a specific chattel - because Debt was available. If so, Slade's Case certainly removed this difficulty and therefore was directly responsible for an at least partial expansion of the doctrine of enforceable mutual promises.

37. Supra, (1557) Plowd. 180; 75 E.R. 277.

38. With respect, I think that Professor Ames has summed this up as well as anybody:

From the mutuality of the obligations growing out of the parol bargain without more, one might be tempted to believe that the English Law had developed the consensual contract more than a century before the earliest reported case of assumpsit upon mutual promises. But this would be a misconception. The right of the buyer to maintain detinue, and the corresponding right of the seller to sue in debt, were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants - each party's grant of a right forming the quid pro quo for the corresponding duty of the other. Lectures on Legal History, p.77.

39. 4 Co. Rep. 92 b at 94 A; 76 E.R. 1074 at 1077.

40. See too, A.K.R. Kiralfy, The Action on the Case, pp. 166, 167.

41. 81 L.Q.R. 422, 539; 82 L.Q.R. 81.

42. 81 L.Q.R. at p. 540.

43. Cro. Eliz. 703; 78 E.R. 938.

44. 81 L.Q.R. at p.541.

45. Yelv. 133; 80 E.R. 90.

46. 1 Lev. 293; 83 E.R. 913.

47. 1 Lev. 87 at 88; 83 E.R. 311 at 311.
48. Thus, see Gower v. Capper (1597) Cro. Eliz. 543; 78 E.R. 790;  
Spanish Ambassador v. Gifford (1616) 1 Rolle 336; 81 E.R. 526;  
Thorp's Case (1639) March, N.R. 75; 82 E.R. 418; Olive v. Yeames  
(1652) Keb. 333, 342; 83 E.R. 977, 983 (and see sub nom. Oliver v. Evens 1 Lev. 70; 83 E.R. 301).
49. op. cit. 81 L.Q.R. at p. 542.
50. 2 Leon 154; 74 E.R. 437.
51. 81 L.Q.R. at p. 540.
52. (1681) 3 Lev. 41; 83 E.R. 567.
53. Yelv. 133; 80 E.R. 90.
54. Hob. 88; 80 E.R. 238.
55. 'Dependent and Independent Promises', 2 Syd. L.R. at p.227.
56. Discussed supra (1670) 1 Lev. 293; 83 E.R. 413.
57. Supra, Part II at n.37.
58. History of English Law, Vol. 3 p.355.
59. Y.B. 17 Ed. IV. Pasch f. 1 pl. 2. Translated in Fifoot,  
History and Sources of the Common Law, p.252.
60. (1470) Selden Society Vol. 47, p.163; Fifoot,, op. cit., p.251.
61. Ibid.
62. 1 Dyer 29 b; 73 E.R. 65.
63. It is perhaps not necessary to give these details, but as the case is  
a rather difficult one to understand on a first reading they are  
briefly given so that the ground may be cleared for the point with  
which we are concerned.
64. Dyer 75 a. at 76 a; 73 E.R. 160 at 162.
65. Supra, Part II Chap. I.
66. Hob. 39 at 41; 80 E.R. 189 at 190.

67. Supra.
68. Post, at n. 71.
69. 1 Freem. 196; 89 E.R. 139.
70. Perhaps this thought is supported by a matter which Professor Lücke himself explores (though in a different context), the sixteenth century reforms of the law relating to jeofails and mispleadings. As the learned writer states, at p. 557 of 81 L.O.R., the statute of 1540 attacked in stringent terms the practice of overturning juries' verdicts on technical grounds, and exhorted the courts against this practice. Professor Lücke also points out that the statute received a liberal construction by the courts. In the light of all this, it may well be that the courts were well disposed towards using technicalities to defeat technicalities.
71. Supra, at n. 68.
72. 2 Mod. 33 at 34; 86 E.R. 925.
73. Supra, Part II, Chapter II. Sty. 187; 82 E.R. 633.
74. 2 Mod. 34; 86 E.R. 925.
75. 81 L.Q.R. at 542.
76. 1 Lev. 152; 83 E.R. 344. Contrast the decision in Doctor Samways v. Eldsby (1676) 2 Mod. 73; 86 E.R. 949.
77. 2 Wms. Saund. 350 at 352; 85 E.R. 1144 at 1146. Rainsford J. agreed with Hale C.J. but Twysden J. held that the promises were independent, each having a remedy. Although the majority were thus in favour of there being a condition precedent, in the event the case was decided in favour of the plaintiff because his averment that 'he was ready and offered to perform etc.' was a sufficient averment of performance or attempted performance, see post, Part III Chapter 1.
78. Numerous reports are available. For example, 1 Salk, 171; 91 E.R. 157; 1 Ld. Raym. 662; 92 E.R. 722; 1 Com. 98; 92 E.R. 980. The report

in 12 Mod. 455; 88 E.R. 1448 is, however, the most complete and will be referred to here.

79. 12 Mod. 456; 88 E.R. 1448.

80. 12 Mod. 459; 88 E.R. 1450.

81. It must be conceded that a number of commentators do not share my view of the nature or importance of this decision. Dr. Stoljar, for example, in his article 'Dependent and Independent Promises' already referred to stated that in a 'period of total confusion', 'the existing state of conceptual disorganization is best exemplified in Thorp v. Thorp'. With respect, I must disagree. Perhaps Dr. Stoljar's opinion is, however, partially due to his interpretation of the facts of this case which, with the very greatest respect, appears to me to be incorrect. The learned author states, at 2 Sydney L. Rev. 237, that the plaintiff's argument was that 'A could sue B on mutual promises only where these promises were both independent and unperformed, but that A could not perform his promise and still claim that the promises were independent. Once A's promise was performed he could only recover provided he fully averred performance in the same way as if the mutual promises had originally been dependent'. Dr. Stoljar then observes that Holt C.J. accepted this argument, and proceeded from there. With respect, the argument was of a much more narrow and precise nature than this, and was as I have outlined it in the text. It turned on the interpretation of a specific release clause. Holt C.J. held that it would apply to all causes of action perfect before the release was executed but not those after. Therefore, the question was, was there a condition precedent to a perfect cause of action here?

82. 12 Mod. 460; 88 E.R. 1451.

83. It may be tentatively submitted that original inspiration for this idea is to be found in the early executory remedies of Debt and Detinue in the sale of goods situation, discussed supra, part II, Chapter III. In any case, as Dr. Stoljar observed in the article already referred to, the application of such rules to contracts was not new, having been mentioned, for example, in the cases of Oliver v. Eames (1662), 1 Keb. 342; 83 E.R. 933 and Peeters v. Opie (1671) 2 Wms. Saund 350; 85 E.R. 1144. The rules were later to become famous through their incorporation in Serjeant Williams' 'Rules in Pordage v. Cole'.

It seems clear that Holt C.J. did not mean that the rules were to be of an inflexible nature, but only as a guide to the parties' intention. As Jervis C.J. was to observe many years later, '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 relying on their remedy, and not on the performance of the condition; but where you plainly see that it is their intention to rely on the condition and not on the remedy, the performance of the thing is a condition precedent' (Roberts v. Brett (1856) 18 C.B. 561, 573; 139 E.R. 1489, 1494).

84. 12 Mod. at 464; 88 E.R. at 1453.

85. There was the further point that the plaintiff had not specifically pleaded the execution of the release, but only pleaded generally the performance of his obligations. This would have been fatal on demurrer, but as the defendant had 'pleaded over' (i.e. pleaded with regard to the effect of the release rather than its execution), this was taken

after verdict, to be an admission of the execution of the release.

This rule seems to have been already well established: see, in particular, Vivian v. Shipping (1634) Cro. Car. 384; 79 E.R. 935.

86. Holt, K.B. 148; 90 E.R. 980.

87. 1 Salk, 112; 91 E.R. 104.

88. For example, Lord Hardwicke was later to say that '(T)here can be no condition precedent here, for the reasons given; and the resolution in Thorpe v. Thorpe is certainly good law; for these cases do not so much depend on the manner of penning the covenants as the nature of them. ...' (Russen v. Coleby (1733) 7 Mod. 236; 87 E.R. 1213) And Lord Kenyon was later to say of Callonel v. Briggs, 'The case decided by Lord Holt in Salk 112, if indeed so plain a case wanted that authority to support it, shews that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract'. (Morton v. Lamb (1797) 7 T.R. 125 at 129; 101 E.R. 890 at 892. See discussion post, Part III Chapter II).

89. (1773) 2 Doug. 690; 99 E.R. 437.

90. 2 Syd. L.R. at 234.

91. Yelv. 76; 80 E.R. 53.

92. Cro. Eliz. 477; 78 E.R. 728.

93. For the authorities, see Alington v. Yearhner (1607) Cro. Jac. 165; 79 E.R. 144; Codner v. Dalby (1610) Cro. Jac. 363; 79 E.R. 311; Horseman v. Obbins (1621) Cro. Jac. 634; 79 E.R. 546; Dike v. Ricks (1632) Cro. Car. 335; 79 E.R. 893; Knight v. Keech (1691) 4 Mod. 188; 86 E.R. 341.

For technical matters concerning procedure, see Manser's Case (1608) 2 Co. Rep. 3a; 76 E.R. 393.

94. 2 Salk. 498; 91 E.R. 427.

95. Co. Litt. p. 206 b.

96. Supra. Yelv. 76, at 76; 80 E.R. 53 at 53.

97. 1 Dyer 30a; 73 E.R. 66.

98. Cro. Eliz. 480; 78 E.R. 731; 5 Co. Rep. 20b; 77 E.R. 80. See too, Pilkington v. Winnington (1597) 2 Co. Rep. 59a; 76 E.R. 551; Walmond v. Hill (1621) Hutt. 48; 123 E.R. 1091.

99. 2 Bac. Abr. p.162.

100. 3 Com. Abr. p. 120.

1. Cro. Eliz. 694 at 695; 78 E.R. 930 at 930.

2. Hob. 69; 80 E.R. 219.

3. (1624) Hob. 69; 80 E.R. 219. To a similar effect see Anonymous (1622) 2 Rolle's Rep. 238; 81 E.R. 771 where it was held that preparation of a deed (including the application of wax) was not sufficient on the obligor's part to perform his condition of executing a release, for he could have done more i.e. actually affixed his seal, even though the obligee refused to accept the tender of the prepared deed.

4. Per Lord Holt in Lancashire v. Killingworth (1701) 12 Mod. 530; 88 E.R. 1498.

5. Although technical in the extreme and not sufficiently relevant to our topic to warrant close examination, these cases can provide an insight into the approach of the early law to problems of performance and tender. The reader is referred to: Kidwelly v. Brand (1550) 1 Plowd 71; 75 E.R. 113; Eliat and Nutcomb's Case (1556) 3 Leon. 4; 74 E.R. 503; Baroughe's Case (1595) 4 Co. 72 b; 76 E.R. 1042; Maund's Case (1600) 7 Co. Rep. 28 b; 77 E.R. 455; William Clun's Case



(1613) 10 Co. 127 A; 77 E.R. 1117; Cranley v. Kingswell (1617) Hob. 207; 80 E.R. 354.

6. Co. Litt. 210 A.

7. 5 Co. Rep. 22 a; 77 E.R. 84. See also Lamb's Case (1598) Co. Rep. 23 b; 77 E.R. 85 and Baker v. Bulstrode (1673) 1 Vent 255; 86 E.R. 170 and the cases referred to therein.

8. We have already seen that this principle was recognised by Lord Coke in his Institutes, supra, at n. 95.

9. Cro. Eliz. 888 at 889; 78 E.R. 1112 at 1113. This case furnishes a good example of the two-fold inquiry necessitated by the dependency-independency test. First of all, it was argued that the covenants were independent and therefore no allegation of performance was required. This, however, was rejected because the words super solutionem inde manifested a condition precedent. The second question then arose, if the covenants were dependent, what degree of performance was necessary to discharge this condition precedent?

10. For example, see Large v. Cheshire (1691) 1 Vent. 147; 86 E.R. 100; Peeters v. Opie (1671) 2 Wms. Saund. 350; 85 E.R. 1144.

11. 1 Ld. Raym. 440 at 440; 91 E.R. 1192 at 1192.

12. 'Dependent and Independent Promises', 2 Syd. L.R. at p.232.

13. 1 Ld. Raym. 440 at 441; 91 E.R. 1192 at 1192.

14. Op. cit. p.232, n. 113.

15. It should be remembered that there were two covenants by the defendant, one to accept and one to pay for the stock. If the plaintiff wished, as he did here, to sue on the second covenant, he had to satisfy the more stringent tests of performance (and pleading) appurtenant to such a covenant. This is again underlined by the following dictum of the Court with reference to the first covenant:

But the matter in the declaration might have been a good excuse for the plaintiff, if the defendant had sued him for not transferring the Bank-stock: or the plaintiff might have assigned his breach in the non-acceptance of the stock by the defendant. 1 Ld. Raym. 441; 91 E.R. 1192.

16. 12 Mod. 529; 88 E.R. 1498.

17. Ibid., at 531, 1499. There were a number of other cases decided shortly after Lancashire v. Killingworth which further illustrate the rigid requirements of a tender. For example, in Clark v. Tyson (1721) 1 Str. 504; 93 E.R. 663, the plaintiff again sued for non-acceptance of stock. The plaintiff proved that though the books were not open for transfers in the common form on the specified date, they were available at the office and leave could be obtained from a director, such leave usually being granted. The defendant did not appear, and the plaintiff attended all day but did not actually get leave to have the books opened if the defendant should come. It was decided that this omission was fatal to proof of tender. 'And for this omission the Chief Justice ruled it not to be a sufficient tender, for there was a possibility that leave might not be given, and the plaintiff had not done everything in his power: he ought to have prepared matters so that if the defendant had appeared, there might have been a transfer immediately'. See also, Thornton v. Moulton (1722) 1 Str. 533; 93 E.R. 683; Duke of Rutland v. Batty (1726) 2 Str. 777; 83 E.R. 842; Bowles v. Bridges and Markwich (1728) 2 Str. 832; 93 E.R. 880.

18. It is interesting to note that while the substance of this doctrine had not changed, there had been a slight amelioration in the realm of procedure. As we have seen, the slightest error would be fatal on demurrer, but if there was no demurrer and the plaintiff was able to prove his strict performance at the trial, it could not now be argued, after a

verdict, that the declaration was faulty to the same extent that was possible on a demurrer. This distinction was recognised by Lord Holt in his judgement in Lancashire v. Killingworth, in which he gives examples of this doctrine.

19. See too Callonel v. Briggs (1703) 1 Salk 113; 91 E.R. 104.
20. 10 Mod. 153, 189, 222; 88 E.R. 671, 687, 702 sub. nom. Turner v. Goodwyn, Gib. Cas. 40; 93 E.R. 254 sub. nom. Turnor v. Goodwin, Fort. 145; 92 E.R. 796.
21. Supra 1 Wms. Saund 319; 85 E.R. 449.
22. 10 Mod. at 189; 88 E.R. 688.
23. 10 Mod. at 222; 88 E.R. at 702.
24. Fort. 147; 92 E.R. 797.
25. Gibb 41; 93 E.R. 254.
26. Fort. 147; 92 E.R. 787.
27. There were several arguments advanced by the plaintiff for this view. First of all, it was said that assignment of a judgement without consideration would be maintenance, and therefore payment should precede assignment; see Gibb 42; 93 E.R. 254. Secondly, it was attempted to distinguish cases decided with reference to the availability of mutual remedies thus:

Gray's Case in 5 Co. has been much insisted on, but that is not to this purpose, but only proves if the custom had been to have common, paying so much, that those words paying would be part of the custom, because it made the custom conditional, which before was absolute, but says nothing of the priority of the performance.

Such an argument, of course, completely misses the point of the defendant's argument, namely that because there is no remedy, the law strives to construe such words as a condition. Such was certainly the basis of Gray's Case. Counsel for the plaintiffs

undoubtedly realised this, for they also made a submission that there were in fact mutual remedies here, for the plaintiff became a 'trustee to the defendant for the judgement'. (10 Mod. 224; 88 E.R. 700). These arguments were all weak, and none were referred to by the court in giving judgement.

28. 10 Mod. 190; 88 E.R. 188.

29. Fort. 149; 92 E.R. 797.

30. Fort. 149; 92 E.R. 798.

31. Fort. 150; 92 E.R. 798. The result of the case was therefore that the plaintiff had judgement because, the action being a bond, it was up to the defendant to show that he had done all necessary to acquit himself. The defendant did not, we have seen, have to pay the money absolutely (without an assignment), but he did have to tender it sub modo. As he had done nothing at all, he was liable on his bond.

32. Ibid.

33. 1 Str. 458; 93 E.R. 633.

34. 2 Barn. K.B. 308, 337; 92 E.R. 519, 538.

35. As Wray C.J. and Sir Thomas Gawdy J. picturesquely stated at one time, 'as he who is a bastard born hath no cousin, "so every case imports suspicion of its legitimation, unless it hath another case which shall be as a cousin-german, to support and prove it"'. (3 Co. Rep. at 23 a; 76 E.R. at 680).

36. 1 Str. 535; 93 E.R. 684; 8 Mod. 105; 88 E.R. 83. This action appears to be an action of Debt brought for a penalty, rather than an action of Covenant. However, the penalty was for non-performance of a covenant, and therefore the question of dependency/independency was again in issue, for if dependent the defendant could be called upon to perform a covenant until the condition precedent to the covenant had been performed.

37. Supra, at n. 11, 1 Ld. Raym. 440; 91 E.R. 1192.
38. Supra, at n. 16, 12 Mod. 529; 88 E.R. 1498.
39. 1 Str. 535; 93 E.R. 684.
40. 2 Str. 712, 93 E.R. 801. Court of King's Bench affirmed in the Exchequer Chamber.
41. Supra, at n. 11 1 Ld. Raym. 440; 91 E.R. 1192.
42. That there was a fair degree of uncertainty in the law of this period is illustrated by the disposition of this case. The Court of Common Pleas reasoned that as the money was to be paid for the stock, a legal tender was necessary. This being so, judgement went to the defendant because the tests of tender were not complied with on the record. On error, the Court of King's Bench found for the plaintiff by holding that a tender was in any event unnecessary, because the covenants were independent, for the reasons given in the extract reproduced. However, it appears from a report in 1 Brown P.C. 215; 1 E.R. 523, that a writ of error in Parliament was then brought, and the House of Lords reversed the King's Bench. The reasons for this are, unfortunately, not given.
43. Supra, at n. 16 12 Mod. 529; 88 E.R. 1498.
44. 2 Doug. 690; 99 E.R. 437.
45. 2 Doug. 684; 99 E.R. 434.
46. 2 Doug. 690 at 691; 99 E.R. 437 at 437.
47. 2 Sydney L.R. at p. 238 f.n. 161, p. 239 f.n. 163.
48. Supra, at n. 2.
49. Supra, at n. 1.
50. 2 Doug. 684 at 695; 99 E.R. 434 at 440.
51. Ibid., at 694, 440.
52. Ibid., at 695, 440.

53. In Kingston v. Preston there had been virtually no discussion of the real nature of a concurrent condition, for the stipulation was there held to be a condition precedent. Similarly, in Jones v. Barkley it was unnecessary to discuss the requirements of a concurrent condition because it was clear that the plaintiff had done nothing at all towards performance. It is true that there had been some discussion in Turner v. Goodwin where it was resolved that a party must discharge his own concurrent condition by making a tender sub modo, but this case never had exerted a great deal of influence, possibly because it was concerned with a bond rather than the more difficult performatory problems which arose in connection with bilateral contracts of sale.
54. 2 H. Bl. 123 at 126; 126 E.R. 464 at 466.
55. Supra, 12 Mod. 455; 88 E.R. 1448.
56. Supra, 1 Salk, 112; 91 E.R. 104.
57. Supra, Cro. Eliz. 888; 78 E.R. 1112.
58. Supra, 12 Mod. 529; 88 E.R. 1498.
59. Supra, 1 Vent. 147; 86 E.R. 100.
60. Supra, Hob. 69; 80 E.R. 219.
61. Per Lord Loughborough, 2 H. Bl. 123 at 131; 126 E.R. 464 at 469.
62. 4 T.R. 761; 100 E.R. 1288.
63. 7 T.R. 125 at 128; 101 E.R. 890 at 892.
64. Ibid. at 129, 892.
65. Ibid., at 131, 893.
66. Supra, 10 Mod. 153, 189, 222; 88 E.R. 671, 687, 702. Gilb. Cas. 40; 93 E.R. 254.
67. 1 Str. 458; 93 E.R. 633.
68. 1 East 203 at 207; 102 E.R. 79 at 81.
69. Ibid. at 208, 81.

70. Ibid. , at 210, 82.
71. Ibid., at 211, 82.
72. For example, Dr. Stoljar observes, after referring to the case of Morton v. Lamb, that in Rawson v. Johnson, 'Yet Le Blanc, J., blandly asserted that a mere averment of "ready and willing" was enough'. "Dependent and Independent Promises" 2 Syd. L.R. at 241. Dr. Stoljar's statement of how the two cases should be rationalised in view of the present day substantive law is good: 'In Rawson, the buyer by especially requesting delivery had shown his readiness to take and thereby also to pay for the goods; in Morton, the buyer only complained by action that the seller had not delivered. So combined, the two decisions indeed produce a sound and convenient rule. Obviously, a party should not be able to protest ex post facto that he was ready to perform or pay; he should give a clear indication of his readiness at the appropriate time and place. Ibid.
73. Over the twenty years following Rawson v. Johnson the old arguments in favour of defendants were still advanced, but they were now decisively rejected on the authority of Rawson v. Johnson. Thus in Waterhouse v. Skinner (1801) 2 B. & P. 447; 126 E.R. 1377, Serjeant Marshall, who had been so successful in Phillips v. Fielding, again put forward the same argument, but this time it was rejected. For further examples and discussion, see Martin v. Smith (1805) 6 East 555; 102 E.R. 1401; Levy v. Lord Herbert (1817) 7 Taunt. 314; 129 E.R. 126; Ferry v. Williams (1817) 8 Taunt. 62; 129 E.R. 305.
74. 1 Wms. Saund. 314; 85 E.R. 449.
75. Supra, p. 43; Owen 54; 74 E.R. 894.
76. 2 W. Bl. 1312; 126 E.R. 160.