The Emptio Rei Speratae

Occurs where in the sale of a thing not yet in existence, the intention of the parties is that the price of the thing will only be paid when it comes into being. Thus S&P can enter into an emptio rei speratae for S's next harvest at say R1.00 a bag or in respect of a calf still to be born (with the price determined at the conclusion of the contract). Price only payable if thing comes into existence.

Suspensive condition, construction

Explained by some writers as the operation of a suspensive condition. The full operation of the contract of sale is dependent on the occurrence of an uncertain future event i.e. the thing coming into being. If the thing does not come into existence, contract of sale comes to an end.

Function

The function of the condition construction is to explain why the purchaser cannot claim the thing immediately & why the risk of the thing not materializing is borne by the seller.

Incorrect & unnecessary

It would be wrong to apply a condition in the present context because in accordance with the intentions of the parties there is an obligation resting on the seller to do everything in his power to bring the thing into existence. S has to make sure the harvest is reaped. If it is a duty of a contracting party to see that the condition is fulfilled it cannot be a genuine condition. This construction must be rejected.

CORRECT CONSTRUCTION

(i) The buyer cannot claim the thing immediately as in the case of a contract the buyer can claim performance after the lapse of a reasonable time... so the buyer must allow the seller a reasonable time to prepare the thing. (ii) The seller bears the risk of the thing not coming into being because this is what the parties have agreed to.