

## Discharge for Breach of the Contract of Sale of Goods

Michael G. Bridge\*

The *Sale of Goods Act* has created difficulties for the application of general breach of contract principles to sales contracts. The author examines the evolution of the Anglo-Canadian doctrine of conditions and warranties, dictated by a search for certainty and a desire to transfer questions of discharge for breach from the jury to the judge. He explores the statutory enshrinement of this doctrine and analyses the problem of relating this statutory regime to changes in the general law favouring flexibility and justice in the individual case. The author also examines the foundations of the doctrine of conditions and warranties, namely the principles of dependency of promises, concerned with contractual construction, and failure of consideration, which dealt with the effects of breach on the contractual adventure. Further, he investigates the effects, on the seller's duty of delivery, and the buyer's duties of acceptance and payment, of the failure to articulate them in the language of conditions and warranties. Ultimately, the author's purpose is to explain and criticise the evolution of sales and general contract law in order that the sale of goods contract can be seen as an offshoot of the general law, rather than as a statutory mutation, thus producing that understanding which is indispensable to any reform of sales law.

Le *Sale of Goods Act* a rendu difficile, dans les juridictions de *common law*, l'application des principes généraux du droit contractuel aux contrats de vente. L'auteur examine l'évolution de la doctrine anglo-canadienne des conditions et garanties, motivée par la recherche de la certitude et le désir de voir ces questions déterminées par un juge plutôt que par un jury. Il étudie l'enchâssement statutaire de cette doctrine et analyse le problème d'adapter ce régime statutaire à l'évolution du droit en général vers la flexibilité et la justice dans les cas individuels. L'auteur examine aussi les fondements de la doctrine des conditions et garanties, notamment, les principes de la réciprocité des engagements, traitant de l'interprétation contractuelle, et de l'absence de cause, traitant de l'effet de l'inexécution d'une obligation sur l'entreprise contractuelle. Il constate aussi l'importance pour les parties d'articuler comme conditions et garanties du contrat les obligations du vendeur, de livrer la chose, et de l'acheteur, de l'accepter et d'en payer le prix. L'objectif de l'auteur est d'expliquer et de critiquer l'évolution des droits de la vente et des contrats en général, afin de démontrer que le premier n'est pas une création statutaire autant qu'un sous-produit du droit commun. Toute réforme du droit de la vente repose sur la compréhension de cette donnée essentielle.

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\*Of the Faculty of Law, McGill University.

## *Synopsis*

### Introduction

- I. Development of the Law Before the *Sale of Goods Act*: The Emergence of Conditions and Warranties
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### Introduction

In a lecture delivered recently in Canada, Lord Diplock criticised the *Sale of Goods Act*<sup>1</sup> for its influence in "preventing the development of [sales] law from meeting the changes in society and recent business methods".<sup>2</sup> Prominent in his Lordship's mind was the *Act's* division of contractual terms into conditions and warranties, which, he observed, was done only in the case of the seller's obligations.<sup>3</sup> To this observation one might add that not all of the seller's obligations are classified in this way: the *Act* says nothing about the seller's duty of timely delivery, though the seller's duty to deliver and the buyer's duty to pay for the goods are treated as mutual and concurrent conditions.<sup>4</sup>

The purpose of this paper is twofold: first, to examine the origins of the doctrine of conditions and warranties and to discuss the stresses and strains

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<sup>1</sup>The *Sale of Goods Act* was first passed by the United Kingdom Parliament as 56 & 57 Vict., c. 71 (U.K.). The Canadian common law provinces and the territories all have legislation modelled closely on the U.K. *Act*. See R.O.Y.T. 1958, c. 97 [the *Act* appears in the Revised Ordinances of the Yukon 1971 as c. S-1]; R.O.N.W.T. 1974, c. S-2; R.S.B.C. 1979, c. 370; R.S.A. 1980, c. S-2; R.S.S. 1965, c. 388; R.S.M. 1970, c. S-10; R.S.O. 1980, c. 462; R.S.N.B. 1973, c. S-1; R.S.N.S. 1967, c. 274 [the *Act* appears in the Consolidated Statutes of N.S. as c. S-2]; R.S.P.E.I. 1974, c. S-1; R.S.N. 1970, c. 341. Unless otherwise indicated, references in this paper will be to the provisions of the Ontario *Act*.

<sup>2</sup>Diplock, *The Law of Contract in the Eighties* (1981) 15 U.B.C.L. Rev. 371, 373-4.

<sup>3</sup>*Ibid.*, 375.

<sup>4</sup>*Sale of Goods Act*, s. 27.

imposed upon the law governing sales of goods by the incorporation of this doctrine into the *Sale of Goods Act*;<sup>5</sup> and secondly, to analyze the law governing the interlocking obligations of the seller to deliver the goods and of the buyer to accept and pay for the goods, as well as to perform certain acts to enable the seller to make delivery.<sup>6</sup> These issues have been complicated by the collision in recent years of the doctrine of conditions and warranties and the so-called doctrine of intermediate stipulations against the background of a *Sale of Goods Act* which makes no provision for the latter doctrine. In this paper, an attempt will be made to reconcile the two doctrines in the modern law of sale of goods and the argument will be advanced that the law is in the process of returning to basic principles from which it departed shortly before the passing of the *Sale of Goods Act*. In the process, particular attention will be paid to the recent decision of the House of Lords in *Bunge Corp. v. Tradax Export S.A.*<sup>7</sup> which has made a significant contribution to this area of the law.

The starting point in an analysis of the *Sale of Goods Act's* treatment of contractual terms and breach of contract is subs. 12(1):

Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.

The subsection appears to treat all terms of a contract of sale as either conditions or warranties, an impression compounded by s. 1. This, the definition section, contains no reference at all to conditions, and defines warranty as:

[A]n agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated.

In sum, the *Sale of Goods Act* contemplates two types of remedy and two types of term in its scheme of remedies for breach in subs. 12(2). The definition section deals only with warranties and, consequently, one is led by inference to the position that conditions must be the residuum of contractual obligations, namely those promissory terms that are *not* collateral to the main purpose of the contract. This simple, binary view of contractual terms leads to the conclusion that even trivial breaches of a condition justify the innocent party in terminating the contract (entitlement to regard the guilty party's

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<sup>5</sup>In s. 12.

<sup>6</sup>*Sale of Goods Act*, ss 26 and 27.

<sup>7</sup>[1981] 2 All E.R. 513 (H.L.), *aff'g* the decision of the Court of Appeal, which had reversed the decision of Parker J. (all reported at the same citation).

behaviour as a repudiation of the contract is statutory shorthand for this right), whereas not even breaches of warranty causing substantial injury will confer such a right.

The above conclusion is reinforced by the way the *Act* classifies certain implied terms. Thus the seller's obligations regarding his right to sell,<sup>8</sup> description,<sup>9</sup> merchantable quality,<sup>10</sup> fitness for purpose,<sup>11</sup> and sample<sup>12</sup> are treated as conditions; quiet possession<sup>13</sup> and freedom from encumbrances,<sup>14</sup> on the other hand, are classified as the subject matter of warranties. In addition, the seller's duty to tender the contractually agreed quantity is clearly, though not explicitly, treated as a condition.<sup>15</sup> If the picture so far seems clear, it is clouded somewhat by s. 11:

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale, and whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

If one recognizes in s. 11 a cryptic reference to the seller's duty of timely delivery, as well as to ancillary duties of the buyer relating, for example, to acceptance of the goods, s. 11 states unhelpfully that the status of these time provisions is a matter of construction of the contract, the *Act* adopting a neutral stance towards them, while time of payment obligations are presumptively deemed not to be of the essence unless the contract provides otherwise. To those who had hoped that breach of contract in sale of goods cases would be a simple topic, s. 11 sounds the warning bell. First of all, it uses the mysterious language of "the essence of the contract", instead of the terms "conditions" and "warranties". Secondly, in view of the fact that the draftsman sought faithfully to record sale of goods law at the time he drew up the

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<sup>8</sup> *Sale of Goods Act*, subs. 13(a).

<sup>9</sup> *Sale of Goods Act*, s. 14.

<sup>10</sup> *Sale of Goods Act*, s. 15.2.

<sup>11</sup> *Sale of Goods Act*, s. 15.1.

<sup>12</sup> *Sale of Goods Act*, s. 16.

<sup>13</sup> *Sale of Goods Act*, subs. 13(b).

<sup>14</sup> *Sale of Goods Act*, subs. 13(c).

<sup>15</sup> *Sale of Goods Act*, s. 30. The section speaks of the buyer's right to reject goods. It could be argued, therefore, that s. 30 implicitly recognizes the right of a defaulting seller to make a cure of a defective tender of goods. The *Sale of Goods Act* can be faulted for failing to relate clearly the buyer's right to reject goods to his right to terminate the contract. Consequently, any right to cure on the part of the defaulting seller is neither clearly spelt out nor denied by the *Act*. In contrast to the *Sale of Goods Act*, the draft *Sale of Goods Bill* contained in the Ontario Law Reform Commission, *Report on Sale of Goods* (1979), Appendix I, includes an explicit and extensive cure provision in s. 7.7. A similar provision, also s. 7.7, is contained in the Uniform *Sale of Goods Act*. See Uniform Law Conference of Canada, *Proceedings of the Sixty-Third Annual Meeting* (1981), Appendix S, reprinted in Alberta Institute of Law Research and Reform, *The Uniform Sale of Goods Act* (1982) 184-94 and 287-8 (Report No. 38).

*Act*,<sup>16</sup> the very brevity of s. 11 alerts us to the possibility of undisclosed difficulties in this area of sale of goods law. Thirdly, the section speaks only of the *time* when something is to be done; it does not address the very performance of the obligation in question. Williston once said that it is “desirable to distinguish between a breach of promise to do a thing and a breach of promise as to the time when it shall be done”.<sup>17</sup> Nowhere is it more desirable than here. If the buyer’s duty of timely payment is a warranty, that is, not of the essence of the contract, does this mean that, even if he never pays, the seller is unable to terminate the contract? Or is there a distinction to be drawn between non-payment and late payment? If there were, would it be possible to permit the seller to terminate the contract where the buyer’s failure to pay amounts to a repudiation of the contract or goes to the root of the consideration bargained for by the seller? If the right to terminate exists in the case of non-payment, at what point does late payment become non-payment? Regardless of how obvious the answers to these questions are,<sup>18</sup> the fact that they have to be asked shows that the simple condition-warranty distinction formulated by subs. 12(2), which classifies terms at the time the contract is entered into, cannot resolve the problems posed by late payment and non-payment. Finally, whereas s. 11 appears to contemplate that the buyer’s duty of timely payment is less strict than the seller’s duty of timely delivery, how can this possibly be reconciled with s. 27, which states the presumptive rule that payment and delivery are concurrent conditions?

The reform of sale of goods law has been debated exhaustively by law reform agencies in Canada in recent years<sup>19</sup> and a substantial statutory reform is likely to occur in at least some common law provinces<sup>20</sup> in the foreseeable future. If such a reform follows the lead established by the Uniform Law Conference of Canada, it will cast breach of contract into a mould so radically different from the present one that an extensive discussion of these reform

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<sup>16</sup>Introduction to first edition of M. Chalmers, *The Sale of Goods Act, 1893* (1894), reprinted in the 7th ed. (1910) vii.

<sup>17</sup>S. Williston & G. Thompson, *A Treatise on the Law of Contracts*, rev’d ed. (1936), vol. III, para. 845.

<sup>18</sup>A good discussion of the difficulties posed by late performance is to be found in the judgment of Devlin J. in *Universal Cargo Carriers Corp. v. Citati* [1957] 2 Q.B. 401, [1957] 2 All E.R. 70 [hereinafter cited to Q.B.], *aff’d* [1958] 2 Q.B. 254, [1958] 3 All E.R. 234 (C.A.). In a case dealing with, *inter alia*, the duty of a voyage charterer to load a cargo, he said, at 430:

[A] party to a contract may not purchase indefinite delay by paying damages and a charterer may not keep a ship indefinitely on demurrage. When the delay becomes so prolonged that the breach assumes a character so grave as to go to the root of the contract, the aggrieved party is entitled to rescind.

<sup>19</sup>See, e.g., Ontario Law Reform Commission, *supra*, note 15; Uniform Law Conference of Canada, *supra*, note 15; and Alberta Institute of Law Research and Reform, *supra*, note 15.

<sup>20</sup>See Alberta Institute of Law Research and Reform, *ibid.*

initiatives cannot be integrated into the text of this paper.<sup>21</sup> But because the reform of existing law cannot confidently be predicted in the near future and, in any case, one cannot be certain of the form it will eventually take, and because it would be unrealistic to expect provincial governments to attach a high priority to sales of goods law on their legislative agendas, an extended analysis of the present law remains in order.

Enough has been said so far about existing law to show that the subject of breach of the sale of goods contract requires far more than a mere reading of the *Sale of Goods Act* if it is to be understood. In his celebrated judgment in *Bank of England v. Vagliano Bros*,<sup>22</sup> Lord Herschell advocated a conservative approach to the treatment of pre-codification case law. Such decisions, he said, should be resorted to only if the text of the codifying statute was unclear or if it contained technical expressions that could be clarified by looking at the earlier cases.<sup>23</sup> Over an extended period, the image of clarity projected by a codifying statute tends to break down as problems come to light in its implementation. This observation is particularly true of those provisions in the *Sale of Goods Act* dealing with breach of contract. An extensive analysis of the law's development in the years preceding the passage of the United Kingdom *Sale of Goods Act* is therefore indispensable and will be undertaken in Part I of this paper.

## I. Development of the Law Before the *Sale of Goods Act*: The Emergence of Conditions and Warranties<sup>24</sup>

This Part deals with two separate principles that came to be incorporated in the doctrine of conditions and warranties enacted in the *Sale of Goods Act*. The first of these principles was that of the dependence of contractual promises, which dealt with the order of performance of the parties' obligations under an executory contract; the second principle was that of failure of consideration, which was typically concerned with the effect of breach on a contract that had been executed at least in part. The former principle was therefore concerned with non-performance and the latter with defective or incomplete performance. It will be demonstrated that these principles operated with different degrees of stringency. Put simply, it was easier for a party

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<sup>21</sup>The innovation lies in the combination of breach and cure principles. In the opinion of the Committee on Sale of Goods which reported to the Sixty-Third Annual Meeting of the Uniform Law Conference of Canada (see *supra*, note 15), a broad cure entitlement on the part of a defaulting seller justified extensive rejection and termination rights on the part of a buyer if a cure were not forthcoming.

<sup>22</sup>[1891] A.C. 107, [1891-4] All E.R. Rep. 93 (H.L.).

<sup>23</sup>*Ibid.*, 145.

<sup>24</sup>See C. Morison, *Rescission of Contracts* (1916).

to resist performance because a condition precedent to his duty to perform had not been satisfied than it was to resist further performance or to rescind the contract on the ground that there had been a failure of consideration. The fusion of these essentially different principles in a unified doctrine of conditions and warranties, accomplished through the medium of party intention, created tensions in the law which came to the surface with the decision of the English Court of Appeal in *Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha*<sup>25</sup> in 1962.

The decision of the Court of King's Bench in *Kingston v. Preston*<sup>26</sup> in 1773 will be used as the focal point for an exposition of the principle of dependent promises; *Boone v. Eyre*,<sup>27</sup> decided by the same Court in 1777, will illustrate failure of consideration and highlight the differences between this principle and the dependent promises principle.

The origin of the principle of dependent promises can be traced to the rise of *assumpsit* in the sixteenth century. Prior to that time, what we would now call contractual actions were usually enforced by the writs of debt and covenant,<sup>28</sup> which did not address themselves to the mutual promissory relationship engendered by a consensual transaction. Debt was concerned with the liability to pay a liquidated sum by someone who had received a *quid pro quo* and it was not confined to what we would now call contractual relationships;<sup>29</sup> covenant dealt with the obligation to perform individual promises under seal. *Assumpsit* introduced the idea that contractual promises are binding because each is consideration for the other.<sup>30</sup> It therefore linked together the parties' promises in a state of mutual interdependence so as to produce a contract that was binding from the moment of formation. Though it might appear obvious to us that if the parties' principal obligations are mutually dependent at the moment of formation, so should they also be when the time comes for them to be performed, it was not until *Kingston v. Preston* that this link between formation and performance can be said to have been

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<sup>25</sup> [1962] 2 Q.B. 26, [1962] 1 All E.R. 474 (C.A.) [hereinafter cited to Q.B.].

<sup>26</sup> Decided in 1773, as related by counsel for the plaintiff in *Jones v. Barkley* (1781) 2 Dougl. 684, 689-91, (1781) 99 E.R. 434 (K.B.) [hereinafter cited to Dougl.].

<sup>27</sup> (1777) 1 H. Bl. 273, (1777) 126 E.R. 160 (K.B.).

<sup>28</sup> See A. Simpson, *A History of the Common Law of Contract* [:] *The Rise of the Action of Assumpsit* (1975); S. Milsom, *Historical Foundations of the Common Law*, 2d ed. (1981); C. Fifoot, *History and Sources of the Common Law* [:] *Tort and Contract* (1949); T. Plucknett, *A Concise History of the Common Law*, 5th ed. (1956); J. Baker, *An Introduction to English Legal History*, 2d ed. (1979); and S. Stoljar, *A History of Contract at Common Law* (1975).

<sup>29</sup> See *United Australia, Ltd v. Barclays Bank, Ltd* [1941] A.C. 1, 26 (H.L.) per Lord Atkin.

<sup>30</sup> See *Norwood v. Norwood and Read* (1558) 1 Plowden 180, 182, (1558) 75 E.R. 277 ("every contract executory is an *assumpsit* in itself"); and *Slade's Case* (1602) 4 Co. Rep. 92(b), (1602) 76 E.R. 1074 (K.B.).

decisively made. Thus, in the early *assumpsit* case of *Nichols v. Raynbred*,<sup>31</sup> where Nichols agreed to sell a cow to Raynbred for fifty shillings, Nichols was able to sue Raynbred on his promise to pay without having to aver that he had delivered the cow. If the cow were not delivered, the proper course for Raynbred would be, not to resist payment, but to pay and bring a separate cross action for damages for Nichols's non-delivery.<sup>32</sup>

Until the late eighteenth century, the law tended to interpret contractual promises as independent unless the parties used express language of dependency in the contract or linked the promises explicitly,<sup>33</sup> but Lord Mansfield in *Kingston v. Preston* swept aside the language of formalism evident in the earlier cases and extended the inquiry to the implied intention of the parties. In that case, the defendant covenanted to surrender his business to a partnership consisting of his own nominee and the plaintiff, the latter covenanting in return to pay on an instalment basis for the stock-in-trade. The plaintiff promised to provide security for his covenant to pay but, before doing so, brought the present action against the defendant on the defendant's covenant. It was the plaintiff's contention that his covenant to provide security was independent, so that the defendant could not set up its non-performance as a bar to his own obligation to perform. The defendant, on the other hand, pleaded that the plaintiff's duty to provide security operated as a condition precedent to his own obligation to surrender the business and the Court so held. In Lord Mansfield's view, the question turned on "the evident sense and meaning of the parties"<sup>34</sup> as to the order in which the transaction required that the promises be performed. He divided promises into three categories: independent promises, where a failure by one party to perform does not release the other party from his obligation though it does give him a claim for damages; dependent promises, where a party's promise is dependent upon the prior performance of his promise by the other party; and concurrent dependent promises, where a party's promise is dependent upon prior performance of his promise by the other party and *vice versa*.<sup>35</sup> A party

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<sup>31</sup>[1615] Hobart 88, (1615) 80 E.R. 238 (K.B.).

<sup>32</sup>"Under the old common law a defendant who had any cross-claim against the plaintiff could not raise it in the plaintiff's action: he had to bring a cross-action. But two statutes . . . were passed in the reign of George II, which enabled *mutual debts* to be set off; the scope of these statutes was, however, somewhat limited." D. Casson & L. Dennis, eds, *Oggers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 22d ed. (1981) 199.

<sup>33</sup>See, e.g., *Pordage v. Cole* (1669) 1 Wms Saund. 319, (1669) 85 E.R. 449 (K.B.) [hereinafter cited to Wms Saund.].

<sup>34</sup>*Supra*, note 26, 691.

<sup>35</sup>Morison, *supra*, note 24, 61-9, stresses that Lord Mansfield was dealing with *covenants*, i.e., promises under seal, rather than with express promises at large. It is submitted, however, that there is no need to confine Lord Mansfield's language and principles in this way.

seeking to enforce another's promise was required to aver performance of all conditions precedent to that promise. Concurrent dependent promises therefore raised an obvious problem of circularity, but this was resolved by allowing each party to aver that he was ready and willing to perform as a condition precedent to recovery against the other.<sup>36</sup>

If the principle of dependent promises were applied to the limits of its logic, then a party who had failed to perform in full a promise operating as a condition precedent to the other's obligation to perform would have been unable to bring suit. In his famous notes on the decision in *Pordage v. Cole*,<sup>37</sup> published in 1798, Serjeant Williams nevertheless asserted that this was not the rule:

[W]here a person has received a *part* of the consideration for which he entered into the agreement, it would be unjust that because he has not had the *whole*, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him at his remedy to recover any damage he may have sustained in not having received the whole consideration. . . . Therefore, if an action be brought on a covenant or agreement contained in articles of agreement or other executory contract where the whole is future, it seems necessary to aver performance in the declaration of the whole, or at least of part of that which the plaintiff has covenanted to do; or at least it must be admitted by the plea that he has performed part.<sup>38</sup>

Why an injured party should more readily be confined to a damages claim in the event of a breach can be explained by reference to *Boone v. Eyre*.<sup>39</sup>

That case concerned the conveyance of a West Indian plantation, together with the slaves on it, in consideration for £500 and an annuity of £160 for life. The defendant declined to pay the annuity on the ground that at the time of the deed of conveyance the plaintiff was not lawfully possessed of the slaves. Upon general demurrer, judgment was given for the plaintiff. The breach pleaded by the defendant went only to part of the consideration he bargained for. Consequently, a failure by the plaintiff to transmit title to the slaves would not excuse the defendant from paying the annuity, but would instead be compensable in damages. Though there was nothing in the tersely reported language of the Court to justify it, Serjeant Williams attached great weight to the fact that the contract had been executed in part: "But as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the

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<sup>36</sup> See *Jones v. Barkley*, *supra*, note 26.

<sup>37</sup> *Supra*, note 33. Serjeant Williams's notes follow the report of the case in the first editions of the Williams Saunders Reports, published in 1798.

<sup>38</sup> *Ibid.*, 320.

<sup>39</sup> *Supra*, note 27. See also *Campbell v. Jones* (1796) 6 T.R. 570, (1796) 101 E.R. 708 (K.B.).

plantation, and yet refuse payment, because A. had not a good title to the negroes.”<sup>40</sup>

This comment of Serjeant Williams points to shortcomings in the law of quasi-contract at that time. *Cutter v. Powell*,<sup>41</sup> decided three years before Serjeant Williams’s notes were published, asserted the principle that quasi-contractual recovery on a *quantum meruit* basis would not be available in respect of a deceased seaman’s services where this was inconsistent with the terms of an open, that is to say, unrescinded, contract.<sup>42</sup> Put in the context of *Boone v. Eyre*, this approach would mean that the seller could not recover the value of what he had conveyed on a *quantum valebat* basis, nor compel performance of the buyer’s obligation to pay the annuity, if the seller’s obligation to transfer a good title to the plantation and slaves were treated as a condition precedent to the buyer’s duty to perform. The obvious injustice of such a result explains why the Court in *Boone v. Eyre* invoked the principle of failure of consideration, not satisfied on the facts of the case, so as to permit the defaulting party to recover on the contract. But to what extent did this approach qualify the dependent promises principle?

In answering this question, reference can be made to the later case of *Duke of St Albans v. Shore*.<sup>43</sup> This was an action in debt for a penalty of £500. The parties agreed on the purchase by the defendant of a farm which was to be paid for by a sum of £2,594 and a conveyance of certain property belonging to the defendant on the following Lady Day. The defendant declined to complete and pleaded that “the . . . duke cut down . . . 500 . . . timber trees, 500 . . . elms and 500 . . . willow trees”<sup>44</sup> between the date of the contract and Lady Day. The Court found for the defendant. According to Lord Loughborough, delivering the judgment of the Court: “It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant, . . . he is not entitled to maintain the action.”<sup>45</sup> Such a punctilious standard of performance, which requires strict compliance with conditions precedent, is obviously inconsistent with the laxer standard

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<sup>40</sup>*Supra*, note 33, 320.

<sup>41</sup>(1795) 6 T.R. 320, (1795) 101 E.R. 573 (K.B.) [hereinafter cited to T.R.].

<sup>42</sup>*Ibid.*, 325, *per* Ashhurst J.:

This is a written contract, and it speaks for itself. And as it is entire, and as the defendant’s promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive any thing under it. It has been argued however that the plaintiff may now recover on a quantum meruit: but she has no right to desert the agreement; for whenever there is an express contract the parties must be guided by it. . . .

<sup>43</sup>(1789) 1 H. Bl. 270, (1789) 126 E.R. 158 (C.P.) [hereinafter cited to H. Bl.].

<sup>44</sup>*Ibid.*, 272. If the Duke’s deprecations had not taken place in such an ordered, classical age, they would doubtless have assumed asymmetrical proportions.

<sup>45</sup>*Ibid.*, 278.

laid down in *Boone v. Eyre*, yet the Court in *Duke of St Albans v. Shore* itself did not see any difficulty in reconciling the two cases. It did so by citing the inequality of damages argument<sup>46</sup> by which a promise would be held not to be a condition precedent if to hold that it were would impose a prejudice on the defaulting party out of proportion to the loss actually suffered by the injured party. Thus, in *Boone v. Eyre*, the loss that would have been suffered by the defaulting plantation owner if his promise had been treated as a condition precedent to the buyer's promise to pay the annuity would far have exceeded the loss suffered by the buyer in obtaining defective title to some of the slaves.<sup>47</sup>

The inequality of damages argument is clearly cut from the same cloth as Serjeant Williams's argument that a party who has received a benefit under an executed contract should be confined to a damages action.<sup>48</sup> It mirrors the execution argument when the injured party's benefit can be translated into the disproportionate loss of the defaulting party, but it has potentially a broader field of application than the execution argument since it is not temporally confined to the point at which a contract ceases to be purely executory. The inequality of damages argument might conceivably have been prayed in aid by those incurring great expense in preparing for performance without yet having tendered performance.<sup>49</sup>

The inequality of damages and execution arguments were also employed in later cases in drawing a distinction for the purpose of discharge between executory and executed contracts. Two cases, *Ellen v. Topp*<sup>50</sup> and *Graves v. Legg*,<sup>51</sup> can be used for illustrative purposes. In *Ellen v. Topp*, the master of a deserting infant apprentice brought an action against the apprentice's father on their indenture of apprenticeship. The father pleaded in defence that the infant left the master's service after the master, who carried on the trades of auctioneer and appraiser, gave up the trade of contractor. Though the dispute

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<sup>46</sup>*Ibid.*, 279.

<sup>47</sup>*Cutter v. Powell*, *supra*, note 41, is hard to reconcile with the picture of the law thus established by *Boone v. Eyre* and *Duke of St Albans v. Shore*. In the former case, the widow of a deceased seaman was unable to recover for services he had rendered for most of the distance between the West Indies and the port of destination, Liverpool. It seems a clear case for the application of the inequality of damages argument (or the execution benefit principle) unless one concludes that the very high rate of remuneration justified the inference that the seaman had assumed the risk of non-payment for failure to complete the voyage. Indeed, Lord Kenyon C.J., at 324, stressed that the deceased's contractual stipulation was "a kind of insurance".

<sup>48</sup>*Supra*, note 33, 320.

<sup>49</sup>But see *Ritchie v. Atkinson* (1808) 10 East 295, (1808) 103 E.R. 787 (K.B.).

<sup>50</sup>(1851) 6 Ex. 424, (1851) 155 E.R. 609 [hereinafter cited to Ex.].

<sup>51</sup>(1854) 9 Ex. 710, (1854) 156 E.R. 304 [hereinafter cited to Ex.], *rev'd* on other grounds *sub nom. Greaves v. Legg* (1856) 11 Ex. 642, (1856) 156 E.R. 988, which was *aff'd sub. nom. Graves v. Legg* (1857) 2 H. & N. 210, (1857) 157 E.R. 88 (Ex. Ch.).

arose some time into the period of indenture, the Court, not without some difficulty, treated the contract as though it were severable and therefore executory<sup>52</sup> for the purpose of applying the dependency principle:

If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think, have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable in futuro, yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve.<sup>53</sup>

Although it adhered to Serjeant Williams's execution argument, the Court was at pains to say that the mere fact of some performance, and hence the receipt of some benefit by the injured party, would not prevent there arising a failure of consideration. Referring to *Boone v. Eyre*, it observed that if "two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it".<sup>54</sup>

*Graves v. Legg* concerned a contract that was more obviously executory than the one in *Ellen v. Topp*. The parties agreed on the sale of a quantity of fleece wool shipped at Odessa for carriage to an English port. The seller undertook, *inter alia*, that he would declare the names of the vessels as soon as the wool was shipped. The defendants refused to accept the wool and pleaded the failure of the plaintiff to declare the names of the ships within the agreed time. It appeared from the defence that the wool was destined for resale, that it could not be sold until the names of the ships were known, and that the market had fallen by the time the defendants were apprised of the vessels' names. Counsel for the defendants laid emphasis on the fact that his clients had declined tender and had received no benefit from the contract.<sup>55</sup> Baron Parke delivering the judgment of the Court in favour of the defendants, observed:

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<sup>52</sup> By matching the early services of the apprentice against his early instruction, both parties started with a clean slate with regard to future services and instruction. On the distinction between entire and severable contracts, see G. Treitel, *The Law of Contract*, 5th ed. (1979) 594-9.

<sup>53</sup> *Supra*, note 50, 442.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Graves v. Legg*, *supra*, note 51, 714.

[T]he reason of the decision in [*Ellen v. Topp*] and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may have sustained in not having received the whole consideration. Mr. Serjt. Williams goes on to observe, that it must appear on the record that the consideration was executed in part.<sup>56</sup>

Construing the contract and the nature of the enterprise, the Court held that the seller's obligation to declare the vessels' names was a condition precedent and that nothing had subsequently occurred to alter the position. Consequently, the defendants were excused from accepting the seller's tender of the wool.

Since the inequality of damages and the fact of execution had such a marked effect on the remedial position of the injured party,<sup>57</sup> what needs to be considered now is how precisely the principles of dependence of contractual promises and failure of consideration were reconciled when they came to be incorporated in a unified doctrine of conditions and warranties.

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<sup>56</sup>*Ibid.*, 716-7.

<sup>57</sup>The effect of these arguments in drawing a distinction between executory and executed contracts is apparent in the decisions in *Hoare v. Rennie* (1859) 5 H. & N. 19, (1859) 157 E.R. 1083 (Ex.) [hereinafter cited to H. & N.]; and *Simpson v. Crippen* (1872) L.R. 8 Q.B. 14. In the former case, the Court was clearly impressed by the fact that the defendant buyer had not received a benefit from the contract when it repudiated the contract for the plaintiff seller's breach. According to Pollock C.B. (at 27-8): "Where a person has derived a benefit from a contract, he cannot rescind it because the parties cannot be put in statu quo. . . . [T]he defendants refused to accept the first shipment, because, as they say, it was not a performance but a breach of the contract." In *Simpson v. Crippin*, where doubt was cast on the decision in *Hoare v. Rennie*, there had been part performance of the contract when the seller repudiated the contract on the basis of the buyer's failure to take punctual delivery of a quantity of coal sold on an instalment basis. In a later instalment case, *Honck v. Muller* (1881) 7 Q.B.D. 92 (C.A.), the buyer refused to take delivery of the first of three instalments of pig iron and was unsuccessful in his action against the seller for failing to deliver the two remaining instalments. According to Bramwell L.J., at 99: "If. . . the contract has been part performed and cannot be undone, then it must be proceeded without [the] power of declaring off. If in this case the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery." Indeed, Bramwell L.J. was so insistent on the distinction between executory and executed contracts that he proposed, at 98, a very strict standard of performance in executory cases: "I think where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him." It can be seen from the extracts from *Hoare v. Rennie* and *Honck v. Muller* that the distinction between executory and executed contracts was influenced by the old idea that termination of a contract operated retrospectively and could not be effected where a *restitutio in integrum* was impossible as a result of a valuable benefit having been received by one of the parties. See *infra*, note 104. This approach to termination produced other effects in sale of goods law, notably in regard to the buyer's right of rejection of specific goods, which will be dealt with later in this paper.

## II. The Doctrine of Conditions and Warranties

The law under consideration in this paper developed at a time when it was believed that all manner of contractual problems could be solved by a "true construction" of the agreement. Applying this approach, a court seeking the "evident sense and meaning"<sup>58</sup> of contracting parties, who had not expressly stated whether a promise was dependent or independent, would, in searching for an implied intention, be guided by the consideration bargained for by the promisee. Thus, in some cases where a promise was held to be a condition precedent, emphasis was laid upon its effect in inducing the other party to contract.<sup>59</sup> The more a party's vital interests were engaged by a contractual promise, the more that promise was likely to be treated as a condition precedent. This made it inevitable that failure of consideration would be taken into account in applying the dependent promises principle. But how exactly was this to be done?

The basic choice was between an *a priori* and an *ex post facto* inquiry. The former would be implemented by attributing an intention to the parties, assessed at the date of the contract, based on the possible consequences of a future hypothetical breach or breaches; the latter would weigh the parties' intention in the light of the particular circumstances surrounding the actual breach, which might occur some considerable time after the formation of the contract. If the latter approach were taken, two awkward consequences would ensue. First, if an obligation could be regarded as dependent only in the light of the actual consequences of a particular breach, it would follow that a promise would sometimes be dependent and sometimes independent, so that any attempt to fasten an *a priori* label on it would be impossible. Secondly, a good deal of commercial certainty would be sacrificed if terms could be assessed only according to the actual circumstances of their breach, with the result that cases could be treated as authorities only on their particular facts. Furthermore, an advantage of the former approach, from the point of view of courts seeking to control the verdicts of juries, was that it produced a question of construction, which was a question of law, and so placed the issue of discharge for breach firmly in judicial hands.

In the resolution of the above inquiry, Serjeant Williams's notes to *Pordage v. Cole*<sup>60</sup> are of no great assistance. Admittedly, he criticizes the law prior to *Boone v. Eyre* on the ground that "the Judges in these cases seem to have founded their construction of the independency or dependency of cove-

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<sup>58</sup> *Kingston v. Preston*, *supra*, note 26, 691, *per* Lord Mansfield.

<sup>59</sup> See, e.g., *Flight v. Booth* (1834) 1 Bing. (N.C.) 370, (1834) 131 E.R. 1160 (C.P.); *Bannerman v. White* (1861) 10 C.B. (N.S.) 844, (1861) 142 E.R. 685 (C.P.); and *Associated Newspapers Ltd v. Bancks* (1951) C.L.R. 322 (Austl. H.C.).

<sup>60</sup> *Supra*, note 33. See also discussion *supra*, note 37.

nants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties".<sup>61</sup> Yet the five rules he formulated to summarize the case law hardly make plain the role that intention or consequences of breach should play, though his commentary does throw some light upon the latter. Rules 1, 2 and 5 are concerned with the relative or absolute date on which promises have to be performed;<sup>62</sup> rules 3 and 4 deal with promises that go to a part or the whole of the consideration.<sup>63</sup> Any elucidation of the role played by intention and consequences of breach in deciding whether a party is entitled to terminate a contract has to be sought in later cases.

The state of the law in the years before the enactment of the United Kingdom *Sale of Goods Act* in 1893<sup>64</sup> can be shown by analyzing two decisions of 1876, *Poussard v. Spiers*<sup>65</sup> and *Bettini v. Gye*,<sup>66</sup> and one decided in 1893 itself, *Bentsen v. Taylor, Sons & Co.*<sup>67</sup> *Poussard v. Spiers* concerned a singer whom illness forced to her bed during rehearsals, some five days before the opening night of an opera. A provisional arrangement was made by the theatre management with a substitute and this became firm when Madame

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<sup>61</sup> *Ibid.*, 320.

<sup>62</sup> *Ibid.*:

If a day be appointed for the payment of money, or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that, which is the consideration of the money or other act [Rule 1; emphasis in original].

[W]hen a day is appointed for the payment of money, &c. and the day is to happen *after* the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance [Rule 2; emphasis in original].

Where two acts are to be done at *the same time*, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the *same day*, neither can maintain an action without shewing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act: and this particularly applies to all cases of sale [Rule 5; emphasis in original].

<sup>63</sup> *Ibid.*:

Where a covenant goes only to *part* of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration [Rule 3; emphasis in original].

But where the mutual covenants go to the *whole consideration* on both sides, they are mutual conditions, and performance must be averred [Rule 4; emphasis in original].

<sup>64</sup> See discussion *supra*, note 1.

<sup>65</sup> (1876) 1 Q.B.D. 410.

<sup>66</sup> (1876) 1 Q.B.D. 183, [1874-80] All E.R. Rep. 242 [hereinafter cited to Q.B.D.].

<sup>67</sup> [1893] 2 Q.B. 274 (C.A.).

Poussard was unable to attend on opening night. When she recovered sufficiently to offer her services a week after opening night, the management declined the offer and an action was brought by Madame Poussard's husband for her wrongful dismissal. The management pleaded, *inter alia*, that her illness prevented her from complying with a condition precedent to their obligation to engage her, namely to be ready and willing to perform. Verdict was entered for the plaintiff at trial but was reversed on appeal by the Court of Queen's Bench. In reaching its decision that the failure of Madame Poussard to perform on the opening and early nights went to the root of the contract, the Court was influenced primarily by the serious detriment that her illness had caused the management.<sup>68</sup> This detriment seems to have been assessed, not in hypothetical terms at the date of the contract, but in the light of the circumstances prevailing at about the time of opening night when the management had to decide whether to engage the substitute or delay the opening night for a short time to permit Madame Poussard to recover;<sup>69</sup> hence the Court's concession that the question depended at least in part upon the evidence so that it was one of mixed fact and law for judge and jury to decide.<sup>70</sup> In the circumstances, therefore, the Court's use of the language of "breach of a condition precedent" to describe her inability to perform is open to criticism for dressing up failure of consideration in the clothing of the dependent promises principle, for imposing an *a priori* label on a term classified by means of an *ex post facto* inquiry.

*Bettini v. Gye* was the case of a tenor whom illness prevented from attending rehearsals on time prior to a singing engagement. The engagement was to begin on 30 March and Bettini was to arrive for rehearsals at least six days before. In fact, he presented himself to the theatre management on 28 March. Bettini's services were declined by the theatre and he brought an action for wrongful dismissal. In the Court's view, this depended upon whether his attendance on time for rehearsals was "a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages".<sup>71</sup> The Court gave judgment for the plaintiff because his failure to present himself for rehearsals did "not go to the root of the matter so as to require us to consider it a condition precedent".<sup>72</sup>

The obvious question at this point is: Why had Bettini complied with all conditions precedent when Madame Poussard had not? It need hardly be said that the answer cannot be found in an *a priori* characterization of their

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<sup>68</sup> *Poussard v. Spiers*, *supra*, note 65, 414.

<sup>69</sup> *Ibid.*, 415.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Bettini v. Gye*, *supra*, note 66, 187.

<sup>72</sup> *Ibid.*, 189.

contractual obligations without regard to the actual or hypothetical consequences of their breach; the obligations of the two singers were essentially the same. Nevertheless, the Court in *Bettini v. Gye* laid particular emphasis on the intention of the parties, even to the extent of downplaying the consequences of breach. Thus:

Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.<sup>73</sup>

But the intention of the parties was not apparent on the face of the contract, and the Court had to decide “whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for”.<sup>74</sup> It resolved this issue by scrutinizing the nature of Bettini’s engagement. Since Bettini was not singing only in opera, where extensive rehearsals would be important, and his engagement was a lengthy one running for three and a half months, against which a delay of four days did not seem serious, his failure to attend did not go to the root. On the facts, therefore, a distinction between the cases of Bettini and Madame Poussard was clearly appropriate. Nevertheless, *Bettini v. Gye* may be criticised for sowing the seeds of later trouble. It accorded particular weight to the parties’ intention and, even though the circumstances of breach were investigated, the inquiry was conducted on an *a priori* basis: the Court believed that the answer was to be found in “the true construction of the contract taken as a whole”.<sup>75</sup> Such an approach has an obvious tendency to classify terms of the contract on a once-and-for-all basis as either conditions or warranties. It tends also to submerge the failure of consideration principle.

The above criticism is borne out by *Bentsen v. Taylor, Sons & Co.*,<sup>76</sup> which concerned a clause in a voyage charterparty that a ship was “now sailed or about to sail”. The classic judgment of Lord Justice Bowen is replete with the language of intention and construction and it is plain that he regarded contractual promises as definitively either conditions or warranties. In classifying a promise, it depended

as a matter of construction, whether it is such a promise as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the

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<sup>73</sup> *Ibid.*, 187.

<sup>74</sup> *Ibid.*, 188.

<sup>75</sup> *Ibid.*, 187.

<sup>76</sup> *Supra*, note 67.

performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party. . . .<sup>77</sup>

This question of construction was answered by seeking the intention of the parties which in turn would lead to examining whether "the accuracy of the statement. . . would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out".<sup>78</sup> Then Bowen L.J. went on to state in no uncertain terms that the inquiry was an *a priori* hypothetical one and not an *ex post facto* actual one:

In the case of a charterparty it may well be that such a test could only be applied after getting the jury to say what the effect of a breach of such a condition would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract.<sup>79</sup>

Bowen L.J. concluded that the term "now sailed or about to sail" was a condition<sup>80</sup> of the contract. A similar term, "now in the port of Amsterdam", had been held to be a condition in *Behn v. Burness*<sup>81</sup> and in both cases the term served as an indispensable datum to enable the hirer of the ship to determine when it would be ready for loading.

*Bentsen v. Taylor, Sons & Co.* is authority for the view that terms of the contract are either conditions or warranties whose status is determined prospectively from the date of the contract. The intention of the parties, whether express or implied, is considered on the basis of the general foundation of the contractual adventure and there is no room for a *tertium quid* assigning the remedy best suited to the consequences of a particular breach.<sup>82</sup> Hence, any contrary approach in *Poussard v. Spiers*<sup>83</sup> would appear to have been abandoned. Failure of consideration was thus absorbed into the interstices of the dependent promises principle. This terminological usage, adopted by all three members of the Court, is reflected perfectly in the *Sale of Goods Act*.

It is worth repeating that the consequence of these developments was that failure of consideration, so radically modified by the twin devices of intention and *a priori* construction, had disappeared from sight in sale of goods law.

<sup>77</sup> *Ibid.*, 280-1.

<sup>78</sup> *Ibid.*, 281.

<sup>79</sup> *Ibid.* It would not, of course, be open to the jury to decide whether the term breached was a condition or a warranty.

<sup>80</sup> Perhaps the earliest example of this terminology, later enshrined in the *Sale of Goods Act*, is *Glaholm v. Hays* (1841) 2 Man. & G. 257, (1841) 133 E.R. 743 (C.P.).

<sup>81</sup> (1863) 3 B. & S. 751, (1863) 122 E.R. 281 (Ex. Ch.) [hereinafter cited to B. & S.].

<sup>82</sup> But see the revisionist views of Lord Lowry in *Bunge Corp. v. Tradax Export S.A.*, *supra*, note 7, 544 *et seq.*

<sup>83</sup> *Supra*, note 65.

This was the law that Chalmers, the draftsman, codified in the *Sale of Goods Act* and this is the reason why the *Act* contains no reference to the failure of consideration principle.<sup>84</sup> Simple as this conclusion is, it leaves one crucial question unanswered, namely, what became of the difference between the principles of failure of consideration and dependent promises in their application to cases of contractual discharge? Did it disappear too or does the *Sale of Goods Act* retain it still, perhaps in a disguised form? *Ellen v. Topp*<sup>85</sup> and *Graves v. Legg*,<sup>86</sup> considered earlier, provide the clue.

In *Ellen v. Topp*, Pollock C.B., referring to Serjeant Williams's assertion that the execution of a contract and the conferment of a benefit on an injured party confines him to a damages action in the event of breach, drew attention to the fact that such an event served to alter the construction of the contract:

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter ex post facto; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less. . . .<sup>87</sup>

This way of putting the matter was, however, modified by the same Court in *Graves v. Legg* where Parke B., referring to the receipt by the injured party of "part of the consideration",<sup>88</sup> stated: "When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all."<sup>89</sup> Briefly put, the inequality of damages and execution arguments had been reformulated in terms of election:<sup>90</sup> notwithstanding the initial classification of a term as a condition precedent, a party could not rely on it so as to discharge himself from the contract if, by his conduct in accepting performance, he had elected to affirm the contract and confine himself to his damages action. In the next Part of this article, it will be demonstrated that the *Sale of Goods Act*, while formulating the doctrine of conditions and warranties, absorbed the inequality of damages and execution arguments in a number of ways, notably through this election principle.

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<sup>84</sup>It will be shown that, despite the silence of the *Sale of Goods Act*, the failure of consideration principle has been worked by the cases into various parts of sale of goods law.

<sup>85</sup>*Supra*, note 50.

<sup>86</sup>*Supra*, note 51.

<sup>87</sup>*Supra*, note 50, 441.

<sup>88</sup>*Supra*, note 51, 716.

<sup>89</sup>*Ibid.*, 717.

<sup>90</sup>See Morison, *supra*, note 24, 100-6, where the author refers to the behaviour of a contracting party in waiving full performance of what had been a condition precedent to his own duty to perform.

### III. The Doctrine of Conditions and Warranties and the Sale of Goods

Speaking of the Sale of Goods Bill shortly after its enactment, Chalmers stated that "it endeavoured to reproduce as exactly as possible the existing law, leaving any amendments that might seem desirable to be introduced in Committee on the authority of the Legislature. . . . [T]he conscious changes effected in the law have been very slight."<sup>91</sup> The condition-warranty usage, best exemplified by *Bentsen v. Taylor, Sons & Co.*,<sup>92</sup> which itself took the lead from *Bettini v. Gye*<sup>93</sup> rather than *Poussard v. Spiers*,<sup>94</sup> is therefore writ large in the *Act*. Its characteristics have been discussed in earlier sections of this paper. An inquiry into the way the *Act* harmonized the *a priori* approach to the construction of contracts and the different *ex post facto* approach bearing on the distinction between executory and executed contracts, now in order, is best conducted by scrutinizing the *Act* for traces of the distinction.

First of all, the implied terms of quiet possession<sup>95</sup> and freedom from encumbrances,<sup>96</sup> whose content suggests an *ex post facto* interference with a flawed but real beneficial enjoyment of goods, are designated as warranties of the contract of sale. Consequently, the injured buyer is left to his remedy in damages and has no right to reject the goods and terminate the contract. Secondly, the general tendency of the *Act* to confer on the buyer extensive rejection and termination rights where the goods are non-conforming, explainable by the likelihood that there has been a breach of condition by the seller, is checked in the case of severable instalment contracts where the buyer's entitlement to put an end to the contract turns on whether the seller's behaviour is repudiatory, which modern case law frequently regards as tantamount to the concept of a breach going to the root of a contract.<sup>97</sup> In many,

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<sup>91</sup> *Supra*, note 16, viii-ix.

<sup>92</sup> *Supra*, note 67.

<sup>93</sup> *Supra*, note 66.

<sup>94</sup> *Supra*, note 65.

<sup>95</sup> *Sale of Goods Act*, subs. 13(b).

<sup>96</sup> *Sale of Goods Act*, subs. 13(c).

<sup>97</sup> *Sale of Goods Act*, subs. 30(2). The distinctions between, on the one hand, entire and severable (or divisible) contracts, and on the other hand, instalment and non-instalment contracts do not quite coincide. See further, M. Bridge & F. Buckley, *Sales and Sales Financing in Canada* [:] *Cases and Materials* (1981) 144-5. The tendency nowadays is not to draw a sharp distinction between repudiation as such and a breach going to the root of the contract except in those cases where the breach is anticipatory in nature, and even there a compelling argument can be made (see Dawson, *Metaphors and Anticipatory Breach of Contract* (1981) 40 *Camb. L.J.* 83) that anticipatory repudiation can be rationalized in terms of the present breach of an implied term of the contract not to impede the innocent party's performance of his conditions precedent under the contract. See further McRae, *Repudiation of Contracts in Canadian Law* (1978) 56 *Can. Bar Rev.* 233, who argues that there is a distinction between repudiation and a breach going to the root, and the Ontario Law Reform Commission, *supra*, note 15, 520, which stated that such a distinction would not be "meaningful". The

perhaps most, such cases, the buyer will have already taken delivery of one or more instalments and thus will have derived a benefit from the contract.

The most important case, however, where the *Sale of Goods Act* recognizes the distinction between executory and executed contracts lies in the acceptance rules.<sup>98</sup> Subsection 12(1) states that a buyer may waive a breach of condition by the seller or may elect to treat it as a breach of warranty so as to confine himself to a damages action. Although the two provisions are not explicitly linked, subs. 12(1) may be seen as the inspiration behind s. 34 which lays out three sets of circumstances in which the buyer will be taken to have lost his right to reject the goods and therefore also his right to terminate the contract for breach of condition. According to s. 34, the buyer may no longer reject where he intimates to the seller that he has accepted the goods, where he performs after delivery an act inconsistent with the seller's ownership<sup>99</sup> or where he retains the goods beyond a reasonable time without intimating to the seller that he will not accept them. The first of these cases is a very clear instance of an express election and the second and third suggest an implied or deemed election. In addition, the third case seems to be consistent with execution benefit analysis: a buyer who retains even defective goods for a lengthy period is likely to derive a benefit from the contract. Taking the benefit theme further, it may be argued that the reason so many of the implied terms are conditions is that the draftsmen contemplated a very short period between delivery of the goods and acceptance. In such a short period, the buyer would be unlikely to derive any benefit from the goods. But the modern

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distinction between a repudiation and an actual breach is stated clearly by Upjohn L.J. in *Hongkong Fir*, *supra*, note 25, 64. It is also acknowledged, though treated as immaterial on the actual facts, in *Shevill v. The Builders Licensing Board* (1982) 56 A.L.J.R. 793, 795 (Austl. H.C.) *per* Gibbs C.J. Lord Denning M.R. refers to the tendency to confuse the two concepts in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H. (The Hansa Nord)*, *infra*, note 144, 59. No clear distinction is drawn between the two notions in *Decro-Wall International S.A. v. Practitioners in Marketing Ltd* [1971] 2 All E.R. 216, [1971] 1 W.L.R. 361 (C.A.); *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 421-2, [1966] 2 All E.R. 61 (H.L.) *per* Lord Upjohn; *Woodar Investment Development Ltd v. Wimpey Construction U.K. Ltd* [1980] 1 All E.R. 571, 589-90 (H.L.) *per* Lord Scarman; or in *Federal Commerce and Navigation Co. v. Molena Alpha Inc.* [1979] A.C. 757, 778-9, [1979] 1 All E.R. 307 (H.L.) *per* Lord Wilberforce.

A recent *dictum* of Lord Diplock presents its own difficulties in relating repudiation to actual breach. In his Lordship's view, a repudiation can only entitle the innocent party to terminate the contract if an actual breach of the term under threat would produce a substantial deprivation of the benefit contracted for by the innocent party. See *Afivos Shipping S.A. v. Pagnan* [1983] 1 All E.R. 449, 455 (H.L.).

<sup>98</sup>*Sale of Goods Act*, s. 34.

<sup>99</sup>See *Hardy and Co. v. Hillerns and Fowler* [1923] 2 K.B. 490, [1923] All E.R. 275 (C.A.); *A.J. Frank & Sons Ltd v. Northern Peat Co.* [1963] 2 O.R. 415, (1963) 39 D.L.R. (2d) 721 (C.A.); and *E. & S. Ruben Ltd v. Faire Bros & Co.* [1949] 1 K.B. 254, [1949] 1 All E.R. 215, annotated by Gower, *Sale of Goods — Right of Rejection* (1949) 12 M.L.R. 368.

tendency, especially in Canada, is greatly to prolong this period. This prolongation occurs particularly in the case of seriously defective goods and it is perhaps no accident that the principles of fundamental breach<sup>100</sup> and failure of consideration<sup>101</sup> are invoked in support of this extension, for in cases of such serious breach the buyer is unlikely to derive a net benefit from the contract.<sup>102</sup>

The receipt of a benefit is also implicit in the controversial provisions dealing with specific goods whose apparent effect is to compel the buyer to treat all breaches of conditions concerning the fitness and quality of goods as breaches of warranty.<sup>103</sup> The reasoning behind this rule seems to be as follows. At one time it was thought that a quasi-contractual action for money had and received on a total failure of consideration could not be brought until the plaintiff had rescinded the contract *ab initio*.<sup>104</sup> Furthermore, a plaintiff who

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<sup>100</sup> See, e.g., *Lightburn v. Belmont Sales Ltd* (1969) 69 W.W.R. 734, (1969) 6 D.L.R. (3d) 692 (B.C.S.C.); *Murphy v. Penney Motors Ltd* (1979) 23 Nfld & P.E.I.R. 152 (Nfld S.C., T.D.); *Burroughs Business Machines Ltd v. Feed-Rite Mills (1962) Ltd* (1973) 42 D.L.R. (3d) 303 (Man. C.A.); and *Public Utilities Commission of City of Waterloo v. Burroughs Business Machines Ltd* (1974) 52 D.L.R. (3d) 481 (Ont. C.A.).

<sup>101</sup> See, e.g., *Rafuse Motors Ltd v. Mardo Construction Ltd* (1963) 41 D.L.R. (2d) 340 (N.S.S.C.); *Rowland v. Divall* [1923] 2 K.B. 500, [1923] All E.R. Rep. 270 (C.A.) [hereinafter cited to K.B.]; and *Butterworth v. Kingsway Motors* [1954] 2 All E.R. 694, [1954] 1 W.L.R. 1286 (Liverpool Assizes).

<sup>102</sup> The benefit theme is also implicit in the duty imposed by the *Sale of Goods Act* on the buyer not to take delivery of the goods, but to accept them. See s. 26.

<sup>103</sup> This effect is achieved by s. 19, r. 1, which enacts the presumptive rule that the property in specific goods passes at the time of the contract, in combination with subs. 12(3), which reduces conditions to the remedial status of warranties in those cases where the property in specific goods has passed to the buyer.

<sup>104</sup> *Cutter v. Powell*, *supra*, note 41, illustrates the proposition that quasi-contractual recovery will be denied where it is inconsistent with the terms of an open (*i.e.* unrescinded) contract. Furthermore, cases such as *Weston v. Downes* (1778) 1 Dougl. 23, (1778) 99 E.R. 19 (K.B.) and *Towers v. Barrett* (1786) 1 T.R. 133, (1786) 99 E.R. 1014 (K.B.), show that before a quasi-contractual action for money had and received could be maintained, any contract between the parties had to have been rescinded *ab initio*. Consequently, a defaulting party who had conferred a benefit on the other would at this time have faced insurmountable obstacles in recovering anything for his pains if it were held that he had not performed in full a dependent covenant or that his breach had gone to the root of the contract.

The modern position is both hostile to the idea of rescission *ab initio* for breach and receptive to the proposition that quasi-contractual recovery can lie even if the contract has not been "wiped out" completely. In overruling *Chandler v. Webster* [1904] 1 K.B. 493 (C.A.), the House of Lords decision in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, [1942] 2 All E.R. 122 (H.L.) held that a total failure of consideration could lie for the purpose of an action for money had and received even if an executory but unperformed promise had not been expunged by a rescission *ab initio*. This created the possibility that quasi-contractual recovery might be permitted even if inconsistent with an "open", *i.e.* unrescinded, contract. The Supreme Court decision in *Degelman v. Guaranty Trust Co.* [1954] S.C.R. 725, [1954] 3 D.L.R. 785, held that a *quantum meruit* action could lie even if inconsistent with an unenforceable contract; *a fortiori*, it should lie where a contract has been

had already derived a benefit from a contract was, by virtue of the benefit, disabled from rescinding the contract because the parties could not be put back in *statu quo ante*.<sup>105</sup> Consequently, a contract of sale of goods could not be rescinded where the buyer had had even the abstract enjoyment of the property in specific goods from the date of the contract.<sup>106</sup> This line of reasoning was extended from buyers seeking recovery of a price paid to buyers resisting any liability under the contract to pay the price.<sup>107</sup> Consequently, buyers of specific goods were in effect denied any right to reject them in the absence of an agreed condition subsequent permitting a return of the goods.<sup>108</sup> Such an agreed condition subsequent would be regarded as a special agreement permitting rescission.

The significance of the buyer's receipt of a benefit in the case of specific goods was stressed by Williams J. in a *dictum* drawn from a charterparty case, *Behn v. Burness*:<sup>109</sup>

[I]f a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken. . . but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or in other words, that the condition expressed

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prospectively terminated. The attempt in *Horsler v. Zorro* [1975] Ch. 302, [1975] 1 All E.R. 54 to restate the old orthodoxy that a contract might in some circumstances be terminated *ab initio* for breach was roundly suppressed by the House of Lords in *Johnson v. Agnew* [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.). Consequently, a defaulting plaintiff should not be embarrassed nowadays by the existence of an inconsistent contract, that has been prospectively terminated by the innocent party, in making a quasi-contractual claim.

<sup>105</sup> See, e.g., *Hunt v. Silk* (1804) 5 East 449, (1804) 102 E.R. 1142 (K.B.). In such cases, the rescission process was not flexible enough to allow a minor monetary adjustment in order to effect a true *restitutio in integrum*. Contrast the American position as set forth in Williston, *Repudiation of Contracts* (1901) 14 Harv. L. Rev. 317 (Part I) and 421 (Part II); and American Law Institute, *Restatement of the Law of Contracts* (1939) §349, as reformulated in broader discretionary terms in *Restatement of the Law Second* [·] *Contracts* (1982) §384(2)(b).

<sup>106</sup> See, e.g., *Street v. Blay* (1831) 2 B. & Ad. 456, (1831) 109 E.R. 1212 (K.B.) [hereinafter cited to B. & Ad.]. *Street v. Blay* can be contrasted usefully with *Rowland v. Divall*, *supra*, note 101, where it was held that the enjoyment of the possession in goods did not prevent a total failure of consideration from arising when this possession was unlawful, the seller having no right at all to sell the goods. More than anything else, the comparison of these two cases shows the vital significance of the transfer of the property in goods in existing sales law.

<sup>107</sup> *Street v. Blay*, *ibid*, 462.

<sup>108</sup> This entitlement was preserved by the concluding words of the *Sale of Goods Act*, subs. 12(3). See, e.g., *O'Flaherty v. McKinlay* [1953] 2 D.L.R. 514 (Nfld S.C.); and *Rowland v. Divall*, *supra*, note 101, *per* Atkin L.J. *Head v. Tattersall* (1871) L.R. 7 Ex. 7 may be regarded as a pre-statutory example of such an agreed condition.

<sup>109</sup> *Supra*, note 81.

in the contract has not been performed. Still, if he receives the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages.<sup>110</sup>

It can therefore be seen that the execution benefit theme is retained by the *Sale of Goods Act*, but in such a way as not to conflict with the doctrine of conditions and warranties by which terms are classified on a once-and-for-all, *a priori* basis. Hence the proposition established by *Graves v. Legg*,<sup>111</sup> that the difference for purposes of discharge between executory and executed contracts does not affect the initial characterization of a term as a condition precedent, is confirmed by the *Act* and supported further by the celebrated judgment of Fletcher Moulton L.J. in *Wallis, Son & Wells v. Pratt & Haynes*,<sup>112</sup> in which he states that the condition of correspondence to contractual description is no less a condition because, the goods having been accepted, it has to be treated as though it were a warranty.

The corollary to the proposition, once a condition always a condition, is of course the proposition, once a warranty always a warranty. This would follow from the virtual disappearance of failure of consideration from sales law.<sup>113</sup> The *Sale of Goods Act* does not contain the obverse of an acceptance rule, namely that a warranty may in certain circumstances be treated as a condition.<sup>114</sup> Thus, the *Act* does not state that a buyer may decline tender, as opposed to rejecting goods already delivered to him, in the event of a breach of warranty. This is not surprising if only because the implied terms, almost all of which are conditions, cover a wide range of attributes in the goods and a breach resulting in defective goods evident at tender would necessarily be a breach of condition.<sup>115</sup> Nor does the *Act* provide that a breach of warranty may

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<sup>110</sup> *Ibid.*, 755-6.

<sup>111</sup> *Supra*, note 51.

<sup>112</sup> [1910] 2 K.B. 1003, (1910) 79 L.J.R. (N.S.) 1013 (C.A.). The dissenting judgment of Fletcher Moulton L.J. in this case was adopted by the House of Lords on appeal as a model statement of the law at [1911] A.C. 394, [1911-13] All E.R. Rep. 989.

<sup>113</sup> The principle re-emerges strikingly in the judgment of Bankes L.J. in *Rowland v. Divall*, *supra*, note 101, to justify the rescission of the contract (at the time, a necessary prerequisite to the action for money had and received) where the buyer had otherwise lost his entitlement under the *Sale of Goods Act* itself to reject the goods and terminate the contract.

<sup>114</sup> Hence there is no provision in the *Act* corresponding to the second statement quoted from the judgment of Bramwell L.J. in *Honck v. Muller*, *supra*, note 57, that a party may not demand the acceptance of a tender amounting to less than the "entirety" of his own obligations.

<sup>115</sup> It may be argued that the reason so many of the implied terms are conditions is that the draftsman contemplated a very short time between delivery of the goods and acceptance. The modern tendency to extend this period, particularly in cases of breach where the consequences are serious, may be regarded, when coupled with the above observation, as reproducing in a concealed fashion the distinction between executory and executed contracts: a buyer who has had quite a lengthy possession of seriously defective goods could be denied as having received a benefit from them. Lord Diplock has remarked that the enactment of the *Sale of Goods Act*

be treated as a breach of condition in a particular case where the effects of its breach are grave. Once again, the breadth of the implied terms and the fact that they are principally conditions obviates any need on the buyer's part to invoke the failure of consideration principle.

Although the serious breach of warranty has not proved troublesome in sale of goods cases, the trivial breach of condition certainly has, and nowhere more so than under s. 14, which provides for an implied condition that goods shall correspond with their contractual description. The judicial experience with this provision poses in acute fashion the question whether it was wise to subject so much breach of contract law to the principle of *a priori* construction of the contract. This is not the place to undertake an extended analysis of the scope of the description condition and the modern tendency to confine it.<sup>116</sup> It suffices to say that the courts, in line with the modern tendency to play down the distinction between specific and unascertained goods,<sup>117</sup> have assimilated the two classes for the purpose of description.<sup>118</sup> Furthermore, while description at one time appeared to encompass all attributes of unascertained goods,<sup>119</sup> the general rule would now appear to be that the condition of correspondence with description is broken only if the departure of such goods from the contractual description goes to their very identity.<sup>120</sup> Consequently, it would be most unlikely today that cans of peaches packed in cases of twenty-four instead of thirty<sup>121</sup> or staves departing from the contractual measure but still remaining perfectly fit for the construction of barrels,<sup>122</sup>

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stultified sales law. See *supra*, text accompanying notes 1 to 3. One might also observe that the *Act* has interposed a barrier between us and an understanding of the themes and impulses behind the development of sales rules. For many, the *Sale of Goods Act* has been responsible for inculcating a mechanical understanding of sale of goods law.

<sup>116</sup> See Bridge & Buckley, *supra*, note 97, 151-64; Coote, *Correspondence with Description in the Law of Sale of Goods* (1976) 50 A.L.J. 17; and Stoljar, *Conditions, Warranties and Descriptions of Quality in Sale of Goods* (1952) 15 M.L.R. 425 (Part I) and (1953) 16 M.L.R. 174 (Part II).

<sup>117</sup> This approach is apparent in cases dealing with the buyer's right of rejection. See, e.g., *Diamond v. B.C. Thoroughbred Breeders' Society* (1965) 52 W.W.R. 385, (1965) 52 D.L.R. (2d) 146 (B.C.S.C.); and *Wojakowski v. Pembina Dodge Chrysler Ltd* [1976] 5 W.W.R. 97 (Man. S.C.).

<sup>118</sup> See, e.g., *Ashington Piggeries Ltd v. Christopher Hill Ltd* [1972] A.C. 441, [1971] 1 All E.R. 847 (H.L.); and *Reardon Smith Line Ltd v. Hansen-Tangen* [1976] 3 All E.R. 570, [1976] 1 W.L.R. 989 (H.L.).

<sup>119</sup> See, e.g., *Taylor v. Combined Buyers Ltd* [1924] N.Z.L.R. 627; and *Burlington Canning Co. v. Campbell* (1908) 7 West. L.R. 544 (Man. S.C.).

<sup>120</sup> See, e.g., *Reardon Smith Line Ltd*, *supra*, note 118. The approach in this case would appear to be somewhat stricter than that in *Ashington Piggeries Ltd*, *supra*, note 118, though Lord Wilberforce introduced the possibility of the old broad view of description being applied to future unascertained goods, i.e., commodities.

<sup>121</sup> *In re an Arbitration between Moore & Co. and Landauer & Co.* [1921] 2 K.B. 519, [1921] All E.R. 466 (C.A.).

<sup>122</sup> *Arcos, Ltd v. E.A. Ronaasen & Son* [1933] A.C. 470, [1933] All E.R. 646 (H.L.).

would entail a breach of s. 14. It is worth underlining precisely what has happened. Denied by the *Act* the opportunity of treating some breaches of s. 14 as breaches of warranty giving rise at most to nominal damages, the courts have done the next best and, in practical terms, functionally identical thing: they have, by narrowing description, denied that trivial breaches of s. 14 are breaches at all.<sup>123</sup>

#### IV. Developments Outside the *Sale of Goods Act* and their Impact upon Sale of Goods Cases

Though it was noted above that the breach of warranty having serious consequences has not posed a problem in sale of goods cases, it has to be remembered that the *Sale of Goods Act* studiously refrains from subjecting payment and delivery obligations to condition-warranty analysis, except to the extent that it provides that payment obligations are *prima facie* not of the essence of the contract.<sup>124</sup> In so far as this suggests that not all obligations in a sale of goods contract can be subjected to condition-warranty analysis,<sup>125</sup> this absence of a definitional mould prompts a discussion of the developments set in train by the English Court of Appeal in *Hongkong Fir Shipping v. Kawasaki Kisen Kaisha*.<sup>126</sup>

Though it was never easy to see how the doctrine of conditions and warranties applied to certain classes of cases, such as building contracts and other lump sum agreements,<sup>127</sup> the doctrine certainly straddled a broad area of

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<sup>123</sup> This approach is evident particularly in Lord Wilberforce's interpretation of the disputed words in *Reardon Smith Line Ltd*, *supra*, note 118.

<sup>124</sup> *Sale of Goods Act*, s. 11.

<sup>125</sup> A suggestion rendered plausible by the decision in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H.*, *infra*, note 144, that subs. 12(2) does not impose a strict condition-warranty straitjacket on all the terms, express and implied, in a sale of goods contract.

<sup>126</sup> *Supra*, note 25.

<sup>127</sup> See, e.g., *H. Dakin & Co. v. Lee* [1916] 1 K.B. 566 (Div. Ct and C.A.); *Hoinig v. Isaacs* [1952] 2 All E.R. 176 (C.A.); *Bolton v. Mahadeva* [1972] 1 W.L.R. 1009, [1972] 2 All E.R. 1322 (C.A.); and *Markland Associates Ltd v. Lohnes* (1973) 33 D.L.R. (3d) 493 (N.S.S.C.). Cf. *Fairbanks Soap Co. v. Sheppard* [1953] 1 S.C.R. 314, [1953] 2 D.L.R. 193. These cases of course amount to an acceptance of the failure of consideration principle as formulated by *Boone v. Eyre*, *supra*, note 27. They also reject the proposition that the promisor under a lump sum entire contract must perform in full before becoming entitled to any payment at all. *Cutter v. Powell*, *supra*, note 41, had refused a quasi-contractual *quantum meruit* action to a party, who had not performed in full, as an alternative to an action on the contract. *Sumpter v. Hedges* [1898] 1 Q.B. 673 revealed the technical limitations in the idea that a retention of the fruits of performance could raise a genuine implied contract (and thus a *quantum meruit* claim) after the termination of the express contract. *H. Dakin & Co. v. Lee*, cited immediately above, introduced the idea that, subject to a counterclaim for damages, a substantially performing plaintiff could recover the contract price on the express contract itself. The idea was refined in

the law of contract, including charterparty contracts, at the time when the *Sale of Goods Act* was passed. *Bentsen v. Taylor, Sons & Co.*,<sup>128</sup> perhaps the common law *locus classicus* of the doctrine, was a charterparty case and when the doctrine came under fire in *Hongkong Fir*, a time charterparty case, notice was effectively served that the application of the doctrine of conditions and warranties to sale of goods contracts would eventually come under review.

The facts of *Hongkong Fir* are too well known to rehearse at length here. The case concerned the breach of the seaworthiness term in a two-year charterparty in circumstances where the charterer had already lost five weeks and was set to lose a further fifteen when it repudiated the contract. The Court of Appeal held that the charterer's repudiation at this point was unlawful. According to Diplock L.J., the question when a party is relieved from the duty to perform his contractual undertakings depends upon whether an event has occurred which has deprived him of substantially the whole of the benefit which the contract gave him as consideration for performing those undertakings; in assessing the existence of such an event, it did not matter that it was produced by a breach of contract or in circumstances whereby the contract was frustrated.<sup>129</sup> Moreover, since the injured party obtained his release from the event irrespective of its pedigree (breach or frustration), it followed that the doctrine of conditions and warranties was inadequate as a means of explaining when a breach of contract produced this event.<sup>130</sup> Quite why this conclusion was dictated by the previous proposition, his Lordship did not say, but it is a matter of reasonable inference that the doctrine of conditions and warranties was judged insufficient because it paid no attention to the actual circumstances surrounding a particular breach. Thus, according to Diplock L.J., many complex contractual undertakings, such as the shipowner's duty to tender a seaworthy ship, which can be breached in circumstances as diverse as the presence of a rusty nail in the deck and the broken-down state of the ship's engines, could not be fitted into the condition-warranty classification

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later cases. It is evident that this idea of substantial performance is closely affiliated to the *Hongkong Fir* principle; indeed, the judgment of Denning L.J. in *Hoening v. Isaacs*, cited immediately above, at 180-1 anticipates *Hongkong Fir*. See also the judgment of Somerwell L.J. in *Hoening v. Isaacs*, at 177 *et seq.*, where he refers to the use of waiver to blunt the rule that there must be performance in full before the plaintiff can recover the price under a lump sum entire contract.

It can therefore be seen that the rejection of *Sumpter v. Hedges*, implicit in the evolution of the substantial performance rule, was the rejection of a case which ignored execution benefit and inequality of damages arguments in denying relief to the defaulting builder. In light of the cases discussed in this paper, *Sumpter v. Hedges* was tantamount to persisting in applying the dependent promises principle notwithstanding the partial execution of the contract.

<sup>128</sup> *Supra*, note 67.

<sup>129</sup> See *Hongkong Fir*, *supra*, note 25, 68-9. But see *Peter Lind and Co. v. Constable Hart and Co.* [1979] 2 Lloyd's Rep. 248, 253 (Q.B.) *per* Mustill J.

<sup>130</sup> See *supra*, text accompanying note 25.

since not every breach could be said to produce, or denied as ever producing, a substantial deprivation of the injured party's contractual benefit.<sup>131</sup> Consequently, the question of the injured party's remedies in such a case could not be resolved by an *a priori* construction of the contract; rather, there had to be an *ex post facto* assessment of the event created by the breach measured against the expected contractual benefit.<sup>132</sup> *Hongkong Fir* thus reintroduced the binary approach to breach of contract,<sup>133</sup> based upon the principles of failure of consideration and dependent promises, that cases like *Bentson v. Taylor, Sons & Co.*<sup>134</sup> had done so much to compress into a unitary mould.

The boost given by *Hongkong Fir*<sup>135</sup> to the failure of consideration principle was, however, arrested by the English Court of Appeal in *The Mihalis Angelos*,<sup>136</sup> which concerned an "expected ready to load" clause in a voyage charterparty. The shipowner was in breach of this provision by virtue of its failure honestly and reasonably to believe that the ship would be ready for loading in Haiphong on 1 July 1965. Despite the shipowner's attempt to argue that this term should not be treated as a condition, and its contention that the lack of any necessary relationship between the degree of unreasonableness of its belief and the length of delay tended against the view that the parties intended every breach to give rise to the right to terminate the contract, the Court held that the provision was a condition. Megaw L.J. relied on the authority of *Scrutton*<sup>137</sup> and on a line of sale of goods cases where the expected ready to load clause had been treated similarly;<sup>138</sup> he also felt that it would be no injustice to the shipowner to suffer termination and that treatment of the clause as a condition would be conducive to commercial certainty.<sup>139</sup> In

<sup>131</sup> *Hongkong Fir*, *supra*, note 25, 69-71.

<sup>132</sup> *Ibid.*, 72.

<sup>133</sup> Just as one cannot accept the proposition mentioned *supra*, note 82, that *Hongkong Fir* was implicit in *Bentson v. Taylor, Sons & Co.*, *supra*, note 67, so must one reject the view that the *Hongkong Fir* decision introduced a novel principle. For examples of this latter view, see Weir, *Contract — The Buyer's Right to Reject Defective Goods* [1976] Camb. L.J. 33; and Hutchison & Wakefield, *Contracts — Innominate Terms: Contractual Encounters of the Third Kind* (1982) 60 Can. Bar Rev. 335.

<sup>134</sup> *Ibid.*

<sup>135</sup> Besides being echoed in the judgment of Judson J. in *Field v. Zien* [1963] S.C.R. 632, 635, (1963) 42 D.L.R. (2d) 708, this approach has recently been approved in *Table Stake Construction Ltd v. Jones* (1977) 18 O.R. (2d) 203 (H.C.). It was also applied, heterodoxically and in conflict with the language of the *Sale of Goods Act*, in *Polar Refrigeration Service Ltd v. Moldenhauer* (1967) 61 D.L.R. (2d) 462 (Sask. Q.B.).

<sup>136</sup> *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H. (The Mihalis Angelos)* [1971] 1 Q.B. 164, [1970] 3 All E.R. 125 (C.A.).

<sup>137</sup> T. Scrutton, *Scrutton on Charterparties and Bills of Lading*, 10th ed. (1921) (an edition for which the original author retained responsibility).

<sup>138</sup> See, e.g., *Finnish Government v. H. Ford & Co.* (1921) 6 Lloyd's List L. Rep. 188 (C.A.).

<sup>139</sup> *Supra*, note 136, 205.

addition, Edmund Davies L.J. applied a passage in the judgment of Williams J. in *Behn v. Burness*,<sup>140</sup> approved also by Megaw L.J.,<sup>141</sup> to the effect that the time of a ship's arrival was of prime importance to a charterer "considering winds, markets and dependent contracts".<sup>142</sup>

Helpful as *The Mihalis Angelos* is on the status of the expected ready to load clause, it affords little assistance in the interpretation of other express contractual terms beyond informing us that there are limits to the acceptability of the *Hongkong Fir* approach. Most of the arguments cited by the Court for its reaction against *Hongkong Fir* are cogent, except for the assertion that defaulting shipowners cannot complain if they have to suffer termination of the contract, which could be applied to any breach of any contractual term. The *Mihalis Angelos* stands strongly in support of the *a priori* constructionist approach and its conflict with *Hongkong Fir* reveals the eternal clash between certainty and flexibility. But how the line is to be drawn between these competing values is not shown clearly by *The Mihalis Angelos*. Nevertheless, and despite the fact that the point was not relied upon in the disposition of the case, it is surely significant that the contract was breached at an executory stage in its life: the charterer refused tender of the ship before the commencement of the voyage. This echo of the old law appears in a more explicit way in *Hongkong Fir* itself where Sellers L.J. stated that the charterer, if it had learned of the incompetence of the engine room staff before tender of the ship, could have refused to take her in that state.<sup>143</sup> This *dictum* clearly raises the possibility of a differential approach to the innocent party's remedy according to whether the breach occurs at the executory stage or in the course of performance of a contract, and encourages a search for this theme in the cases following *The Mihalis Angelos*.

*Cehave N.V. v. Bremer Handelsgesellschaft*<sup>144</sup> was the case where the *Hongkong Fir* revision of the doctrine of terms was imported into the law governing sale of goods contracts. It concerned the sale by Bremer to Cehave on c.i.f. instalment terms of 12,000 tons of citrus pulp pellets for compounding into cattle food. The contract incorporated Form 200 of the Cattle Food

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<sup>140</sup> *Supra*, note 81.

<sup>141</sup> *Supra*, note 136, 207. The approval of Edmund Davies L.J. can be found at 199.

<sup>142</sup> *Behn v. Burness*, *supra*, note 81, 759.

<sup>143</sup> *Supra*, note 25, 56. An interesting exercise is posed by the hypothesis of *Hongkong Fir* as a sale of goods case. Suppose that the fault had rested exclusively in the condition of the engines and that there had been a breach of the fitness for purpose condition. The likely result would be that the "buyer" would have accepted the goods so as to lose the right of rejection and thus the right to terminate the contract. It is precisely because the acceptance rules in the *Sale of Goods Act* amount to an extension of common law rules of waiver and election, and because there are no analogous statutory rules in charterparty cases, that a result similar to the one aimed at in the sale of goods hypothesis has to be reached with the failure of consideration principle in *Hongkong Fir*.

<sup>144</sup> [1976] Q.B. 44, [1975] 3 All E.R. 739 (C.A.) [hereinafter *Cehave*; cited to Q.B.].

Trade Association, clause 7 of which provided that shipment was to be made in good condition. A dispute arose over one shipment of 3,400 tons, a substantial proportion of which had suffered heating damage. The buyer had already paid the price against shipping documents and, claiming the right to reject the shipment, sought to recover this sum. The contract price of the 3,400 tons was £100,000 but the consignment would, if sound, have fetched only £86,000 on the falling Rotterdam market prevailing at the date the pellets were unloaded. Had the buyer elected to keep the goods and sue for damages, it seems that it would have received an allowance of £20,000 off the contract price.<sup>145</sup> The rejected goods, sold by order of a Rotterdam court, were purchased by the original buyer, Cehave, through a strange backdoor procedure at a third of the contract price.<sup>146</sup> Subsequently, Cehave used the entire shipment in compounding cattle food, though in more conservative proportions than would have been the case with perfectly sound goods.

*Cehave* raises two principal issues: first, whether the condition of merchantable quality<sup>147</sup> had in the circumstances been breached; and secondly, whether the *Sale of Goods Act* permitted the express term that the goods should be shipped in good condition to be treated in the same way as the seaworthiness term in *Hongkong Fir*. Little will be said here about the first issue. *Cehave* did nothing to overturn the orthodox view that the statutory conditions in the *Sale of Goods Act* cannot be subjected to the *Hongkong Fir* analysis:<sup>148</sup> the practical consequences of a particular breach are irrelevant in settling the status of the implied term, which is either breached so as to confer on the buyer a right of rejection, or not breached at all, in which latter case the buyer is entitled to nothing by way of damages.<sup>149</sup> The English Court of Appeal, no doubt influenced by its desire that the buyer on these facts should

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<sup>145</sup> *Ibid.*, 68, where Roskill L.J. points out that the findings of the Board of Appeal of the Grain and Feed Trade Association Ltd would lead to a damages award in the region of this figure.

<sup>146</sup> In what Lord Denning, *ibid.*, 55-6 describes as "an astonishing sequence of events", a Rotterdam court appointed agents to conduct a sale of the goods in dispute. The agents approached only one person, a Rotterdam importer of feeding products, who bought the whole shipment for £33,720 and sold it on the same terms and at the same price to the original buyer, Cehave.

<sup>147</sup> *Sale of Goods Act*, s. 15.2.

<sup>148</sup> But see the curious decision in *Polar Refrigeration Service Ltd v. Moldenhauer*, *supra*, note 135.

<sup>149</sup> This approach is surely responsible for the difficulties experienced in recent years in defining the merchantable quality standard, and for the relaxation introduced into that standard. See Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law* (1980) 65 Iowa L. Rev. 1249, 1258, where the author sees the modern attitude to the merchantable quality term, exemplified by the statutory definition of merchantable quality in the *Sale of Goods Act 1979*, 1979, c. 54 (U.K.), subs. 14(6), as part of the metamorphosis of legal rules from universal principle to fact-based pragmatism.

not get away with rejection, held that the merchantable quality term had not been broken. But for the express term in the contract, the buyer would therefore have recovered nothing despite the severe heating damage suffered by the citrus pellets. The decision is plainly undesirable in respect of this holding and a most unsatisfactory guide for the resolution of cases where no express terms dealing with the quality of goods are to be found in a contract of sale of goods.<sup>150</sup>

The Court's decision on merchantable quality did, however, prepare the way for the flexible disposition of the case under the express term. The Court was unanimous in holding that this shipment term was not a condition: there was no case law holding that this term was a condition<sup>151</sup> and the Court was reluctant to add to the stock of known conditions.<sup>152</sup> There was also unanimity in the conclusion that this term was not a warranty in the sense used by the *Sale of Goods Act*, namely that the remedy for its breach could never be anything other than damages. Rather, the buyer's remedy turned on the actual consequence of the seller's breach. If this breach went to the root of the contract or deprived the buyer of the benefit it bargained for, the buyer would then be entitled to reject the goods and terminate the contract. According to Lord Denning M.R., this result was dictated because the shipment term belonged to that majority of contractual terms which could neither be classified as conditions nor as warranties, but constituted a *tertium quid*, intermediate stipulations.<sup>153</sup> Ormrod L.J., however, seems to have regarded parties as entitled to terminate a contract if the term in question were either a condition or if its breach produced a failure of the consideration bargained for by the buyer,<sup>154</sup> a view apparently shared by Roskill L.J.<sup>155</sup> The practical point in this difference of opinion is that under Lord Justice Ormrod's scheme, the breach of a term commonly regarded as a warranty, as opposed to a condition, could lead to termination in the absence of a legislative provision or contractual intention that only damages would lie in the event of a breach.

On the facts of the case, the Court was unanimous in holding that the seller's breach did not go to the root of the contract or result in a failure of

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<sup>150</sup> On one reading of Lord Denning's judgment, however, the presence of the express term "shipped in good condition" was relevant in defining the standard of merchantable quality in that it indicated that a money allowance was the appropriate remedy for goods that were not seriously defective. This approach would, of course, open the door to a contrary holding on merchantable quality on similar facts where there was no such express term. See, *Cehave*, *supra*, note 144, 63.

<sup>151</sup> See *Cehave*, *ibid.*, 61 (*per* Lord Denning M.R.), 70 (*per* Roskill L.J.), and 80 (*per* Ormrod L.J.).

<sup>152</sup> *Ibid.*, 70-1, *per* Roskill L.J.

<sup>153</sup> *Ibid.*, 61.

<sup>154</sup> *Ibid.*, 84.

<sup>155</sup> *Ibid.*, 73.

consideration. All the goods could be used for their intended purpose so that the appropriate remedy was a price allowance. Moreover, the tribunal of fact had made no finding that there had been a failure of consideration.

There remained, however, the seller's argument that the *Sale of Goods Act* required all terms of a contract of sale to be classified as conditions or warranties and left no room for rights of termination depending on failure of consideration. Support for the seller's argument was to be found in the United Kingdom equivalents of subs 12(2) and 30(2).<sup>156</sup> The former provision does two things: it states that whether a term is a condition or warranty turns on the construction of the contract, and that a breach of condition may give rise to a right to terminate the contract but a breach of warranty does not.<sup>157</sup> According to the seller, this provision put in place a comprehensive scheme of remedies leaving no room for a *tertium quid* in sale of goods law. The latter provision, which deals with certain instalment contracts,<sup>158</sup> provides that a breach by buyer or seller as to one or more instalments gives rise to a right to terminate the contract if the breach is repudiatory of the whole contract, which turns, *inter alia*, on "the circumstances of the case".<sup>159</sup> Because subs. 30(2) is the only section in the *Act*, so the seller's argument would run, which takes the consequences of a breach into consideration in fixing the remedy,<sup>160</sup> the consequences of breach must be irrelevant where a buyer's or seller's right to terminate a sale of goods contract arises other than under subs. 30(2).<sup>161</sup>

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<sup>156</sup> *Sale of Goods Act, 1893*, 56 & 57 Vict., c. 71 (U.K.), para. 11(1)(b) and subs. 31(2). Now see subs 11(3) and 31(2) of the *Sale of Goods Act 1979*, 1979, c.54 (U.K.).

<sup>157</sup> *Sale of Goods Act*, subs. 12(2):

Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.

<sup>158</sup> See *supra*, note 97; and Ontario Law Reform Commission, *supra*, note 15, 541-5.

<sup>159</sup> *Sale of Goods Act*, subs. 30(2):

Where there is a contract for the sale of goods to be delivered by stated instalments, that are to be separately paid for and the seller makes defective deliveries in respect of one or more instalments or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

On the approach taken by the courts before the enactment of the United Kingdom statute in 1893, see, e.g., *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Cas. 434, [1881-85] All E.R. Rep. 365 (H.L.); and *Freeth v. Burr* (1874) L.R. 9 C.P. 208, [1874-80] All E.R. Rep. 751. The principal modern case is *Maple Flock Co. v. Universal Furniture Products (Wembley) Co.* [1934] 1 K.B. 148, [1933] All E.R. Rep. 15 (C.A.).

<sup>160</sup> See *supra*, note 97.

<sup>161</sup> The argument does not emerge with the greatest clarity from the report of the arguments of counsel for the buyer in *Cehave, supra*, note 144, 51.

The first of these provisions affords the main support for the seller's argument, since the latter section would be significant only if the scheme of remedies in the *Sale of Goods Act* were intended to be comprehensive. Subsection 12(2) itself appears to be more formidable if one accepts Lord Justice Ormrod's, rather than Lord Denning's, scheme of contractual terms. It is not easy to see how a warranty can ever give rise to a right to terminate a contract of sale when subs. 12(2) states that "the breach of [a warranty] may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated". It is much easier to believe that the section applies only to conditions and warranties and not to any invented *tertium quid*, intermediate stipulations.

Consequently, Lord Denning did not feel troubled by the seller's arguments on the construction of the *Act*.<sup>162</sup> Roskill and Ormrod L.JJ., on the other hand, were compelled to lay emphasis on the body of contract law, drawn from the executed consideration cases, which stressed the *ex post facto* consequences of breach.<sup>163</sup> It was unthinkable that a statute like the *Sale of Goods Act*, which was intended to codify rather than reform the antecedent case law governing sale of goods contracts, should have produced a radical change in sale of goods contract law, which after all was but a branch of the general law of contract.<sup>164</sup> Although this may indeed be a sound way of disposing of sale of goods problems, particularly the problem of breach of a warranty whose effects can range from the trivial to the severe, it fails to do justice to the impact of cases like *Bettini v. Gye*<sup>165</sup> and *Bentsen v. Taylor, Sons & Co.*<sup>166</sup> on the law before the *Act*. *Cehave* does not repair a deficiency in the *Act* so much as a deficiency in the law codified by the *Act*, and its construction of the *Act* can only be described as heroic.

One does not find in the reasoning of the Court in *Cehave* any acknowledgement of its decision being influenced by the fact that the contract had been executed wholly or in part. Nevertheless, the contract had been executed, in the sense that the shipping documents had already been transferred to the buyer and the goods carried onward to their destination. It had also been executed in the indirect but very real sense that the goods had been purchased again after the judicial sale and consumed. Given the circumstances of the rejection of the goods, the seller would have been prejudiced severely if the rejection had been held to be lawful.<sup>167</sup> To that extent, the old inequality of

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<sup>162</sup> *Ibid.*, 60.

<sup>163</sup> *Ibid.*, 71 (*per* Roskill L.J.), and 82-3 (*per* Ormrod L.J.).

<sup>164</sup> *Ibid.*, 60 (*per* Lord Denning M.R.), 72-3 (*per* Roskill L.J.), and 82-3 (*per* Ormrod L.J.).

<sup>165</sup> *Supra*, note 66.

<sup>166</sup> *Supra*, note 67.

<sup>167</sup> He would have recovered £33,720, less the expenses of the judicial sale, for goods all of which could be used (and were used) in compounding cattle food, and which were originally priced at £100,000.

damages argument comes to mind and the position of the seller can be compared with that of the tenor in *Bettini v. Gye* who had refrained for three months from singing in the London area, as required by the contract, before turning up late for rehearsals. Unless one reads *Cehave* as giving a large measure of dispensation to sellers supplying faulty goods, one should not assume that it would entitle a seller to compel a buyer to accept tender of manifestly defective goods when in no respect has the contract been executed.<sup>168</sup> This would explain the strict attitude of the law towards the tender of defective documents, which the Court in *Cehave* had difficulty in reconciling with its actual decision that the buyer had no right to reject the defective goods.<sup>169</sup>

The question of remedies for breach of the contract of sale was explored further in the important case of *Bunge Corp. v. Tradax S.A.*<sup>170</sup> The seller was required to ship 5,000 tons of soya meal by 30 June 1975 at a Gulf of Mexico port of its own choice under an f.o.b. contract for the sale of 15,000 tons of soya meal containing the usual term that each shipment was to be regarded as a separate contract. It was the buyer's duty to nominate an effective ship and to give the seller fifteen days' notice of readiness to load. The buyer was itself the seller of the same quantity of goods in a string and, because the ultimate purchaser was late in starting the process of giving notice, the buyer was four days late in notifying the seller's agent of readiness to load. The seller in consequence repudiated this separate 5,000 ton contract and sued for damages for the loss it sustained by reselling the goods on a falling market.<sup>171</sup> Its entitlement to recover such damages turned on whether its repudiation was lawful, which depended upon the status of the term in question, namely the obligation of the buyer to give fifteen days' notice of readiness to load. The buyer did not argue that the term was a warranty, in the sense that its breach could lead only to damages, so the choice came down to condition or intermediate stipulation. As for intermediate stipulation, the seller did not

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<sup>168</sup> See the words of Bramwell L.J. in *Honck v. Muller*, *supra*, note 57, 99 and of Sellers L.J. in *Hongkong Fir*, *supra*, note 25, 56 to the effect that the charterer could have declined tender of the ship if it had then been apprised of the incompetence of the engine room staff. If a bill of lading, claused to show that the goods had not been shipped in good condition, had been tendered to the buyer in *Cehave*, the buyer would have been perfectly free to reject the appropriation. Consequently, there would never have been a tender of the goods themselves.

<sup>169</sup> See the judgment of Roskill L.J., *supra*, note 144, 70. The learned judge justified this discrepancy on the ground that "the seller's obligation regarding documentation had long been made sacrosanct by the highest authority". Thus does authority supplant reason.

<sup>170</sup> *Supra*, note 7. See Reynolds, *Discharge of Contract by Breach* (1981) 97 L.Q. Rev. 541, 543.

<sup>171</sup> On the facts presented in *Bunge*, it cannot be understood why the seller should have been so punctilious about its rejection rights on a falling market. The facts are outlined in the judgment of Megaw L.J. in the Court of Appeal. See *supra*, note 7, 525-8.

press the argument that in the circumstances the breach went to the root of the contract or deprived the seller of the consideration for which it bargained. Consequently, the seller's repudiation was lawful, if the term was a condition, and unlawful, if the term was an intermediate stipulation.

A special case was stated to Parker J., who held, following *Hongkong Fir* and *Cehave*, that the term was an intermediate stipulation. The Court of Appeal unanimously reversed him, holding that the term was a condition, and the House of Lords confirmed the decision of the Court of Appeal.<sup>172</sup> Briefly, *Bunge* is another step in the process of accommodating the failure of consideration principle by charting a route between conditions and intermediate stipulations. The first point to note is that both the Court of Appeal and House of Lords, though holding the term in question to be a condition, gave their approval to the doctrine of intermediate stipulations.<sup>173</sup> It is therefore proposed to analyze the decision along the following lines: first, to consider why the two Courts concluded that the buyer's duty to give notice of readiness to load was a condition and whether they were right in so deciding; and secondly, to assess the decision in terms of its success in drawing or predicting a consistent line between conditions and intermediate stipulations. One of the criticisms levelled against the doctrine of intermediate stipulations, that it promotes uncertainty,<sup>174</sup> can be met to a considerable degree if this dividing line is a predictable one and if respect continues to be paid to party autonomy in defining the status of a contractual term.

The parties in this case failed to express their intention regarding the status of the notice of readiness to load term so it fell to the courts to remedy the deficiency. It can be said with certainty that in concluding that the term in question was a condition, neither the Court of Appeal nor the House of Lords saw its role in terms of a discovery of the real but inarticulated intention of these particular parties. How could such a search be consistent with the arguments raised concerning the authority of decided cases<sup>175</sup> and the principles expressed in support of the policy behind treating the term in question as a condition?<sup>176</sup> It has been seen that the introduction in the nineteenth century of

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<sup>172</sup> A very similar term was held to be a condition by Mocatta J. in *Bremer Handelsgesellschaft v. J.H. Rayner & Co.* [1978] 2 Lloyd's Rep. 73, 89 (Q.B.), *rev'd* on different grounds in [1979] 2 Lloyd's Rep. 216 (C.A.).

<sup>173</sup> *Supra*, note 7, 531 and 534 (*per* Megaw L.J.), and 539 (*per* Browne L.J.) in the Court of Appeal. In the House of Lords, see 541-2 (*per* Lord Wilberforce), 542-3 (*per* Lord Scarman) and 550 (*per* Lord Roskill). In most cases, this recognition of *Hongkong Fir* takes the form of clear implication.

<sup>174</sup> See, *e.g.*, Weir, *supra*, note 133.

<sup>175</sup> Such arguments were raised throughout the various judgments in the Court of Appeal and in the House of Lords.

<sup>176</sup> Such principles were also expounded throughout the judgments in the House of Lords and the Court of Appeal.

the *a priori* constructionist approach, finding its clearest expression in the judgment of Bowen L.J. in *Bentsen v. Taylor, Sons & Co.*,<sup>177</sup> had the effect of removing decisions on contractual discharge from the jury,<sup>178</sup> a development complementing the articulation of the remoteness rules in *Hadley v. Baxendale*,<sup>179</sup> which inaugurated a measure of judicial control over the award of damages by juries in contract cases. That this task of construction remains a legal task emerges clearly from the judgments in the *Bunge* case: though juries may sit only rarely in English civil cases, an English commercial court is still faced with the problem of handling the findings of arbitrators and trade boards of appeal. This fact accounts for the delicate way in which para. 5 of the special case stated by the Board of Appeal of the Grain and Feed Trade Association was dealt with in *Bunge*. Although this paragraph, which stated that the buyer's duty to give notice of readiness to load "is regarded in the trade as of such great and fundamental importance that any breach thereof goes to the root of the contract",<sup>180</sup> was obviously palatable to the Court of Appeal and House of Lords in *Bunge*, Lord Roskill in the House of Lords,<sup>181</sup> and Megaw L.J. in the Court of Appeal,<sup>182</sup> were at pains to say that it did not bind a court deciding what was a question of law; such a court would, however, accord weight to the views of the trade tribunal concerned.<sup>183</sup>

Two principal justifications were given by the Courts in *Bunge* in concluding that the buyer's duty to give notice of readiness to load was a condition: first of all, there was a series of related policy arguments pointing

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<sup>177</sup> *Supra*, note 67.

<sup>178</sup> "[I]t was no part of the Judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the port, supposing it to be untrue, was an essential part of the contract, or a mere representation. . . ." *Behn v. Burness*, *supra*, note 81, 756-7, *per* Williams J.

<sup>179</sup> (1854) 9 Ex. 341, (1854) 156 E.R. 145. In view of developments like *Hongkong Fir*, *supra*, note 25, concentrating on events occurring at the time of a contractual breakdown, one wonders how long the principle will hold that the application of remoteness rules in contract cases depends upon what was within the reasonable contemplation of the parties at the date of the contract, rather than at the date of breach.

<sup>180</sup> *Supra*, note 7, 532.

<sup>181</sup> *Ibid.*, 553.

<sup>182</sup> *Ibid.*, 532.

<sup>183</sup> Frustration of contract is another area which in relatively recent years has witnessed a movement in the law away from the construction of the contract and towards an assessment of the actual supervening event on the foundation of the adventure. Lord Radcliffe is perhaps the leading exponent of the latter approach, and it is probably no accident that he had to address himself to the respective roles of judge and arbitrator in ruling on questions of law and fact in his speech in *Davis Contractors Ltd v. Fareham Urban District Council* [1956] A.C. 696, 730, (1956) 2 All E.R. 145 (H.L.).

to the wisdom of this conclusion; and secondly, there was the established status as a condition of the seller's duty of timely shipment in commercial contracts, a duty dependent upon the prior performance of the buyer's duty to give notice of readiness.

The primary policy argument in favour of treating the buyer's obligation as a condition was certainty in commercial transactions. This value was expressed best by Megaw L.J.:

The parties, where time is of the essence, will at least know where they stand when the contractually agreed time has passed and the contract has been broken. They will not be forced to make critical decisions by trying to anticipate how serious, in the view of arbitrators or courts, in later years, the consequences of the breach will retrospectively be seen to have been, in the light, it may be, of hindsight.<sup>184</sup>

Treating the term in question as a condition spares the aggrieved party the following dilemma: if he repudiates the contract too soon, before the guilty party's breach goes to the root of the contract, he will be held to have unlawfully repudiated the contract; if he acts cautiously and bides his time before repudiating, his delay could be regarded as tantamount to accepting the other party's breach, in which case his repudiation would again be unlawful.

A number of other policy arguments emerge in the judgments, particularly in that of Lord Lowry who stressed the practical expediency of an approach which avoided the difficulties of damages assessment, protracted trials and the making of time of the essence in contracts of this nature.<sup>185</sup> His Lordship made particular mention of the characteristics of string contracts where "today's buyer may be tomorrow's seller" and where the administration of many ongoing contracts would be eased by the simple practice of designating the readiness to load term as a condition;<sup>186</sup> he also emphasized the desirability of consistency of result in adjudicating upon different contracts in the same string, which the intermediate stipulation approach would certainly jeopardize.<sup>187</sup> As important as the certainty argument is in the disposition of this case, perhaps even more important was the argument that, given the established status as a condition of the seller's duty to deliver in commercial contracts, it was a logical corollary that the readiness to load term should be characterized in the same way.<sup>188</sup> The status of the seller's obligation was accepted with very little question, though one might wonder whether a need

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<sup>184</sup> *Bunge Corp. v. Tradax Export S.A.*, *supra*, note 7, 536 (in the Court of Appeal).

<sup>185</sup> *Ibid.*, 545-6 (in the House of Lords).

<sup>186</sup> *Ibid.*, 545 and 547.

<sup>187</sup> *Ibid.*, 546.

<sup>188</sup> *Ibid.*, 542 (*per* Lord Wilberforce), 543 (*per* Lord Scarman), and 553 (*per* Lord Roskill). In the Court of Appeal, see *supra*, note 7, 532 (*per* Megaw L.J.), and 540 (*per* Browne L.J.).

arises to justify this conclusion *de novo* in view of the fact that the scope of the concept of description, so important in the Court's conclusion in *Bowes v. Shand*<sup>189</sup> that the seller's obligation of timely shipment was a condition, has been so narrowed in recent years as to make impossible a similar resort to description today.<sup>190</sup>

Although performance of the buyer's duty to give notice of readiness to load was a condition precedent to the seller's duty to deliver, should this necessarily have meant that any breach by the buyer of its obligation would permit the seller to terminate the contract? To put it another way, could a contractual term be a condition precedent with regard to working out the order of performance of contractual obligations, and yet not a condition, but instead a warranty or intermediate stipulation, when it came to the actual discharge of the contract? This approach would amount to invoking the old principle of dependent promises to justify non-performance, but invoking the more stringent principle of failure of consideration if one wanted to go further and terminate the contract.<sup>191</sup> It is hard to see any logical reason why this should not be possible and there is nothing in the judgments of the Courts in *Bunge* to deny such an analysis. Nevertheless, this analysis was not considered at all by either the Court of Appeal or the House of Lords. When they declined to

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<sup>189</sup> (1877) 2 App. Cas. 455, [1874-80] All E.R. Rep. 174 (H.L.).

<sup>190</sup> See *supra*, text accompanying notes 117 to 123.

<sup>191</sup> A related idea is put forward by Reynolds, *supra*, note 170, 547 where he states:

The special English use of the word "condition" undoubtedly facilitates the operation of a policy favourable towards rejection (or other forms of treating a contract as discharged). But it also blurs considerably another possibility: that a term may simply lay down a condition of one party's liability without implying also a promise to perform the condition. If the condition does not occur, the party concerned is discharged from the relevant duty: but there is no breach by the other.

Although the Reynolds approach is directed at the concept of non-promissory conditions, the idea in the text, similarly blurred as a possibility by existing terminology, concerns terms which in one respect are promissory conditions but in another sense are promissory warranties or intermediate stipulations. The same dual possibility is evident in the judgment of Lord Denning M.R. in *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.* [1972] 2 All E.R. 1173, [1972] 1 W.L.R. 840 (C.A.) [hereinafter cited to All E.R.], *aff'd* [1974] A.C. 235, [1973] 2 All E.R. 39 (H.L.) [hereinafter cited to A.C.], where, at 1180, Denning M.R. draws a distinction between a condition that is "a prerequisite to the *right to recover* on the agreement" [emphasis in original] and a condition in the sense of a promissory term, any breach of which gives rise to termination rights.

Splitting the condition in this way would lead to the result that in some cases of breach the innocent party would be permitted to do no more than suspend the contract. This result would be conceptually awkward in that the modern approach to contractual termination, exemplified by cases such as *Photo Production Ltd v. Securicor Transport Ltd* [1980] A.C. 827, [1980] 1 All E.R. 556, would make it hard in practice to distinguish the suspension and the termination of a contract. There would also be difficulties in applying the principle of waiver. See *Tsakiroglou and Co. v. Transgrains S.A.* [1958] 1 Lloyd's Rep. 562 (Q.B.).

characterize the buyer's obligation as an intermediate stipulation, it was not because of any illogicality in setting up performance of an intermediate stipulation as a condition precedent to the seller's duty to perform a condition of the contract; rather, the Courts believed that the parties had quantified at fifteen days the reasonable time in which the buyer had to nominate a ship, and there was no justification for any court to disturb the parties' assessment.<sup>192</sup> Had the Courts concluded otherwise and held that the assessment of a reasonable time was at large for them to discover, the buyer's duty to give notice of readiness could have been seen as a curious hybrid, condition in form and intermediate stipulation in substance, which should give one pause as to whether the distinction between conditions and intermediate stipulations can truly be regarded as an absolute one.<sup>193</sup> The Courts' reasons for not disturbing the parties' assessment of fifteen days is best expressed by Megaw L.J. in the Court of Appeal: "It would, in my opinion, be arrogant and unjustifiable for a court to substitute any view of its own for the view of the parties themselves as to what was a reasonable time for this purpose."<sup>194</sup>

A remaining stumbling block to the Courts' conclusion that the buyer's obligation was a condition was a *dictum* of Diplock L.J. in *Hongkong Fir* which appeared to suggest that, for any term to be a condition, it had to be predicated that any breach thereof would deprive the injured party of the consideration for which he bargained.<sup>195</sup> Such a test would be difficult indeed to satisfy and would apparently deny parties the unfettered right of classifying their contractual obligations. The test was rejected by Megaw L.J. as being inconsistent with a number of decided cases and as so strict that no contractual term could possibly satisfy it.<sup>196</sup> Furthermore, if each and every breach had to deprive a party of substantially the whole benefit he contracted for, it was hard

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<sup>192</sup> *Supra*, note 7, 532, *per* Megaw L.J. The judgment of Megaw L.J. found favour in the House of Lords. See the judgment of Lord Roskill, *supra*, note 7, 548.

<sup>193</sup> It is, to this writer, not easy to see how Diplock J. could have characterized as a condition a seller's obligation to deliver within a reasonable time of a certain date, as he did in *McDougall v. Aeromarine of Emsworth Ltd* [1958] 3 All E.R. 431, 439. In practical terms, how different would such an approach be from intermediate stipulation analysis? The same difficulty is referred to in *D.T.R. Nominees Pty Ltd v. Mona Homes Pty Ltd* (1978) 138 C.L.R. 423, 430, (1978) 19 A.L.R. 223 (Austl. H.C.) *per* Stephen, Mason and Jacobs JJ.: "[W]e fail to see how a stipulation calling for action to be taken expeditiously of itself constitutes an essential term."

<sup>194</sup> *Bunge, supra*, note 7, 532.

<sup>195</sup> *Supra*, note 25, 69-70 where a number of lengthy passages suggest this requirement. This same approach has re-emerged in a slightly different context, namely anticipatory repudiation. See Lord Diplock's observations in *Afovos Shipping S.A., supra*, note 97.

<sup>196</sup> *Bunge, supra*, note 7, 537:

Conditions would no longer exist in the English law of contract. For it is always possible to suggest hypothetically some minor breach or breaches of any contractual term which might, without undue use of the imagination, be wholly insufficient to produce serious effects for the innocent party, let alone the loss of substantially all the benefit.

to speak realistically of the injured party's right to elect between accepting the breach and continuing with the contract, on the one hand, and terminating the contract, on the other.<sup>197</sup> In the House of Lords, Lord Roskill added the observations that Lord Justice Diplock's words were taken out of context, intended to be applied only to intermediate stipulations, and that even if his words were meant to have universal significance, they were not consistent with *dicta* of the two other judges in *Hongkong Fir*.<sup>198</sup> Lord Roskill also had to contend with a passage from Lord Diplock's speech in *United Scientific Holdings Ltd v. Burnley Borough Council*,<sup>199</sup> which stated that, by the time of the fusion of the courts of common law and equity in 1873, it had become accepted law that time obligations were never of the essence of a contract and could only confer the right of termination for breach if the injured party were deprived of substantially the whole benefit for which he contracted.<sup>200</sup> Declining to believe Lord Diplock intended the passage to be read literally, Lord Roskill also stressed its inconsistency with cases decided before and after 1873.<sup>201</sup>

The decision in *Bunge* that the readiness to load term was a condition is, it is submitted, a perfectly sound one. The reasons given by the Courts are compelling, though it is difficult to say how far they will extend outside international commodities contracts. It is apparent that parties engaged in such transactions attach a great measure of importance to the prompt performance of obligations: in a rapidly moving market where parties have to manage a complex array of contracts, that is only natural. The certainty factor here is paramount. It is difficult to know, however, how far *Bunge* can be taken if the matter in dispute concerns the timely delivery of consumer durables<sup>202</sup> or even of custom-built machinery for industrial purposes.<sup>203</sup> In the

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<sup>197</sup> *Ibid.*, 537. Cf. *Harbutt's "Plasticine" Ltd v. Wayne Tank & Pump Co.* [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.).

<sup>198</sup> *Supra*, note 25, 60 (*per* Sellers L.J.), 63 (*per* Upjohn L.J.).

<sup>199</sup> [1978] A.C. 904, [1977] 2 All E.R. 62 (H.L.) [hereinafter cited to A.C.].

<sup>200</sup> *Ibid.*, 928.

<sup>201</sup> *Supra*, note 7, 552.

<sup>202</sup> See, e.g., *Allen v. Danforth Motors Ltd* (1957) 12 D.L.R. (2d) 572 (Ont. C.A.) and *Alteen's Jewellers Ltd v. Cann* (1980) 40 N.S.R. (2d) 504. In the former case, the Court rejected parol evidence that a particular delivery date had been agreed on for a consumer car but also expressed its disinclination to treat such a term as a condition. In the latter case, the Court ignored the possibility of treating a delivery term giving a precise date as a condition, but instead addressed itself to the question whether delivery had taken place within a reasonable time. In a consumer contract where the buyer must wait patiently for a distant delivery date, a stricter attitude may be appropriate. See *Charles Rickards Ltd v. Oppenheim* [1950] 1 K.B. 616, [1950] 1 All E.R. 420 (C.A.).

<sup>203</sup> In the supply of labour and materials case of *Fairbanks Soap Co. v. Sheppard*, *supra*, note 127, the Supreme Court applied the doctrine of substantial performance in deciding whether a factory owner was entitled to reject a machine for manufacturing soap chips so as to terminate

former case, it is hard to believe that consumer buyers attach as much importance to timely performance of the seller's obligations as is the case in a commodities market; in the latter case, the prejudice that a seller would suffer if the buyer promptly terminated as soon as the delivery date had passed should persuade a court, assuming the parties had made no express provision for termination rights, to extend a measure of leniency to the seller.

It is pertinent to ask how far *Bunge*, a decision attaching considerable weight to certainty in commercial dealings, itself assures certainty in drawing the line between conditions and intermediate stipulations. This discussion can be pointed by returning to Lord Denning's judgment in *Cehave*<sup>204</sup> where he said that, in deciding whether an injured party could terminate a contract, the inquiry was conducted in two stages:

First, see whether the stipulation, on its true construction, is a condition strictly so called, that is, a stipulation such that, for any breach of it, the other party is entitled to treat himself as discharged. Second, if it is not such a condition, then look to the extent of the actual breach which has taken place. If it is such as to go to the root of the contract, the other party is entitled to treat himself as discharged: but, otherwise, not.<sup>205</sup>

It can readily be seen that Lord Denning's inquiry starts with an *a priori* construction of the contract and culminates, if the second stage of the inquiry is necessary to give the injured party termination rights, in an *ex post facto* assessment of the consequences of breach. Now, it is evident that there is a degree of tension between these radically different approaches to contractual termination, the one stimulated by the choice of the parties and the other by the nature of the event attendant upon the breach of contract. This tension can be accommodated in practice if the two stages are mutually exclusive and all rights of termination can be fitted into one or other of the two stages, but it cannot be eliminated in doctrinal terms by the observation that, if parties designate a particular term as a condition of the contract, it can only be because they regard each and every breach as satisfying the *Hongkong Fir* test of contractual termination.<sup>206</sup> One can think readily of other reasons why parties may designate a term as a condition. A party may wish to have an effective lever to ensure punctilious performance by the other, or may wish to

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the contract. On the facts, the Court concluded that the builder had not substantially performed the contract and so could not claim the price subject to a counterclaim for damages. The significance of a case like this lies in the way in which a strict condition precedent logic is eschewed. It is most unlikely that a party tendering late performance under such a contract would suffer termination and unlikely too that a court would permit radically divergent results according to whether such a contract were classified as one for labour and materials or one for the sale of goods.

<sup>204</sup> *Supra*, note 144, 55.

<sup>205</sup> *Ibid.*, 60.

<sup>206</sup> See, *e.g.*, the excerpts from *Bunge* cited *supra*, note 173.

have the option of termination instead of a difficult, perhaps unprovable, claim for damages for certain types of repeated or continuing breaches.<sup>207</sup>

It was doubtless a sense of unease about attempting to harmonize the twin approaches of party intention and event assessment to termination that led Diplock L.J. in *Hongkong Fir* to play down the role of the former and exalt that of the latter. Indeed, at one point he appeared to deny the relevance of party intention at all when he said that a term could be regarded as a condition only if each and every breach satisfied the test for a discharging event;<sup>208</sup> elsewhere, he was prepared to accede to party intention only in so far as it was based upon an express characterization of the term as a promissory condition.<sup>209</sup> These passages were criticized in *Bunge*<sup>210</sup> but the difficulty of harmonizing the two approaches survives that case. In *Bunge*, Lord Roskill states that his conclusion that the buyer's duty to give notice of readiness to load was a condition was based on "the construction of the relevant clause",<sup>211</sup> but it is difficult to see that this adequately describes an inquiry ranging across a broad band of the contract economy, namely commodities contracts, and in which a judicial legislative function is being employed to set the characteristics of a particular type of standard form contract. Lord Lowry's judgment is no more helpful, with its invocation of the "business efficacy" test laid down in *The Moorcock*<sup>212</sup> for the implication of terms into contracts.<sup>213</sup> According to that test, which exists because the parties in a given case have presumably intended their agreement to have some contractual force, terms are implied in contracts when and to the extent that they give the contract a minimum of business efficacy. There is nothing in *Bunge* to suggest that the contract could not have functioned in the event of the disputed term being treated as an intermediate stipulation. Consequently, Lord Lowry's explanation can hardly be the correct one and the decision in *Bunge* is most difficult to fit within Lord Denning's two-stage inquiry in *Cehave*. The result is uncertainty in charting the boundary between conditions and intermediate stipulations.

It is therefore necessary to consider whether some other approach can give a bearing on the decision in *Bunge* in such a way as to diminish this uncertainty. In the Court of Appeal in *Bunge*, Megaw L.J. cryptically observed: "It is possible that somewhat different considerations may apply,

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<sup>207</sup> This fact is a cogent reason why the disputed term in *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.*, *supra*, note 191 may truly have been intended as a condition.

<sup>208</sup> *Supra*, note 25, 69-70.

<sup>209</sup> *Ibid.*, 72.

<sup>210</sup> *Supra*, note 7. See the speeches of Lords Wilberforce, Lowry and Roskill.

<sup>211</sup> *Ibid.*, 553.

<sup>212</sup> (1889) 14 P.D. 64, [1886-90] All E.R. Rep. 530 (C.A.).

<sup>213</sup> *Bunge*, *supra*, note 7, 545.

when the question arises as to condition or 'intermediate' term, as regards, on the one hand, provision [*sic*] as to time and, on the other hand, provisions unrelated to time."<sup>214</sup> Two possible meanings of this passage are that time obligations are conditions and hence cannot be intermediate stipulations; or that time obligations cannot be intermediate stipulations, though they may be conditions or warranties. The first meaning surely cannot be right as far as the buyer's payment duty is concerned and is probably wrong in so far as it purports to apply to all delivery obligations of sellers. The second meaning is also suggested by the following words of Lord Wilberforce:

The fundamental fallacy of the appellants' argument [that the *Hongkong Fir* approach be applied to the readiness to load term] lies in attempting to apply this analysis [of Diplock L.J. in *Hongkong Fir*] to a time clause such as the present in a mercantile contract, which is totally different in character. As to such a clause there is only one kind of a breach possible, namely to be late, and the questions which have to be asked are: first, what importance have the parties expressly ascribed to this consequence? and, second, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole?<sup>215</sup>

This passage amounts to a bold statement that the *Hongkong Fir* approach has no part to play in time stipulations in mercantile contracts, presumably because, to a commercial party, gross and venial lateness are all one. While this might strike a responsive chord in the man who just misses the last train, it would hardly approximate to the experience of the hungry patron in a restaurant where the service is slow. Lord Wilberforce's logic may be unfortunate, but the clear message flowing from *Bunge* is that time obligations in commodities contracts are immune from intermediate stipulation analysis.

Consequently, the impression remains that a significant, though inarticulated, distinction exists between time obligations and other obligations arising under the contract. To fill the gap, it is tempting to judge *Bunge* as yet another example in the long line of cases drawing a distinction between executory and executed contracts, although the length of the tradition has obscured the logic of the law in a way that case law has a habit of doing. Almost by definition, time obligations arise before tender and therefore pose problems when the contract is still executory. This would also explain why, notwithstanding s. 11 of the *Sale of Goods Act*, many (perhaps most) time obligations in mercantile sale contracts are conditions. Yet there remains very little direct evidence that the Courts in *Bunge* rationalized the law along these lines, apart from the following words of Lord Scarman:

The contract, when made, was, to use the idiom of Diplock L.J. [in *Hong Kong Fir*] "synallagmatic", ie a contract of mutual engagements to be performed in the future, or, in

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<sup>214</sup> *Ibid.*, 534.

<sup>215</sup> *Ibid.*, 541.

the more familiar English/Latin idiom, an "executory" contract. The seller needed sufficient notice to enable him to choose the loading port; the parties were agreed that the notice to be given him was 15 days; this was a mercantile contract in which the parties required to know where they stood not merely later with hindsight but at once as events occurred. Because it makes commercial sense to treat the clause in the context and circumstances of this contract as a condition to be performed before the seller takes his steps to comply with bargain [*sic*], I would hold it to be not an innominate term but a condition.<sup>216</sup>

It is useful at this point to rehearse the arguments in favour of execution analysis in the discharge of contracts for breach. Undoubtedly, the courts in the early cases were impressed by deficiencies in quasi-contract law when faced with the predicament of a defaulting party who had performed at least in part: in principle, the injured party was entitled to retain the benefits of the performance received without accounting for them.<sup>217</sup> The defaulting party was in no position to rescind the contract, a step necessary before one of the common counts could be used.<sup>218</sup> A quasi-contractual action would not be tolerated when it was not consistent with the terms of an open contract which had not been rescinded *ab initio*.<sup>219</sup> There were difficulties, too, in the inference of a genuine implied contract when the injured party had no choice but to accept performance or had already consumed the benefits thereof.<sup>220</sup> More recently, in Canada at least, developments in unjust enrichment law would appear to permit recovery even if a contract has not been wiped out completely<sup>221</sup> and so would take the edge off the argument that the execution of a contract, for reasons of unjust enrichment or quasi-contractual deficiencies, should markedly lessen the chances of an injured party to terminate the contract. The same could be said for a related argument which has arisen in the case law, namely that executed contracts should be permitted to continue because of the practical impossibility of undoing performance that has already been rendered.<sup>222</sup>

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<sup>216</sup> *Ibid.*, 543-4.

<sup>217</sup> See *Cutter v. Powell*, *supra*, note 41.

<sup>218</sup> *Ibid.*

<sup>219</sup> Whether implied in law — *Cutter v. Powell*, *ibid.* — or implied in fact — *Sumpter v. Hedges*, *supra*, note 127.

<sup>220</sup> See, e.g., *Sumpter v. Hedges*, *ibid.*; and *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888) 39 Ch. D. 339, 364-5, [1886-90] All E.R. Rep. 65, *per* Bowen L.J.

<sup>221</sup> See *Degelman v. Guaranty Trust Co.*, *supra*, note 104. In *Britain v. Rossiter* (1879) 11 Q.B.D. 123, however, the English Court of Appeal declined to imply a contract that was inconsistent with the terms of an existing but unenforceable contract. This limitation was understood in *Degelman* as being confined to the implication in fact of a new contract, as opposed to the implication in law of *quantum meruit* recovery to prevent unjust enrichment.

<sup>222</sup> See *Honck v. Muller*, *supra*, note 57, 99-100, *per* Bramwell L.J. explaining the decision in *Hoare v. Rennie*, *supra*, note 57. It has been seen that this approach owes much to the dated view of contractual termination whereby the contract is rescinded *ab initio* in accordance with *restitutio in integrum* principles.

But there are continuing arguments in favour of execution analysis, apart from the one that the force of inertia separating an executory contract from execution dictates a division along this line in the discharge of contracts. One such argument is that an executing defaulter is more likely to suffer prejudice than one whose default takes place when the contract is still executory. This argument has some substance to it, though a more exact division, following the old inequality of damages argument, might be between defaulting parties only one of whom has taken substantial steps in preparation for performance rather than in actual performance. To the extent that execution analysis can adduce other arguments in its favour, it may need to be corrected somewhat to take account of the prejudice suffered by a defaulting party.

A forceful argument in favour of execution analysis is that requiring an innocent party to accept tender of defective performance is tantamount to compelling him to contract again on different terms and with different expectations, and, besides altering the basis of the original bargain, constitutes a serious abridgement of his right of freedom of contract. The practical considerations set in train when some performance has already been rendered would, of course, blunt this argument to a degree. Finally, compelling an injured party to give up the security inherent in the retention of performance on his part and to have recourse only to substitutional damages relief with its vagaries, imperfections and undercompensation<sup>223</sup> seems unjust and supports the case for a strict approach to executory breaches.<sup>224</sup>

For the reasons given above, it is submitted that the distinction between executory and executed contracts remains a useful analytical starting-point in charting the distinction between conditions and intermediate stipulations. Nevertheless, even assuming some support for it in *Bunge*, the distinction cannot be applied too rigidly, or universally to all contracts. For the purpose of contractual discharge, it would be convenient to deal with sale of goods contracts under broad heads, for example, commodities and consumer durables transactions. One of the prices<sup>225</sup> paid for a supposedly general law of contract is the difficulty experienced in knowing how much to rely on a commodities case like *Bunge* when dealing with contracts of a different type, such as one for the production of custom-built machinery. This example suggests that the distinction between executory and executed contracts should be tempered by consideration of whether the defaulting party would be unduly prejudiced by termination. This consideration could also be rationalized in

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<sup>223</sup> Any legal system whose remoteness of damage rules cut back on the compensation that would flow from a factual causation rule applied alone surely produces undercompensation.

<sup>224</sup> A case going against this analysis is *Table Stake Construction Ltd v. Jones*, *supra*, note 135.

<sup>225</sup> There are others, as anyone who has taught the doctrine of consideration can surely attest.

terms of the parties' reasonable expectations, an approach which could also be usefully applied in the case of consumer durables.

## V. The Status of the Seller's Duty to Deliver and the Buyer's Duty to Accept and Pay for Goods

In the Introduction to this paper, it was stated that s. 11 of the *Sale of Goods Act*, avoiding any reference to the doctrine of conditions and warranties, treated the buyer's duty of payment as presumptively not of the essence of the contract and the seller's duty of delivery and the buyer's duty of acceptance as open questions of construction. It was further stated that the *Act* was unhelpful in drawing a necessary distinction between late performance and non-performance in those cases where a term was not of the essence of the contract.

This Part of the paper serves a three-fold purpose. First, an attempt will be made to show the evolution of the common law in relation to timely performance and how this body of law responds to the doctrine of conditions and warranties and the doctrine of intermediate stipulations, the latter of which serves to reintroduce the failure of consideration principle. This discussion has already been anticipated to a degree in the treatment of the *Bunge* case. Secondly, references will be made to the problem of reconciling common law and equity a century after fusion, particularly in the light of the House of Lords decision in *United Scientific Holdings Ltd v. Burnley Borough Council*,<sup>226</sup> which has an obvious bearing on attempts made in recent years to extend the scope of the doctrine of intermediate stipulations.<sup>227</sup> Finally, the *Sale of Goods Act* will be examined to see how far it is consistent in its treatment of the timely performance of the various duties of buyer and seller and it will be shown that once again there emerges the intractable

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<sup>226</sup> *Supra*, note 199.

<sup>227</sup> See the expanded principle of equitable forfeiture in *Stockloser v. Johnson* [1954] 1 Q.B. 446, [1954] 1 All E.R. 630, and the attempts made, so far with little success, to extend this principle to contracts for the hire of machinery (see, e.g., *Barton Thompson and Co. v. Stapling Machines Co.*, [1966] Ch. 499, [1966] 2 All E.R. 222), and to time charterparties (see, e.g., *Mardorf Peace & Co. v. Attica Sea Carriers Corp. of Liberia* [1977] A.C. 850, 873-4, [1977] 1 All E.R. 545 (H.L.) per Lord Simon; *Afovos Shipping Co. S.A. v. Pagnan* [1980] 2 Lloyd's Rep. 469, 476-80, per Lloyd J, *rev'd* [1982] 3 All E.R. 18 (C.A.) on other grounds; and *Scandinavian Trader Tanker Co. A.B. v. Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 1 All E.R. 301 (C.A.)). If the owner of goods is prevented from exercising a contractual right to withdraw them from hire when the hirer is late in making payment, this is, of course, tantamount to denying that the payment term is a condition and, moreover, equivalent to denying the entitlement of the parties to make particular terms conditions of the contract.

problem of reconciling the principles of dependent promises and failure of consideration.

One of the reasons advanced in *Bunge* for classifying the buyer's duty to give timely notice of readiness to load as a condition of the contract was that it was necessarily preliminary to the seller's duty of timely delivery, which had been treated as a condition of the contract by the House of Lords in *Bowes v. Shand*,<sup>228</sup> decided a hundred years earlier. In that case, a seller, who had shipped part of a quantity of Madras rice aboard a vessel in February when the contract called for shipment "during the months of March and/or April", was held to have disabled himself from suing the buyer when he refused to accept the cargo. The seller had failed to comply with all the requisite conditions precedent because, as held by the House of Lords, the time of shipment was part of the description of the goods so that the goods tendered were different from those called for by the contract. Given the strict attitude of the courts of this period towards the seller's time obligations,<sup>229</sup> it is perhaps surprising that s. 11 of the *Sale of Goods Act*, after dealing with stipulations as to the time of payment, went on to state that "whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract". The neutrality of this wording, coupled with the concentration of the decided cases on the seller's obligation of timely delivery in the area of commodities contracts, in particular those complex contracts containing interlocking obligations on the part of buyer and seller,<sup>230</sup> should leave the courts free to strive for a sensible result in other commercial and consumer contracts.<sup>231</sup> Consequently, in cases where the parties do not invest the same degree of importance in timely delivery as they do in commodities contracts, it should

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<sup>228</sup> *Supra*, note 189.

<sup>229</sup> See, for example, the strict canons of construction adopted in *Coddington v. Paleologo* (1867) L.R. 2 Ex. 193. See also Stoljar, *Untimely Performance in the Law of Contract* (1955) 71 L.Q. Rev. 527, 531-44. The effect of *Bowes v. Shand*, *ibid.*, on the seller's delivery obligations can also be seen in contracts designating a particular mode of shipment where compliance with the buyer's shipping instructions, the reasons for which were not communicated to the seller, was held to be of the essence of the contract. See *McLean v. Brown* (1887) 15 O.R. 313 (Ch. Div.); and *California Prune and Apricot Growers, Inc. v. Baird* [1926] S.C.R. 208, [1926] 1 D.L.R. 314. In both cases, *Bowes v. Shand* was relied upon by the Court.

<sup>230</sup> Besides *Bunge*, *supra*, note 7, a recent example of the tendency of courts to characterize as conditions interlocking obligations in commodities contracts is afforded by *Toepfer v. Lenersan-Poortman N.V.* [1980] 1 Lloyd's Rep. 143 (C.A.) (late tender of shipping documents). This interlocking aspect being absent in *Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, the House of Lords declined to treat the seller's obligation, contained in a GAFTA form, to give timely notice of prohibition of performance, as a condition; it was analyzed instead as an intermediate stipulation.

<sup>231</sup> In *Ballantyne v. Watson* (1880) 30 U.C.C.P.R. 529, the seller's obligation to make timely delivery of 700 boxes of cheese was held to be not of the essence of the contract. In pre-contractual negotiations, the parties had shown a lack of concern for precise dates.

be possible, now that the core of the condition of correspondence with description has been shrunk, to characterize the seller's duty of timely delivery as an intermediate stipulation.<sup>232</sup> The buyer would then be entitled to terminate on the occurrence of a failure of consideration, in other words, at the point where he is entitled to treat late delivery as non-delivery. It should, however, be emphasized that a commitment to the intermediate stipulation approach would not necessarily import the stringency of the test<sup>233</sup> favoured by Diplock L.J. in *Hongkong Fir*. Rather, an entitlement to terminate might be accorded a buyer who has been deprived of a substantial part of the benefit for which he bargained.

Section 11 of the *Sale of Goods Act* treats the buyer's duty of timely acceptance as a question of open construction. Though, on one reading, s. 36 of the *Act* indicates a preference for treating the buyer's duty as not of the essence of the contract,<sup>234</sup> it is submitted that the better view is that the *Act* is neutral on the status of this obligation. Section 36 has not been taken up by the case law, which is generally unilluminating. These cases do nevertheless reveal that sometimes the status of the buyer's duty is dealt with by a construction of the contract, while in others, the particular consequences of the buyer's breach are examined to see if the seller is entitled to terminate the contract.

In *Woolfe v. Horne*,<sup>235</sup> the purchaser of specific goods at an auction was one working day late in removing his goods from the auction room. A nonsuit having been entered against the plaintiff in his action to recover damages for non-delivery of the goods which had been disposed of by the defendant to a third party, the defendant failed in his attempt to show cause why the nonsuit should not be set aside; the Court of Queen's Bench entered judgment in favour of the plaintiff. There is little reasoning in the Court's decision to support its conclusion that the plaintiff's duty to accept the goods was not a

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<sup>232</sup> *Pace* Lord Wilberforce in *Bunge*, *supra*, note 7, 541.

<sup>233</sup> Lord Justice Diplock's reference to the injured party being deprived of substantially the whole benefit he bargained for, and his insistence that in breach cases the nature of the event discharging the injured party is the same as it is in cases of frustration and impossibility, suggest that the test he advocates is too strict. See *Hongkong Fir*, *supra*, note 25.

<sup>234</sup> Section 36 reads as follows:

When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods, but nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

See also Ontario Law Reform Commission, *supra*, note 15, 148.

<sup>235</sup> (1877) 2 Q.B.D. 355.

condition because it did not go to "the whole root of the consideration".<sup>236</sup> In *Lasby v. Walsh*,<sup>237</sup> on the other hand, the Saskatchewan Court of Appeal, in a contract for the sale of specific goods, namely two horses, held that the buyer's failure to take delivery of the horses entitled the seller to terminate the contract. The buyer was nearly two weeks late in taking delivery and the contract required the seller to maintain the horses at his own expense until actual delivery. In a terse judgment, the Court treated the buyer's default as going to payment and simply observed that, for the purpose of s. 11 of the *Sale of Goods Act* (in Saskatchewan, s.12), a different intention had appeared making time of the essence.<sup>238</sup> Notwithstanding this reference to the initial construction of the contract, the Court's decision seems to have been dominated by its assessment of the effect of the buyer's breach upon the seller. Consequently, if the two cases are to be reconciled at all, it is on the ground that the failure of consideration principle produced different results on the two sets of facts.

There is a little more authority in the case of unascertained goods. In *Sharp v. Christmas*,<sup>239</sup> the purchaser of an unascertained quantity of potatoes was in breach of his obligation to take delivery of the potatoes by canal before Christmas. Laying stress on the fact that the goods were perishable, the Court of Appeal held that time was of the essence. No indication appears in the report as to the extent of the buyer's tardiness. A different result was reached in *Kidston and Co. v. Monceau Ironworks Co.*<sup>240</sup> where the buyer was late in furnishing specifications for a quantity of iron to be manufactured by the seller. The decision of the Court that the buyer's obligation was not a condition, which may not be easy to reconcile with *Bunge* since the buyer's obligation had to be performed before the seller could ship the goods in May and June as required by the contract, emphasized the fact that the buyer's default did not impede the seller's ability to organize its production and arrange for shipment.<sup>241</sup>

In *Thames Sack and Bag Co. v. Knowles & Co.*,<sup>242</sup> Sankey J. held that time was of the essence regarding the buyer's duty to make payment and take delivery of goods. The seller agreed to sell to the buyer ten bales of Hessian bags on terms requiring cash against delivery order on or before 19 Septem-

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<sup>236</sup> *Ibid.*, 360, per Field J.

<sup>237</sup> (1920) 13 Sask. L.R. 201, [1920] 1 W.W.R. 1027 (C.A.) [hereinafter cited to Sask. L.R.].

<sup>238</sup> *Ibid.*, 202. But see *Ratner Bros v. Porter* (1911) 1 W.W.R. 236 (Sask. Dist. Ct) (time not originally of the essence in the case of a contract for the sale of twenty-five steers).

<sup>239</sup> (1892) 8 T.L.R. 687 (C.A.).

<sup>240</sup> (1902) 7 Com. Cas. 82.

<sup>241</sup> *Ibid.*, 86-7.

<sup>242</sup> (1918) L.J.K.B. 585.

ber. This “spot” contract further required prompt delivery and provided for storage and insurance at the seller’s expense up to 19 September. It is quite clear from Mr Justice Sankey’s judgment that his conclusion that the buyer’s duty to take timely delivery was of the essence of the contract turned on the construction of the contract: “I think the whole object of the contract was to make a bargain which should be completed by the buyers at least by September 19, and the object of the contract was that by that date the matter was to be entirely finished.”<sup>243</sup>

Finally, in the companion cases of *Sierichs v. Hughes*<sup>244</sup> and *Gerow v. Hughes*,<sup>245</sup> which dealt with severable instalment contracts for the sale of flour, the Ontario Appellate Division held that the buyer’s duty to give timely instructions for the delivery of the various instalments of flour was of the essence of the contract. In the *Sierichs* case, Ferguson J.A. observed that “it was material to the [seller] in the carrying on of his jobbing business to contract ahead for the requirements of his customers, and from time to time to know what flour he might be called upon to deliver”.<sup>246</sup> The decision of the Courts in these two cases concerned the discharge of individual instalments under the contract and Ferguson J.A. in *Sierichs*, following the earlier Ontario Appellate Division decision in *Doner v. Western Canada Flour Mills Co.*,<sup>247</sup> concluded that “each delivery stipulated for should be treated like a delivery under a separate contract”.<sup>248</sup> Consequently, the particular regime in s. 30 of the *Sale of Goods Act*, which governs only the discharge of severable instalment contracts and not individual instalments thereunder, would have no application.<sup>249</sup>

These decisions dealing with unascertained goods, like those dealing with specific goods, appear to draw no sharp distinction between the *a priori* construction of the contract and an examination of the consequences of breach dictated by the failure of consideration principle. Despite doubts expressed in *Bunge* about the appropriateness of the doctrine of intermediate stipulations in matters of late performance, one can be certain that courts will be flexible in choosing between that doctrine and the doctrine of conditions and warranties in resolving individual cases. There is, after all, no statutory presumption that the buyer’s duty to accept goods is of the essence of the contract, that is to say,

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<sup>243</sup> *Ibid.*, 587.

<sup>244</sup> (1918) 42 Ont. L.R. 608, (1918) 43 D.L.R. 297 (App. Div.) [hereinafter cited to Ont. L.R.].

<sup>245</sup> (1918) 42 Ont. L.R. 621, (1918) 43 D.L.R. 307 (App. Div.).

<sup>246</sup> *Supra*, note 244, 617.

<sup>247</sup> (1917) 41 Ont. L.R. 503, (1917) 41 D.L.R. 476 (App. Div.).

<sup>248</sup> *Supra*, note 244, 617.

<sup>249</sup> At the time the cases referred to in this paragraph were decided, Ontario had not yet adopted the *Sale of Goods Act*.

a contractual condition. In the case of commodities transactions, one can predict a strict approach in the form of a construction of the contract that the buyer's duty of timely acceptance is of the essence. The buyer's duty to give notice of readiness to load under an f.o.b. contract, the subject of the *Bunge* decision, was indeed a component of his duty of acceptance.

The *Sale of Goods Act* is unclear whether payment and acceptance are separate obligations of the buyer or components of an omnibus obligation. The case law, however, appears to treat them as separate obligations. Indeed, an examination of the payment cases reveals a different development to that occurring in the acceptance cases. The starting point is *Martindale v. Smith*,<sup>250</sup> decided in 1841, which relaxed any requirement that a plaintiff buyer, as a condition precedent to suit, had to aver and prove his readiness to perform at all material times.

In that case, the defendant sold the plaintiff six stacks of oats on terms providing that the plaintiff was at liberty to let the oats stand on the defendant's land until the middle of August but that he should pay for the oats no later than 16 July. Early in July, the defendant notified the plaintiff that the oats had to be paid for by the agreed date or the contract would be at an end. When the plaintiff failed to pay on time, the defendant informed him that he could not have the stacks and refused two late tenders of the purchase price and a demand from the plaintiff that he be allowed to remove the stacks on 14 August.

The plaintiff brought an action in trover for the wrongful conversion of the stacks of oats to which the defendant pleaded, *inter alia*, that the plaintiff did not have the necessary possessory right to the goods to maintain the action. The existence of such a right depended upon whether the defendant was entitled to terminate the contract for the plaintiff's failure to make timely payment. The jury returned a verdict in favour of the plaintiff and this verdict was later confirmed by the Court of Queen's Bench. Two reasons were given by the Court to justify its decision. According to the first and less clear of the reasons, the transfer of the property in specific goods to the buyer prevents the seller from rescinding the contract on account of the buyer's late payment; the seller is left with an action against the buyer for the price and a lien over the goods while they remain in his possession.<sup>251</sup> This approach would seem ultimately to depend upon execution analysis in that the transfer of the property in the goods to the buyer renders impossible the rescission *ab initio* of the contract of sale<sup>252</sup> and the re-vesting of the property in the seller. The role

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<sup>250</sup> (1841) 1 Q.B. 389, (1841) 113 E.R. 1181.

<sup>251</sup> *Ibid.*, 395.

<sup>252</sup> *Supra*, notes 104 to 106.

of execution analysis in this part of the Court's reasoning becomes a little clearer if it is borne in mind that the stock reason for the passing of property in specific goods to the buyer at the date of the contract had previously been formulated by Parke J. in *Dixon v. Yates*<sup>253</sup> as follows:

[W]here, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.<sup>254</sup>

The first of the two reasons given by the Court in *Martindale* would not, of course, have been open to it if the goods had been unascertained and the property in them had not passed to the buyer. The second reason advanced by the Court, however, would apply to all kinds of goods. According to Lord Denman C.J., delivering the judgment of the Court: "In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement, than which nothing can be more easy, by introducing conditional words into the bargain."<sup>255</sup> Though no reference is made to *Seton v. Slade*,<sup>256</sup> the leading equity decision which formulated the same rule for sale of land contracts, the reasoning of the Court on this point in *Martindale v. Smith* is clearly influenced by equity thinking; it also avoids the classical common law language of the buyer's breach going to a part only of the consideration bargained for by the seller.

Before leaving *Martindale v. Smith*, two further points can be made. First, subsequent decisions established that the language of Lord Denman in the passage quoted above was too broad in so far as it stated that the *prima facie* rule for *all* time obligations was that they were not of the essence of the contract.<sup>257</sup> Secondly, it should be noted that the buyer in *Martindale v. Smith*, though in breach of his duty to pay for the goods in accordance with the terms of the contract, was not in breach of his duty to accept the goods.<sup>258</sup> *Martindale*

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<sup>253</sup> (1833) 5 B. & Ad. 313, (1833) 110 E.R. 806 (K.B.).

<sup>254</sup> *Ibid.*, 340.

<sup>255</sup> *Supra*, note 250, 395.

<sup>256</sup> (1802) 7 Ves. Jun. 265, (1802) 32 E.R. 108 (Ch.). An earlier case, *Gregson v. Riddle* (1784), cited in *Seton v. Slade*, would apparently have denied parties the power to make time of the essence. Rather than stating that common law courts were "influenced by equity thinking" as said in the text, it may be more accurate to say, as Lord Diplock put it in *United Scientific Holdings Ltd*, *supra*, note 199, 925-6, that the common law courts increasingly tended to adopt a more rational scheme for the classification of contractual obligations and to that extent pre-empted intervention by courts of equity.

<sup>257</sup> See, e.g., *Bowes v. Shand*, *supra*, note 189.

<sup>258</sup> He was not obliged to take away the oats until a month after he paid the price.

v. *Smith* therefore leaves open a different approach to the timely performance of the buyer's duty of acceptance.

Section 11 of the *Sale of Goods Act* legislated the result in *Martindale v. Smith* in two respects. First, it recorded faithfully the fact that *Martindale* did not deal with the buyer's duty of acceptance by leaving timely performance of this duty to be worked out according to the construction of individual contracts.<sup>259</sup> Secondly, in respect of the buyer's obligation of timely payment, it stated that "[u]nless a different intention appears from the terms of the contract, stipulations as to time of payment are not [deemed to be] of the essence of a contract of sale".<sup>260</sup> Notwithstanding inflation and the law's slowness in coming to terms with the problem of pre-judgment interest,<sup>261</sup> this provision seems to have survived relatively unscathed. Where it applies and the buyer is in default, this does not of course mean that the buyer can postpone payment indefinitely. At some point, his late payment may be seen as a repudiation or as a breach going to the root of the contract.<sup>262</sup> There will be cases too where the presumption is ousted. In the light of *Bunge*, commodities contracts, where the buyer's breach will frequently consist of a failure to make available on the due date a banker's documentary credit, constitute a likely example.<sup>263</sup>

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<sup>259</sup> *Sale of Goods Act*, s. 11.

<sup>260</sup> *Sale of Goods Act*, s. 11.

<sup>261</sup> See the discussion of the problem in *Tehno-Impex v. Gebr. Van Weelde Scheepvaartkantoor B.V.* [1981] 1 Q.B. 648, [1981] 2 All E.R. 669 (C.A.). See also the *Judicature Act*, R.S.O. 1980, c. 223, s. 36; Manitoba Law Reform Commission, *Report on Prejudgment Compensation on Monetary Awards: Alternatives to Interest* (1982) (Report No. 47); Law Commission [of England], *Report on Interest (Law of Contract)* (1978) (Report No. 88); and Western Australia Law Reform Commission, *Report on Pre-Judgment Interest* (1981) (Project No. 70, Part 1).

<sup>262</sup> See, e.g., *Decro-Wall International S.A. v. Practitioners in Marketing Ltd*, *supra*, note 97; and *Shevill v. The Builders Licensing Board*, *supra*, note 97. A case where the rule in s. 11 of the *Sale of Goods Act* that timely payment is not of the essence was ousted was *Hayden v. Rudd* (1922) 17 Alta L.R. 452, (1922) 66 D.L.R. 619 (S.C., App. Div.). The contract was a complex one for the purchase of a quantity of straw produced by a certain acreage which also permitted the buyer to run his stock on the seller's ranch between the end of threshing and the beginning of seeding. Beck J.A. stressed how important it was for the seller to have timely payment, which combined the costs of the straw and the pasturage, so that he would "know promptly . . . whether the plaintiffs [*sic*] intended to take advantage of it, or, on the other hand, whether the pasturage would be thrown back upon his hands and he at such an advanced and late date, in the season during which stockmen would naturally be looking for pasturage, would be compelled to find a new customer" (at 466). The dissenting judgment of Stuart J.A. is interesting if only for its narrow proposition that an intention ousting the rule in s. 11 must be sought in the contract itself and not in the general circumstances of the case. This approach would come close to requiring an express exclusion of the s. 11 rule.

<sup>263</sup> See P. Atiyah, *The Sale of Goods*, 6th ed. (1980) 172, fn. 7.

Equity has long adopted a more lenient attitude to timely performance than has the common law. The fusion of the courts of common law and equity by the *Supreme Court of Judicature Act, 1873*<sup>264</sup> necessitated subs. 25(7) of the same *Act* for the purpose of resolving conflicts between the rules of common law and those of equity in a unified court system. According to subs. 25(7):

Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity.<sup>265</sup>

Putting aside the difficulty that the courts of equity had not before fusion indicated their attitude towards time provisions in a contract of sale of goods, the effect of this provision would apparently have been to enact the words of Lord Denman quoted above<sup>266</sup> in all their generality.

Nevertheless, the English Court of Appeal, in the years following fusion, betrayed a notorious hostility towards equitable principles which is illustrated clearly by the words of Cotton L.J. in *Reuter, Hufeland, & Co. v. Sala & Co.*,<sup>267</sup> a case involving an entire contract to sell a quantity of pepper where the seller was unable to make a timely appropriation to the contract of the whole quantity of twenty-five tons. Cotton L.J. said:

It was argued that the rules of courts of equity are now to be regarded in all courts, and that equity enforced contracts though the time fixed therein for completion had passed. This was in cases of contracts such as purchases and sales of land, where, unless a contrary intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must therefore hold that the time within which the pepper was to be declared was an essential condition of the contract, and in such a case the decisions in equity, on which reliance is placed, do not apply.<sup>268</sup>

There the matter rested for almost a hundred years until it came to the fore again in a forceful way in the decision of the House of Lords in *United Scientific Holdings Ltd v. Burnley Borough Council*.<sup>269</sup> This case concerned

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<sup>264</sup> 36 & 37 Vict., c. 66 (U.K.).

<sup>265</sup> Subsection 25(7) was replaced by the slightly different s. 41 of the *Law of Property Act, 1925*, 15 & 16 Geo. V, c. 20 (U.K.), according to which: "Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules." A provision very similar to subs. 25(7) is to be found in the *Mercantile Law Amendment Act*, R.S.O. 1980, c. 265, s. 15.

<sup>266</sup> See *supra*, text accompanying note 255.

<sup>267</sup> (1879) 4 C.P.D. 239 (C.A.).

<sup>268</sup> *Ibid.*, 249.

<sup>269</sup> *Supra*, note 199.

the question whether a lessor had timeously set in motion the machinery for conducting a rent review in a long-term lease of commercial premises. The decision of the House of Lords on this point is of no particular concern to sale of goods lawyers, but the case is of general interest in what it reveals of the attitude of equity towards time provisions in contracts and in the opinions expressed about the relationship of common law and equity a century after fusion. Some of the statements made by Lord Diplock about the attitude of the common law towards time provisions, consistent with his more general remarks about discharge in *Hongkong Fir*, also repay examination, particularly in the light of the later decision in *Bunge*.

Equity's attitude towards time provisions is brought out well in the following summary of its pre-fusion development by Lord Diplock:

[T]he rules of equity, to the extent that the Court of Chancery had developed them up to 1873 as a system distinct from rules of common law, did not regard stipulations in contracts as to the time by which various steps should be taken by the parties as being of the essence of the contract unless the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure of one party to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract.<sup>270</sup>

A number of observations flow from this passage. The first point, which anticipates the question whether this attitude of equity can be expanded beyond its traditional boundaries encompassing mortgages and sale of land contracts and into an area regarded as the preserve of common law, concerns the doctrine of specific performance. One of the difficulties in estimating the scope of equitable intervention outside its traditional boundaries, and the resurgence of the doctrine of forfeiture in *Stockloser v. Johnson*<sup>271</sup> furnishes a good example of this problem, lies in knowing whether equitable intervention is indissolubly linked to the equitable doctrine of specific performance.<sup>272</sup> To put the question in a sale of goods context: If the equitable attitude towards time provisions were to be imported into sale of goods law, would this attitude apply only in those rare cases<sup>273</sup> where a court might be prepared to decree specific performance of a sale of goods contract? Such a limitation seems

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<sup>270</sup> *Ibid.*, 927.

<sup>271</sup> *Supra*, note 227.

<sup>272</sup> A good example in sales law is that of equitable appropriation in the area of passing of property. See *In re Wait* [1927] 1 Ch. 606, [1926] All E.R. Rep. 433 (C.A.) and the discussion of this problem in *Bridge & Buckley*, *supra*, note 97, 309-21.

<sup>273</sup> The self-imposed limitations on the courts' discretion to grant this decree are revealed by cases such as *Cohen v. Roche* [1927] 1 K.B. 169, and *Falcke v. Gray* (1859) 4 Drewry 651, (1859) 62 E.R. 250 (Ch.). The extensive nature of interlocutory replevin relief in the Canadian common law provinces serves to undermine the strictness of the position taken on specific performance. See Ontario Law Reform Commission, *supra*, note 15.

unlikely in an age which is becoming increasingly unsympathetic to technical legal argument.

The second point suggested by the passage from Lord Diplock's judgment concerns the efficacy of the parties' initial designation of a contractual term as being of the essence. If the court were to conduct a broad-ranging inquiry into the equity of treating time as being of the essence, and if this inquiry were to be carried out according to conditions prevailing at the date of the hearing,<sup>274</sup> it should follow that the parties' designation of a term as being of the essence would not be determinative of the inquiry,<sup>275</sup> though it would be a very strong factor to be considered. Consequently, to return to the language employed in the earlier part of this paper, the court would not be concerned solely with an *a priori* construction exercise, but would have to conduct an *ex post facto* assessment of, *inter alia*, the consequences of the defaulting party's breach.

The third point, which follows from the second, is that the introduction of equitable considerations into commercial contracts of sale of goods, especially commodities contracts, would undermine forward planning and would be destructive of that certainty upon which the House of Lords put such a high value in *Bunge*.

In view of the above problems, it is appropriate to consider the judgments in *United Scientific Holdings Ltd* in order to assess the likelihood of an extension of equity beyond its traditional boundaries. Subsection 25(7) of the *Judicature Act, 1873*, set out above, stated that time stipulations in contracts should be construed according to the effect they would have been given, prior to 1873, in equity. The vital questions raised by this provision are whether it is confined to transactions preoccupying equity before fusion, namely mortgages and contracts for the sale of land, or whether it gives precedence to equitable rules over common law rules in any area that equity chooses to inhabit after fusion.<sup>276</sup> Cotton L.J., a member of a Court which had no enthusiasm for extending the scope of equity, made it plain in a passage in *Reuter, Hufeland, & Co., v. Sala & Co.*,<sup>277</sup> quoted above, that in his view

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<sup>274</sup> Cf., *Price v. Strange* [1978] Ch. 337, [1977] 3 All E.R. 371 (C.A.).

<sup>275</sup> This approach would be broadly consistent with attempts to cut back on party autonomy, evident in the judgment of Diplock L.J. in *Hongkong Fir*, *supra*, note 25, in *Wickman Machine Tool Sales Ltd v. L. Schuler A.G.*, *supra*, note 191 and in recent attempts to invoke forfeiture principles to prevent a shipowner from terminating a time charterparty under a provision explicitly allowing cancellation and withdrawal of the ship in the event of a late payment of hire. See *supra*, note 227.

<sup>276</sup> The point seems less controversial once it is realized that the generalization of certain equitable rules, notably those concerning innocent misrepresentation and promissory estoppel, that has taken place since fusion, has necessarily been at the expense of common law rules.

<sup>277</sup> *Supra*, note 267.

subs. 25(7) was an historical provision confined to the scope of equity in the years preceding fusion. In *United Scientific Holdings Ltd*, a number of passages in the judgments of Lords Diplock<sup>278</sup> and Simon<sup>279</sup> reveal the opposite view, but this contrary position is expressed most concisely in a passage from Lord Fraser's judgment:

I am not qualified to explore the history of the two streams of English jurisdiction, legal and equitable, which formerly flowed in separate channels. But since the Supreme Court of Judicature Act 1873 they have at least shared the same channel, and I gratefully adopt the reasons given by . . . Lord Diplock and Lord Simon of Glaisdale for thinking that they have now merged into a single stream. Consequently rules of equity, so called because they are as a matter of history derived from equity are now simply part of the corpus of English law and as such they are free to develop like other parts of that law. Neither section 41 of the Law of Property Act 1925 nor section 27(5) of the Supreme Court of Judicature Act 1873 contains any negative provision against the development or extension of equitable principles, and the effect of those sections is quite different from the incorporation into the law of a colony of the law of England *as it stood at some specified date*.<sup>280</sup>

It is therefore no wonder that the decision in *United Scientific Holdings Ltd* caused some alarm in the commercial bar. Even if it were significant for nothing else, the decision in *Bunge* would be important for its reassurance that certainty and forward planning have not been undermined by *United Scientific Holdings Ltd*.

The final question raised by *United Scientific Holdings Ltd* concerns certain statements made by Lord Diplock which reveal a measure of internal inconsistency. On the one hand, his Lordship was prepared to concede that "[i]n commercial contracts for the sale of goods prima facie a stipulated time of delivery is of the essence".<sup>281</sup> On the other hand, it is not easy to reconcile this *dictum* with more general statements such as the following about the state of the common law at the time of fusion:

The question whether a stipulation as to the time at which the event should occur was of the essence of the contract depended upon whether even a brief postponement of it would deprive one or other of the parties of substantially the whole benefit that it was intended that he should obtain from the contract.<sup>282</sup>

This statement, similar to others made by him in *Hongkong Fir*, must now be taken to have been authoritatively disapproved by the House of Lords in *Bunge*.

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<sup>278</sup> *Supra*, note 199, 924-8.

<sup>279</sup> *Ibid.*, 943-5.

<sup>280</sup> *Ibid.*, 957-8 [emphasis in original].

<sup>281</sup> *Ibid.*, 924.

<sup>282</sup> *Ibid.*, 928. See also Lord Diplock's similar observations on anticipatory repudiation in *Afovos Shipping S.A.*, *supra*, note 97.

Finally, since *Bunge* appears to have halted the penetration of equity into the discharge of commercial contracts of sale of goods, it is now pertinent to inquire whether the law governing the status of the seller's duty to deliver and of the buyer's duty to accept and pay for goods can be reconciled with s. 27 of the *Sale of Goods Act* which reads:

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.<sup>283</sup>

How is this provision consistent with the presumptive treatment of the seller's delivery obligation in a commercial sale of goods contract as a condition, while the buyer's payment obligation is generally regarded as presumptively not being a condition and the status of his duty of acceptance is an open question of construction? And why does s. 27 make no reference to the buyer's duty of acceptance when this duty is clearly recorded, along with the seller's duty to deliver and the buyer's duty to pay the price, in s. 26? One is compelled to agree with statements made about the difficulty of reconciling s. 27 with other provisions of the *Sale of Goods Act*.<sup>284</sup>

It is nevertheless worth considering whether sense can be made of s. 27. A number of possibilities present themselves. First of all, one can simply do as the Saskatchewan Court of Appeal did in *Mooney v. Lipka*<sup>285</sup> and disregard s. 11, which makes time of payment presumptively not of the essence of the contract. In that case, the Court observed that, since the seller's obligation to load a rail car with a quantity of potatoes was of the essence of the contract, it followed that the buyer's duty to pay, a contemporaneous act under the terms of the contract, must also be of the essence. It is appropriate to consider, however, whether a less drastic and less artificial solution is available.

A second possibility is to modulate the language of s. 11 and to assert that, although time of payment may presumptively be not of the essence of all contracts, this does not prevent it from being presumptively of the essence of commercial contracts, or at least of certain types of commercial contracts. This argument may be consistent with the approach of courts to payment in

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<sup>283</sup> See generally Atiyah, *supra*, note 263, 172-3.

<sup>284</sup> See, e.g., Ontario Law Reform Commission, *supra*, note 15, 148. Atiyah, *ibid.*, finds that there is nothing really inconsistent in the relationship between ss 11 and 27 (ss 10 and 28 of the U.K. Act). He points out that subs. 46(3) (subs. 48(3) of the U.K. Act), which deals with the entitlement of an unpaid seller to sell perishable goods when the buyer defaults on his obligation to pay, creates indirectly an exception to s. 11 and so tends to harmonize ss 11 and 27.

<sup>285</sup> (1926) 21 Sask. L.R. 40, [1926] 4 D.L.R. 647 (C.A.).

commercial cases, but it fails to reconcile the conflicting language of ss 11 and 27.<sup>286</sup>

Thirdly, one can separate the buyer's duty to accept goods from his duty to pay for them and stress the fact that s. 11 of the *Sale of Goods Act* regards both duties of delivery and acceptance as open matters of construction. Thus, there would be no conflict between ss 11 and 27 and the courts would be free to rationalize the relationship between the duties of delivery and acceptance. It makes sense to distinguish the buyer's duty of acceptance from his duty to pay because the two are frequently separated in practice.<sup>287</sup> If a buyer is allowed to take delivery before payment, this effectuates the parties' intention that the buyer is to receive credit. In such a case, it may be quite proper to regard his failure to make timely payment as not being the breach of a term that is of the essence of the contract: the seller has already surrendered his lien and the difference between, for example, an agreed thirty days' credit and the thirty-five days taken by the buyer may not be substantial. If, however, the terms of the contract require cash on delivery, the laying of emphasis on the buyer's failure to accept the goods in the manner prescribed by the contract, namely accompanied by payment, brings out the critical factor that it is the intention of the parties that the buyer shall not receive credit. One drawback with this approach, however, is that nowhere in s. 27 is there any reference to the buyer's duty of acceptance.

The fourth solution to the problem of ss 11 and 27 and, it is submitted, the best solution, is to do as suggested in an earlier part of this paper<sup>288</sup> and to separate the question of order of performance (s. 27) from the question of discharge for breach (s. 11). Consequently, a buyer who fails to pay may not compel the seller to deliver and the seller may continue to refuse delivery, citing his own refusal to deliver on the due date as excused by the buyer's failure to pay. This would be tantamount to a right of suspension of his obligations on the seller's part. When the buyer's failure to pay eventually produces a failure of consideration or amounts to a repudiation of the contract, the seller is free to terminate the contract. This solution accommodates the dependent promises and failure of consideration principles and serves ultimately to reconcile decisions as apparently diverse as *Hongkong Fir* and *Bunge*. Furthermore, this solution was countenanced by the draft Sale of Goods Bill,<sup>289</sup> published with the *Report on Sale of Goods* of the Ontario Law Reform Commission, which retained the order of performance rule in draft

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<sup>286</sup> This possibility would also need to be supported by (unavailable) statistical data to justify the reversal, not merely the displacement, of the presumption.

<sup>287</sup> See Ontario Law Reform Commission, *supra*, note 15, 350.

<sup>288</sup> See *supra*, text accompanying note 191.

<sup>289</sup> Ontario Law Reform Commission, *supra*, note 15, Appendix I.

ss 7.6<sup>290</sup> and 7.10<sup>291</sup> but proposed in s. 8.1<sup>292</sup> that a general and flexible substantial breach rule be applied in all cases of discharge. The Ontario proposal establishes that there is nothing logically wrong with this fourth solution. Moreover, it is difficult to see it as inconsistent with the premises of existing law.

## Conclusion

One need not be regarded as an unfair critic of statutes in the common law tradition if one points to the unfortunate tendency of a codifying Act to divorce the practical solutions it enacts from their intellectual base. If the Act in question truly is comprehensive or is sufficiently open-textured in its drafting, this tendency may not constitute a pressing problem to a judiciary that is able to adapt the structure and solutions of the Act to ever-changing conditions. But it seems that a tightly-drafted statute which purports to be a code and yet renders necessary resort to a developing common law, a law which may have changed greatly from that body of operative law in place at the date the statute was first passed, presents the courts with an unfortunate compromise between pure common law and pure code. It may not be entirely accurate to take issue with the *Sale of Goods Act* on this count: an examination of the common law of contract in the area of discharge for breach reveals the lack of a coherent intellectual tradition and explains why courts, and lawyers generally, have such difficulty coping with the subject of breach of contract. The law has not clearly resolved the conflict between the principle of depen-

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<sup>290</sup>Draft Sales Bill, subs. 7.6(1): "Tender of delivery is a condition of the buyer's duty to accept and pay for the goods."

<sup>291</sup>Draft Sales Bill, subs. 7.10(1): "Tender of payment is a condition to [*sic*] the seller's duty to tender and complete any delivery."

<sup>292</sup>Draft Sales Bill, s. 8.1: "[I]f the goods or the tender of delivery are non-conforming and the non-conformity amounts to a substantial breach of the contract, the buyer may,

- (a) reject the whole;
- (b) accept the whole; or
- (c) accept one or more commercial units and reject the rest."

Substantial breach was defined in subs. 1.1(1)<sup>24</sup> as "a breach of contract that the party in breach foresaw or ought reasonably to have foreseen as likely to impair substantially the value of the contract to the other party".

The Committee appointed by the Uniform Law Conference of Canada to consider the Ontario Bill as possible uniform legislation disagreed with the need for a substantial breach rule, given the existence of a very broad cure principle in s. 7.7 of the Ontario Bill. Consequently, it proposed amendments to ss 7.7 and 8.1, the effect of which were to expunge substantial breach and replace it with a strict tender rule. See Uniform Law Conference of Canada, *supra*, note 15, Appendix S, for the text of the Uniform Sale of Goods Act and the Committee's Report.

dent promises, which on one view of *Kingston v. Preston*<sup>293</sup> would seem to have dictated a near-universal requirement that a party bringing a breach of contract action had to aver readiness and willingness to perform at all material times, and the principle of failure of consideration, with its assault on the averment of readiness and willingness. The decisions in *Hongkong Fir* and *Bunge* are no more than *Boone v. Eyre*<sup>294</sup> and *Kingston v. Preston* in modern dress. Perhaps these examples of legal atavism should remind us that the conflict in the law between certainty and reasonableness fluctuates according to the spirit and conditions of the age. They also throw light on the recent upsurge of equitable principles, revealed in cases such as *United Scientific Holdings Ltd*, for this decision can be seen, in the company of cases such as *Hongkong Fir* and *Cehave*, as an expression of the importance of reasonableness in contractual dealings. *Bunge*, however, reasserts the value of certainty. It may be that the best of all possible regimes for dealing with the subject of breach of contract is one that embodies reasonableness and certainty in a state of uneasy but creative tension, responsive to changing needs and the particular exigencies of different sectors of the contract economy. It may be that, despite its unnecessary obscurity, this is the regime we already possess.

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<sup>293</sup> *Supra*, note 26.

<sup>294</sup> *Supra*, note 27.