CONDITIONS IN CONTRACT.

What is a condition in a contract and what do we mean by the term. Either we have in mind some modification or limitation in the terms of the contract, which must consequently be found by a study of the language through which the intent is expressed, or we refer to limitations imposed by rules of court, and which in reality are not part of the contract. These ideas have been well enough indicated by the terms "express conditions" and "conditions implied in law." Whatever their nature may be they are supposed to fall into subdivisions known as "conditions precedent," "mutual and concurrent" and "subsequent." By conditions "precedent," we mean conditions which require that some uncertain event must occur before the promissor is obligated to perform. By mutual and concurrent conditions we indicate that the parties to the contract are to perform concurrently; and by condition subsequent is expressed the idea that a subsisting obligation is terminated by the happening of the uncertain event designated in the contract. While these ancient terms may be convenient, it is believed that conditions in reality are all precedent. Certainly there can be no doubt that in the case of mutual and concurrent conditions we mean only that either party must tender, or in some cases be ready and willing, before he can put the other in default. That is to say, the condition precedent is tendering and not performing. As to so-called conditions subsequent, there seems to be no instance in contract in which one can be found. Thus, suppose A promises to pay B $1,000 on June 1 next, the obligation to become void if a certain ship reaches New York harbor before June 1. In such a case the courts have said that there is a condition subsequent, and that the defendant must establish the arrival of the ship, the theory being that this is a condition subsequent and that consequently as the obligation subsists it must be incumbent upon the defendant to show that it has been terminated. The error lies in supposing that there is a subsisting obligation, but if one says that the contract, as such, is the obligation which is referred to, then it must follow that we can have no such thing as condition precedent in contract, because there certainly must be a contract in existence, if one is to have a limitation upon it. There

cannot be such a thing as construing the terms of such contract unless there are such terms. Yet in the case of conditions precedent the uncertain event happens before there is any obligation to perform, but nevertheless there is a subsisting contract. Conditions in contract do not cause an existing obligation to terminate and there is no such thing as a condition subsequent in this class of obligations. Thus in the illustration given above it is clear that the contract as to the payment of the $1,000 on June 1 subsists, but it is equally clear that until June 1 there is no obligation to pay the $1,000, and there will never be such an obligation unless the time passes without the arrival of the ship—that is to say, the obligation to pay does not arise unless there is a non-arrival of the ship, and such non-arrival is a condition precedent.

When we speak of a contract we seem to mean no more than that the parties have put themselves as regards a certain proposition in a position from which they cannot withdraw of their own volition. It does not at all follow that either party will ever have to perform. An offer contains a proposition which has not reached the stage where withdrawal is impossible, but when it ripens into a promise such stage has been reached, and the will of the party obligated is no longer a factor. It seems clear that this is the nature of a contract. The parties have done certain acts and the law says the obligation of contract results. The contract exists then, and the next question is, What have the parties promised? Is there a promise to do some future thing, absolutely and at all events, or must we wait to see whether by the terms of the contract the promissor will ever have to perform? Convenience leads us to speak of these limitations upon promises, these modifications of obligations as conditions, but they are nothing more than parts of the promise itself. We interpret the promise to find out what the parties intended. Following out this convenient form, we find that in all cases where a party has placed a limitation upon the promise, it is to the effect that a future uncertain event must happen, before there is an obligation to perform on the part of the promissor. Such event may be negative or affirmative, it may be the non-happening or happening as the promise provides, but that situation must first arise before there is any obligation to perform.

It is said that an event, to be a condition, must be future and uncertain. This does not mean objective uncertainty or futurity. It merely means that there must be subjective uncer-

tainty. The parties must be in doubt at the time the contract is made. Thus a promise made upon a condition that a certain ship is then at a certain point on the ocean, or to pay a certain sum of money in case she is lost, is valid although at that moment the ship is not at that spot or has already been destroyed. It may be doubted whether objective uncertainty is possible, but subjective uncertainty meets the requirements of the law. The condition cannot be subject to the will of the promissor, because to have a promise there must be something obligatory upon the one making it, there must be some possibility that he may have to perform in spite of himself, but if the condition is dependent upon his own will, that is not the case. Thus an arrangement by which a tailor agrees to make suit of clothes to the satisfaction of a customer would seem to be no contract, because the courts hold[1] that satisfaction in such a case is esthetic and personal. Thus the customer may reject the clothes at will, which precludes the idea of contract. If he takes the clothes the obligation would seem to arise from that action and not from any antecedent contract. It may perhaps be claimed in such a case that esthetic satisfaction is not a matter of will, but may arise in spite of one's wishes, and further that such satisfaction may manifest itself in various ways, as by facial expression or the like. If this is granted, then it may be said that a contract does arise and that the obligation to pay is subject to an express condition precedent—namely, satisfaction.

In administrating the law in regard to contracts, the courts announce their firm adherence to the doctrine that freedom of contract on the part of the individual is absolute, provided only that the subject matter is lawful. While this is a conservative position to take, the courts, as matter of fact, limit such freedom in various ways and under numerous disguises.[2]

Of these limitations upon the freedom of contract, the most frequent application is found in the cases involving so-called conditions implied in law. This class of conditions is comparatively of modern growth. At first the courts refused to recognize that it was possible to enforce a condition unless it was expressed in the language of the contract—and Lord Holt's well-known refinements in *Thorpe v. Thorpe*,[3] show the struggle

1. *Brown v. Foster*, 113 Mass. 136.

2. See a few remarks of the present writer in IV, *Columbia Law Review*, page 423.

3. 12 Mod. 461.

to keep within the rule, and not reach too outrageous a conclusion. By gradual development, the courts have evolved a set of rules which are now universally recognized, although they carefully state that these rules are simply expressive of the intent of the parties. As matter of fact they become possible because the parties have abstained from any expression of intent, and justice requires their application. Their effect is not to increase the burden of a promissor but to protect him in certain cases. Thus they perform the true functions of a condition. When conditions are express they always serve as a shield, a defense, and these rules of court accomplish the same purpose. The parties have not had sufficient foresight to protect themselves and the courts supply the deficiency. Only good has resulted from this limitation on the freedom of contract, and the conservative development of the rules has prevented the evils which are apt to result when individual judges sometimes cover up their ignorance of the principles underlying a question under consideration by referring, grandiloquently, to broad principles of justice, equity and humanity.[4]

These rules of implied conditions were ably summed up by Mr. Serjeant Williams in his well-known notes to *Pordage v. Cole.*[5] The most frequently applied of these are: (1) Cases involving mutual and concurrent conditions. These occur where the performance on each side can be simultaneous, and there is no contrary intent shown by the terms of the contract. Thus in the case of the delivery of a deed and payment of money. If no date is set for performance, or if the date as to either delivery or payment is fixed, or the same date is set for both, then they are to be performed simultaneously, and either side must tender performance or show a waiver to put the other in default. (2) Cases where the performance on one side takes time, and on the other can be practically instantaneous, as, for example, the payment of money. Here, no date being fixed in the contract, the act which takes time must first be performed, before the payment of money need be made. (3) Cases where an act on one side by the terms of the contract may be performed either before or after a given date, while the performance on the other side is to be given on such date. Thus a promise to write an article between October 1 and May 1, and a promise on the other side to pay $1,000 on January 5. Here it is evident that no conditions can be implied because the

4. For a notable illustration of this see *Buchanan v. Tilden*, 158 N. Y., 109.
5. 1 Wm's. Saund. 219.

terms of the contract show a contrary intent. The result is that the promises are independent, and if the $1,000 is not paid on January 5, an action will lie at once therefore, and it is, of course, unneeessary to allege writing of the article, since this cannot constitute a condition precedent. This seems clear enough. But suppose the proposed author dies prior to January 5, without having written the article. His estate is not liable, of course, because death is an excuse in such a case. Can his legal representatives successfully maintain an action for the $1,000, if not paid on January 5? Logically it would seem that there would be no defense, because the promise is independent. It seems strange to say that the $1,000 must be paid, although it was contemplated that an article should be received, and yet it is difficult to find a proper or logical ground of defense. Suppose again that the author lives, but has not performed by January 5. Clearly in that case the $1,000 is then payable, and a cause of action therefor has arisen. Assume that no action is brought until after May 1, and that the author has then broken his promise by not furnishing the article, can he then recover the $1,000? If we say no, we must explain why the author has lost the cause of action which admittedly arose on January 5. It may be suggested that the theory of preventing circuity of action will help us out of the difficulty; that as the author is liable in damages for the non-production of the article, and the measure of those damages is the price to be paid for the article, the courts will not allow the recovery only to obligate its repayment. The difficulty with this is that the price of the article is not necessarily the measure of damages, they may be greater or less.

The same question in another form would arise in the event that the $1,000 should be paid on January 5, and the author should die before May 1 without having written the article. How can this money be recovered by the publisher? There is no failuré of consideration because the author's promise was valid, and was just what the publisher asked for. There are no principles of conditions either implied in law or found in the language of the contract ,which can be invoked to work out a satisfactory solution, and one seems forced to the logical conclusion that as the promises must be found to be independent the results of such independence must follow.

While other subsidiary rules may be gathered from the cases, these three heads cover a large number of the cases which usually arise. These rules of court or so-called condi-

tions implied in law have been worked out for the purpose of rendering more exact justice between the parties. This being the ground of their existence, they are never applied when they will work injustice. This is the reason why the courts look into the given case to see whether the facts require them to abstain from applying the rules. This is usually expressed by saying that if the breach of an implied condition is not material, does not go to the essence, the courts will not apply such condition.

Whether such breach does go to the essence or not is a question of fact for the court, and it would seem that the burden of establishing to the satisfaction of the court that it does not go to the essence ought to rest upon the plaintiff or actor in any given case. If the court is in doubt, it would seem that the ordinary rules should be applied. It is incumbent upon a plaintiff to allege and prove the performane of such a condition, and if he thinks it should not be required in a given case he should satisfy the court to that effect, precisely as he would have to in the case of a waiver. There are some instances where a party may be helped out by a presumption. Thus in the case of time in a contract, where it is not expressly made of the essence. Ordinarily time is not of the essence, and the burden of showing that breach of a condition dependent upon time goes to the essence, ought to be upon the defendant or party claiming that a condition should be applied. In mercantile transactions time is presumed to be of the essence and the plaintiff should overcome such presumption if he claims that it is not of the essence in a particular case.

One class of contract causes a question to arise as to the nature of certain provisions. It is usual to find in policies of insurance a clause which requires that any action for a breach shall be brought within a fixed time thereafter, usually one year. In other words, a short limitation. As to such a clause, it has been said,[6] "The condition does not come into play until a loss has occurred, and the duty to pay has been neglected, and a cause of action has arisen. Nevertheless it is precedent to the plaintiff's cause of action."

How can this be said to be "precedent to the plaintiff's cause of action?" As is truly said, the cause of action has already arisen; how then can bringing the action within a given time be precedent to a cause of action which already exists? The obligation to pay arises as soon as there has been

6. Holmes, Common Law, p. 313.

a loss and the requisite formalities have been complied with. In other words, the insurance company should pay at once, and if they neglect so to do, and the case goes to trial, they will be defeated with costs. But this obligation which has arisen and is payable under penalty of a litigation and costs, continues one year and then ceases. Bringing the action within one year cannot be said to be precedent to the arising of this obligation to pay, because if so you must first bring your timely action before the obligation arises, and, of course, must fail in that action, because the cause of action had not arisen, but clearly this is not so. The insured would recover in such an action because the obligation had arisen.

Provisions of this character do not seem to be conditions at all but merely limitations attached to the procedure. At any rate they are not conditions in contract.

It is well settled that the parties may so limit the procedure, although if the question were one of first impression, it might well be doubted whether the parties had the right to place any such limitation upon the procedure of the courts.

It has been suggested[7] in another connection, that parties by drawing a condition precedent so that it is in form subsequent, indicate their intention, that the burden of establishing in reference to such condition precedent shall be shifted from the plaintiff to the defendant. In the first place it is not at all probable that the parties had such intention nor does such a form necessarily indicate anything of the kind. Then it does not appear that the courts have decided upon any such ground. Where they have held that the burden was upon the defendant,[8] it seems to have been solely upon the ground that they supposed they were dealing with a true condition subsequent, and that therefore the burden was naturally upon the defendant. The fault was with their analysis.

It may well be doubted whether the parties to a contract have any power to change the burden of establishing from plaintiff to defendant, as that would seem to be a matter for the law to settle. Perhaps the course of the courts in reference to the limitations of time in insurance policies, referred to above, may indicate that they would also allow the parties to change the burden of establishing, but it seems doubtful. Even in the insurance cases the result seems to have been allowed, because they were looked upon as cases of conditions rather than as limitations.

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7. Langdell, Summary of Contract, Sec. 44.
8. *Gray v. Gardner*, 17 Mass. 188.