MEMORANDUM by M. CHORLEY
on CONDITIONS AND WARRANTIES ON THE SALE OF GOODS: BUYERS' REMEDIES IN THE EVENT OF BREACH.

The distinction between conditions and warranties on the sale of goods is one which gives rise to some difficulty, and yet is of importance because of the differing character of the remedies afforded by the law on breach. The object of this Note is to discuss the question whether it is desirable to maintain this difference in remedies, which appears to be peculiar to English law at any rate in respect of overseas commerce, should it in that field appear likely to prove an obstacle to international agreement.

It may at the outset be useful to summarise shortly the essential difference between condition and warranty as it affects this matter. The term condition especially is susceptible of prolonged analysis and discussion of a character which would not be germane to one problem. The conditions we are here concerned with are promises with regard to the subject matter of a contract of sale, to be performed by the parties by whom they are made, which are an integral part of such contract, and the performance of which is intended by the parties to be vital to the performance of the contract as a whole: so that if a condition is not fulfilled the contract is substantially not performed at all. There is no definition of "condition" in the Sale of Goods Act 1893, and it is not suggested that the above meets all the requirements, but when

the emphasis is simply on the difference between condition and warranty it is submitted that this definition will suffice.

A warranty on the other hand is defined in S. 62 as an "agreement with reference to goods which are the subject of a "contract of sale, but collateral to the main purpose of such "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". It will be observed that this definition is unsatisfactory. It is indeed only partly a definition of the term warranty, the later phrases amounting to a declaration of law as to what is to be the effect of a breach of warranty, which throws no light on the real nature of warranty, and is juristically valueless as a definition. For it is clearly necessary to decide in the first instance in any particular case whether or not there is a warranty in order to ascertain what is to be the remedy for breach. The substance of the matter lies in the earlier part of the section and indicates that a warranty is a term of the contract which is of a subsidiary or collateral character and not intended by the parties to be so vital that if it is broken the contract must be regarded as not having been performed at all.

The effect of the two definitions may be illustrated by an example. If I sell "my white horse" and add "I will undertake that he is sound", that the horse I deliver should be a white horse is clearly of fundamental importance, if not I do not perform my contract - that I should do so is therefore a condition. On the other hand if I deliver the white horse, but he is in fact not sound, the purchaser gets in substance what we bargained for, though in a subsidiary or collateral particular, no doubt a material one, there is a breach of the contract. That the horse should

be sound is therefore a warranty. It will be obvious that in particular cases the dividing line will be exceedingly difficult to draw, for it will be a matter of ascertaining the intention of the parties ex post facto from acts and words; and in drawing the inference as to intention the personal factor of the judges reaction will come largely into play. Opinions accordingly often differ as to whether a particular term in a contract of sale is a condition or a warranty.

The difference in the remedies afforded by English law for breach of condition and of warranty has already been indicated in the quotation from Section 62. It also appears from Section 11 (1) (b). To complete the summary it is necessary to add that when there is a breach of condition the innocent party, who will usually be the buyer, has the right to treat the contract as repudiated ie the right of rescission, and to recover damages, or alternatively he may elect to go on with the contract and avail himself of his action for damages only. As appears from S. 11 (1) (c) the former of these rights may in certain circumstances be lost; as when goods are consumed before the breach of condition is discovered in which event the buyers' position is much the same as if there had only been a warranty and not a condition.

It is hardly necessary to point out that from the point of view of the mercantile community the essential importance of distinction between breach of warranty and breach of condition lies in the fact that upon it depends the question of whether the buyer is entitled to reject the goods tendered - a very valuable right during a period of price fluctuations - or must accept them;

subject to a possible reduction of price by way of damages.

These preliminary observations may be summed up in the words of Fletcher Marlton h.g. in Wallis v. Pratt (1910) 2 K.B. al. 1012: -"a party to a contract who has performed or is ready to perform his obligations under that contract is entitled to the performance by the other contracting party of all obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of equal importance. These are some which go so directly to the substance of the contract, or in other words are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non performance, and (if he takes proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract".

We must now attempt to survey the fields covered by the law as to conditions and warranties respectively. It might at first sight appear that each particular case must be considered on its merits according to the intention of the parties made manifest

in their contract, and therefore that warranties were possible in all cases of contracts of sale:nthis however is not so, for certain principles of construction have been laid down by the English Courts which have excluded a predominantly large area from the field of warranty, and assigned it to that of condition. The most important of these is the rule that the law of warranty will only be applied in Sales of specific goods, ie goods identified or agreed upon at the time of sale. This was well put in Smiths' Leading Cases (11th ed., vol. II, p. 28 as follows: - "a warranty, properly so called can only exist when the subject matter of the sale is ascertained and existing, so as to be capable of being inspected at the time of the contract, and is a collateral engagement that the specific thing so sold possesses certain qualities". The reason for this limitation appears from the following passage in Benjamin on Sale (7th ed. 635) "Unascertained goods can have no description but what is given them by the contract, but a specific chattel had also a physical identity, either corporeally present in the sight of the buyer, or mentally identified by him. The question then arises whether the buyer bought simply the particular thing which he saw or identified, or whether he bought it only on condition that it conformed to the description given. A buyer might of course, <u>expressly</u> stipulate that he had bought only on such a condition, but otherwise his intention had to be discovered from the circumstances, and as a general rule a contract for the sale of a specific article was a contract for that article as it was. The property passed by the contract, and any superadded description was either a mere representation having

no legal effect (except in certain circumastances) or was at most a warranty". On the other hand when the goods are "unascertained or future" the buyer only gets what be bargained for if all statements made regarding the goods (which are intended to be contractual) [1] are true, and therefore in all such cases such stipulations are conditions.

Now in overseas commerce probably 99 pr cent. of sales are sales of unascertained or future goods (the principal exception being perhaps ships). It thus appears at the outset that in overseas trade the law as to warranties is unimportant, and that it may be assumed in practice in such cases that on the breach of a material obligation in the contract by the seller the buyer has prima facie the right to reject the goods.

But even in the case of specific goods the law of warranties is applied to a diminishing degree. Probably 99 per cent of sales of specific goods take place in retail trade. It is clear from S. 14 (1) of the Sale of Goods Act 1893 that any statement made by a retailer or by any person whose business it is to deal in goods of the kind being sold as to the fitness of the goods which he supplies for a particular purpose (which is intended to be contractual), is capable of being treated as a condition.

---

1 It is perhaps necessary to add that statements made during the preliminary negotiations to a contract may, on the contract being made, become terms of it, or they may be bare representations which never become terms of the contract. Why the former type of statement can ex hypothesi furnish material for condition or warranty, and such are here referred to as statements intended to be contractual.

The English Courts have construed this subsection strongly in favour of buyers: for example although, by the proviso to Sec. 14 (1), when the contract is for the sale of a specified article under a patent or trade name the implied condition as to fitness does not arise, yet if a statement as to fitness is made by the seller on the sale of such an article the Court will hold it a condition that such statement should be fulfilled (Cf. Baldry v. Marshall (1925) 1 K.B. 260). We shall accordingly be fairly safe in laying it down as a general rule that any warranty or undertaking given on a sale by one who deals in a particular class of goods with regard to their fitness for a particular purpose will be construed by the Courts as a condition. It will be apparent that in retail trade undertakings given by sellers will usually relate to fitness or quality. Statements as to quality are usually intended to denote fitness, and S. 14 indeed appears to regard the words quality and fitness for a particular purpose as meaning much the same thing. Even if there are cases where statements as to quality made during retail trade are not to be regarded as conditions they will form a small proportion, and it is probably safe to say (subject to a qualification later to be made) that the law of warranties has little application to retail trading.

We are thus left with a comparatively small residue of cases involving the sale of specific articles not made by dealers in the way of their business. Only in those cases will the law as to warranties usually apply - they will in their nature more often than not - to sales of second hand articles. Even here however

there has been an observable tendency to extend the field of conditions at the expense of warranties. I refer to sales of specific articles where there is a description by the seller on which the buyer relies. We have seen that at Common Law the inference in such cases was drawn in favour of warranty and against condition (the harshness of the rule appears from such cases as Parsons v. Sexton (1847) 4 C.B. 899, and Heyworth v. Hutchinson L.R. 2 Q.B. 447. S.13 of the Sale of Goods Act however states that: "Where there is a contract for the Sale of Goods by description there is an implied condition that the goods shall correspond with the description. It will be observed that this applies to all goods whether specific or unascertained. It is therefore only necessary to find even in the case of specific goods that the sale was by description in order to bring the case within the law of conditions. This has been done in such a case as Varley v. Whipp (1900) 1 Q.B. 513, where a second hand reaping machine was sold without the buyer seeing it, under a statement that it had only cut fifty to sixty acres, and this statement was held to be descriptive, and therefore a condition. The position was taken a step further in a statement by Bray G. in Thornett and Fehr v. Beers and Sons (1919) 1 K.B. 486 to the effect that there might still be a sale by description though the buyer actually saw the goods, for he might rely partly on the description, and partly only on which he saw. If this be so S. 13 of the Sale of Goods Act has clearly altered the Common Law.

We therefore find that even in the third and smallest group a considerable proportion of sales will involve conditions rather than warranties.

I will now return to the subject of retail sales. In an important proportion of these there will be no statement or express undertaking by the seller at all. The buyer will simply describe what he wishes to purchase, and the seller will there upon make the sale. It seems now to be clear that such a sale though of specific goods over the counter is a sale by description (see Wren v. Holl (1903) 1 K.B. 610, and Morelli v. Fitch (1928) 2 K.B. 636). It will therefore be subject to implied conditions (a) as to correspondence with description under S. 13 and (b) as to merchantable quality under S. 14 (2).

Finally we must notice the important Sale by sample type. Here again (S. 15) the English law implies a condition that the bulk shall correspond with the sample and not a warranty only.

The survey which we have just completed makes it clear that the law of warranties as opposed to conditions is of little importance in the modern English jurisprudence of sale of goods. This theoretical conclusion is borne out by an analysis of the reported decisions. The Law Reports Digest gives an analysis of all cases reported in all accredited series of law reports. During the period 1911-30 (ie twenty years) there appear to be only four cases which even at first sight seem involve questions of warranty as opposed to questions of conditions [1]. All these cases occurred during the first eight years of the period and on a careful study it appears that only one of them was a genuine case of warranty (viz the Irish case of Schawel v. Reade in 1913 where a horse was

---

1 As from what has already been said it appears that the most important group of sales when warranties are likely to be in question largely consists of second hand articles it is possible that many such cases will be tried in County Courts, since such contracts will seldom involve a price of Ls. 100.

warranted sound for stud purposes). Harrison v. Knowles (1917) 2 K.B. 606 one of the other four is worth a comment. The judge of first instance Bailbache I. found that a statement as to the dead weight-capacity of a certain ship which was being sold was a warranty. The Court of Appeal held that the statement was not-contractual at all, and it is fairly clear that, if they had been of opinion that it was contractual they would have held it sufficiently vital to have amounted to a condition. Bailbache I. said that in his view the decisions were by no means clear as to the test for distinguishing a condition from a warranty in the case of specific articles, but he had "come to the conclusion that the rule to apply is that when the subject-matter of a contract of sale is a specific existing chattel a statement as to some quality possessed by or attaching to such a chattel is a warranty, and a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract". This would appear to be only another way of stating the general definitions already laid down, and in any case gives rise to exactly the same difficulties of interpretation and of fluctuation of standard.

It is perhaps necessary to mention two further matters. We have already noticed how the right of rejection on breach of condition may be lost under section 11 (1) (c) of the Sale of Goods Act which provides that where the buyer has accepted the goods, or in the case of a contract for specific goods where the property has passed to the buyer the breach of condition can only be treated as a breach of warranty and not as a ground for the

rescission of the contract. Under Scotch law however failure by the seller to perform any material term of the contract entitles the buyer to reject within a reasonable time of the delivery of the goods (Sec. 11 (2)). The English rule is somewhat harsh, especially in the case of specific goods for in the case of specific goods (in a deliverable state) the property passes prima facie on the actual making of the contract, and therefore it would at first sight appear that the right of rejection is in such cases illusory. This situation has been partly mitigated by implying resolutive conditions under which the buyer may reject goods although they have meanwhile become his property - a position not explicity recognized in the Sale of Goods Act and obtainable only by application of principles of general law. The cases on this subject however are few and by no means clear, and it is suggested that an amendment of the law so as to bring it into line with the Scotch rule would be the best way out of the difficulty.

The other and final point is that even the existing rules as to implied conditions are unpopular with English manufacturers and merchants, at any rate selling merchants - perhaps not-unnaturally. It is very common for manufacturers, and for merchants in certain lines to sell their goods on the terms that none of the conditions implied by law under the Sale of Goods Act are to apply, that there are to be certain warranties of a limited character only, and that under no circumstances is the buyer to have a right of rejection. This attitude is commonly adopted in the case of sales both of specific and of unascertained goods.

The English Courts construe such contracts strictly contra profe-
rentem and in numerous instances they have failed to give the de-
sired protection (Cf. Meyer Ltd. v. Travaru 46 T.L.R. 553). It
is probable therefore that a proposal to abolish the distinction
between warranty and condition in favour of treating all warran-
ties as conditions would arouse instinctive hostility among busi-
ness men in this country. The answer in logic is clear, 1) that
the protection afforded by the present law of warranty is largely
illusory, as has been demostrated above, and 2) that the right
of bargaining away the right of rejection, in so far as that is
possible by an apt contract at the present time, would not in any
way be interfered with. Whether this logic could be sufficiently
brought home to the business men that their opposition would be
overcome appears to me to be distinctly doubtful.